

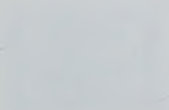
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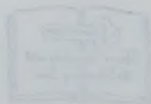
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(261 P.)

**LOS ANGELES COUNTY v. INDUSTRIAL
ACC. COMMISSION OF CALIFORNIA
et al. (L. A. 10200.)***

Supreme Court of California. Nov. 14, 1927.

Rehearing Denied with Modification Dec. 12, 1927.

1. Master and servant ⇨419—Evidence held to authorize Industrial Accident Commission's finding that total temporary disability had not terminated.

Finding of Industrial Accident Commission that total temporary disability of employee whose eye and cheek had been injured by flying splinter had not terminated *held* authorized under evidence.

2. Master and servant ⇨416—Ordering payment for surgical operations on employee's face, mainly for cosmetic purposes, held within authority of Industrial Accident Commission (Workmen's Compensation, Insurance and Safety Act, § 9, subd. [a], as amended).

Under Workmen's Compensation, Insurance, and Safety Act, § 9, subd. (a), being St. 1917, p. 836, as amended, the Industrial Accident Commission has power to order employer to pay for surgical operations on employee's face, notwithstanding that the major object of the proposed operations is for cosmetic purposes only.

3. Master and servant ⇨416—Finding under statute that employer's hospital facilities were inadequate held unnecessary, where order to pay for private treatment was conditioned on employer's failure to furnish it (Workmen's Compensation, Insurance and Safety Act, § 10).

Finding of inadequate facilities under Workmen's Compensation, Insurance, and Safety Act, § 10 (St. 1917, p. 840), providing that the Industrial Accident Commission might, after notice and opportunity to be heard, declare employer's hospital facilities inadequate, and thereafter employee might procure treatment elsewhere, *held* unnecessary, where an order to pay for private treatment was expressly made conditional on employer's failure to furnish treatment ordered.

4. Master and servant ⇨416—Order requiring employer to furnish surgical treatment, or, on its neglect or refusal, to pay expenses for such treatment, held proper.

Order requiring employer to furnish to injured employee within a reasonable time certain surgical treatment, recommended in the doctor's report, and that, if the defendant should neglect or refuse to furnish such treatment within reasonable time the employee might secure treatment from his own physician at the employer's expense, *held* proper, where employer, after twenty-two operations, admitted inability to furnish further relief.

5. Master and servant ⇨417(5)—Whether Industrial Accident Commission exceeded powers in refusing to furnish employer transcript of hearing cannot be considered in petition for certiorari.

Whether, upon payment by employer of fees prescribed by statute, the Industrial Acci-

dent Commission exceeded its powers by refusing to furnish him with a transcript of the hearing before the commission, cannot be considered in a petition for writ of review.

In Bank.

Application by County of Los Angeles, employer, to the Industrial Accident Commission, for the termination of a continuing award to Philip Nelson, employee, with request that the percentage of the employee's permanent disability be fixed and determined. Order denying application, continuing compensation, and ordering further medical and surgical treatment. Employer petitions for certiorari to review the order. Award affirmed.

For opinion of District Court of Appeal, see 259 P. 369.

Everett W. Mattoon, County Counsel, and W. Sumner Holbrook, Jr., Dep. County Counsel, both of Los Angeles, for petitioner.

G. C. Faulkner, of San Francisco, for respondent Industrial Accident Commission.

PER CURIAM. This proceeding comes before this court after decision by the District Court of Appeal, Second District, First Division, Mr. Justice Houser having written the opinion for that court. 259 P. 369. We are in accord with said opinion in many respects, and adopt and approve the following portion thereof:

"Certiorari. The purpose of this proceeding is to review certain findings, orders, and the award made in pursuance of an application to the respondent commission by an employee for adjustment of compensation as a result of injuries sustained by him while acting within the scope of his employment with the petitioner herein.

[1] "From the record it appears that the employee, who was engaged as a 'spudder' on a pile driver operated by the petitioner, suffered an injury by reason of a large splinter which 'flew off a pile, striking him, proximately causing injury to the right eye and cheek'; that in due course, on findings of temporary total disability, an award of continuing compensation and an order for future medical and surgical treatment of the employee were made by the Industrial Accident Commission, the respondent herein; that approximately twenty months thereafter, on the ground that the disability of the employee had become permanent, the employer (petitioner herein) filed an application with respondent commission for the termination of the continuing award to the employee, together with a request that the percentage of such permanent disability be fixed and determined by said commission—which petition finally resulted in an order by said commission denying the employer's application that the award as theretofore made and then in force as to continuing compensation to said employee be terminated, at the same time ordering further medical and surgical treatment of the employee.

"The findings made by the commission, to-

★Rehearing denied.

gether with its order last mentioned, were as follows:

"That the temporary total disability, resulting from the injury sustained by the employee on February 7, 1923, has not yet terminated.

"That further operative treatment as recommended in the report of Dr. George W. Pierce, dated April 21, 1926, should be furnished to the employee at the expense of the defendant county of Los Angeles. * * *

"It is ordered that the defendant's (petitioner's) said petition to terminate indemnity, be, and it hereby is, denied.

"It is further ordered that the said defendant shall furnish to the applicant, within a reasonable time, the further operative treatment recommended in the report of Dr. George W. Pierce, dated April 21, 1926.

"It is further ordered that, should said defendant neglect or refuse to furnish such treatment within a reasonable time from date hereof, the applicant shall be entitled to secure such treatment from his own physician, and said defendant county of Los Angeles will be liable for the reasonable expense thereof, to be determined upon the filing of itemized bills, in duplicate, and the approval of the medical department of this commission."

"The first point presented by petitioner is that the commission acted in excess of its powers in making its finding in effect that total temporary disability of the employee had not terminated. * * *"

The employee Nelson testified as to his condition since sustaining the injury, and particularly as to his condition at the time of the hearing before the commission. He in effect testified that he had not returned to work, and that he had been unable to do any work since his injury; that he had visited his brother at his ranch in Minnesota, and, while there, had assisted in the light chores when he felt well enough, such as driving the cattle and horses into the yard. As to having difficulty with his eye at the time he said: "Yes, lots of it, I cannot get the distance with it." Dr. Pierce testified before the commission that an "examination of the mouth shows sinus opening above the right upper first molar, apparently from antrum. No sulcus behind the lower lid to hold artificial eye. There is a purulent discharge into the mouth." There was undoubtedly sufficient evidence before the commission to justify the finding that total temporary disability of the employee had not terminated.

We also adopt and approve the further portion of the opinion of the District Court of Appeal:

"The next finding and order of the commission to which petitioner directs attention is that wherein in effect it was found and ordered that the employer furnish to the employee 'the further operative treatment recommended in the report of Dr. George W. Pierce'; furthermore, that, should the employer neglect or refuse to furnish such treatment within a reasonable time after the date of the order, at the

expense of the employer, the employee should be entitled to secure such treatment from his own physician.

"At the time the report of Dr. Pierce was made, it appears therefrom that the condition of the employee was as follows:

"Present condition: Numerous scars over the entire right cheek; lower border of orbit, sunken, apparently fracture. There is a paresthesia of the upper lid. The palpebral fissure is one-half inch lower than on other side. There is some voluntary contraction in the orbicularis palpebrarum. The upper lid overlaps the lower at the outer canthus and is distorted at this point of adhesions. There is some loss of tissue of the lower lid with irregularity.

"Examination of the mouth shows sinus opening above the right upper first molar, apparently from antrum. No sulcus behind the lower lid to hold artificial eye. There is a purulent discharge from the orbit. There is also a continuous purulent discharge into the mouth. There is some loss of periorbital fat."

"The operative treatment recommended by Dr. Pierce, to which reference was made in the order by the commission, was indicated in the following language:

"There are two different stages of repair necessary in this case: First—is the deepening of the socket, which could be done in one operation by the method of epithelial inlay, and which would not require over one week to ten days, and then the lower lid would require some plastic operation to complete the borders, while the upper lid could be freed and raised up. These operations would not require any great length of time. The second stage would be the cleaning out of the antrum and closure of the sinus. I cannot state just how long this would take.

"By plastic operation, however, the appearance of the patient could be markedly improved, and he would wear an artificial eye."

"It is the contention of petitioner that the proposed operations and treatment recommended by Dr. Pierce were for cosmetic effect only, and that the commission was without jurisdiction to make the order of which complaint is made. But an inspection of the report discloses the fact that in part at least the purpose of the recommended treatment was to relieve the patient from the condition arising primarily from the two 'purulent discharges' referred to in the report, together with the added feature of 'cleaning out the antrum and closure of the sinus.' To that extent, therefore, it is clear that the commission was acting within its statutory powers. The principal attack of petitioner, however, is directed toward that part of the recommendation with reference to the other steps leading to the conclusion that 'the appearance of the patient could be markedly improved and he would wear an artificial eye.'

[2] "To put the position assumed by petitioner perhaps more plainly, it is that petitioner objects to any operation, the expense of which must be borne by it, for the ultimate purpose of so building up the tissues and bony structure surrounding the orbital cavity that the employee may be provided with and wear an artificial eye.

"Section 9[a] of the Workmen's Compensation, Insurance, and Safety Act (Stats. 1917, p. 831, as variously amended) provides that:

"Where liability for compensation under this act exists, such compensation shall be furnished or paid by the employer and be as provided in the following schedule:

"(a) Such medical, surgical and hospital treatment, including nursing, medicines, medical and surgical supplies, crutches and apparatus, including artificial members, as may reasonably be required to cure and relieve from the effects of the injury. * * *

"Respondent directs particular attention to the words 'as may reasonably be required to cure and relieve from the effects of the injury.' The photographs of the employee, presented at the time of the hearing before the referee, together with the report made by Dr. Pierce (hereinbefore set forth), regarding the condition of the employee shortly preceding the time of the hearing, indicate a deplorable situation so far as the probability of the employee being able to secure employment was concerned.

"On the part of the employer, the purpose of any surgical attempt in connection with an injury received by an employee is to restore him to as nearly a natural and normal condition as may be possible or practicable, to the end that his earning power by reason of his injury may be diminished to the least possible extent. To illustrate: If by accident arising from his employment the foot of a day laborer should be so crushed that by no known surgical skill could it be made useful as a member of his body, the probable medical course and practice would indicate the amputation of the foot. In due course thereafter it is clear that an artificial foot would greatly aid the employee in bringing about a restoration to a considerable extent of his earning power. Could it be doubted that the language of the statute which requires the furnishing by the employer of such surgical treatment, 'including artificial members' as may be required to 'cure and relieve from the effects of the injury,' would be applicable? In the instant case, that the present appearance of the employee would be a decided handicap to his obtaining employment 'in an open labor market' is obvious. The evident purpose of some of the proposed surgical operations on the employee is to give him a more presentable personal appearance. In his present condition, by reason of his limitations and the natural competition in securing employment, it might, and in all probability would, be extremely difficult for the employee to secure even such work as he is capable of doing. If successful, the result of the proposed surgical operations would place the employee, not only in a position where he could secure better and more remunerative employment than at this time he may command, but his improved personal appearance would assist in enabling him to retain such position. The probabilities are that the morale of the employee would be bettered, and his self-respect and appreciation of his good-workmanship qualities be increased—all tending toward a rehabilitation and restoration of the earning powers of the employee as of the date of the injury which he sustained. The principle of the question here under consideration is treated to some extent in the case of *New York Central R. Co. v. Bianc*, 250 U. S. 596, 40 S. Ct. 44, 63 L. Ed. 1161, where among other things, it is said:

"Even were impairment of earning power

the sole justification for imposing compulsory payment of workmen's compensation upon the employer in such cases, it would be sufficient answer to the present contention to say that a serious disfigurement of the face or head reasonably may be regarded as having a direct relation to the injured person's earning power, irrespective of its affect upon his mere capacity for work.

"Under ordinary conditions of life, a serious and unnatural disfigurement of the face or head very probably may have a harmful effect upon the ability of the injured person to obtain or retain employment. Laying aside exceptional cases, which we must assume will be fairly dealt with in the proper and equitable administration of the act, such a disfigurement may render one repulsive or offensive to the sight, displeasing, or at least less pleasing, to employer, to fellow employees, and to patrons or customers. (See *Ball v. William Hunt & Sons*, A. C. 496, 81 L. J. K. B. N. S. 782, 106 L. T. N. S. 911, 28 Times L. R. 428, 56 Sol. Jo. 550, 5 B. W. C. C. 459.)

"This court is therefore led to the conclusion that, even though conceding that the major object of the proposed surgical operations on the employee may be for 'cosmetic purposes' only, the respondent commission, in making its order therefore, was not acting in excess of its statutory powers.

[3, 4] "It is also objected by petitioner that 'the Industrial Accident Commission acted without, or in excess of, its powers in ordering petitioner to pay bills covering operative treatment rendered Philip Nelson by private parties prior to a finding upon notice as provided in section 10 of the Workmen's Compensation, Insurance, and Safety Act, that petitioner's approved hospital was inadequate.' From an examination of the order by the commission (hereinbefore set forth) relating to petitioner's objection, it will be noted, not that the commission has arbitrarily ordered the employer to pay bills covering operative treatment rendered to the employee prior to a finding that the hospital of petitioner was inadequate, but that, in fact, the order was to the effect that the employer furnish the proposed operative treatment within a reasonable time, or on its neglect or refusal so to do the employee 'be entitled to secure such treatment from his own physician' at the expense of the employer. The point made by petitioner, therefore, is without application to the facts herein. It may, however, be said that the record herein clearly discloses the fact that, after twenty-two surgical operations on the employee, the employer admitted its inability to further relieve the employee from the effect of his injuries. Dr. Pierce, the evidence of whose surgical skill was admitted, promised the desired relief. In such circumstances, assuming the successful outcome of the proposed surgical operations, the case of *Union Iron Works v. Industrial Accident Commission*, 190 Cal. 33, 210 P. 410, is authority for the principle that the employer may be made liable for the necessary expense connected therewith.

[5] "Finally, it is urged by petitioner that the respondent commission acted in excess of its powers in refusing to furnish petitioner with a transcript of the hearing before the commission.

"Without deciding whether in ordinary cir-

circumstances, upon payment by the petitioner of the fees prescribed by statute therefor, it becomes the duty of the commission to furnish such transcript, this court is of the opinion that the relief sought is one that cannot be considered in a petition for writ of review.
* * *

The award is affirmed.

202 Cal. 424

In re SIEMERS' ESTATE.★
RAFTERY et al. v. KUCK et al.
(S. F. 12024.)

Supreme Court of California. Nov. 14, 1927.

Rehearing Denied Dec. 12, 1927.

1. Wills ⚡358—Where minute entry recited granting of application for probate of will and denial of application to establish lost will, but formal findings were made and judgment entered on subsequent date, latter judgment only was appealable.

In will contest where record showed entry in court's minutes reciting granting of application for probate of will and denial of application to establish lost will, and showed filing of certificate of proof and facts, as required by Code Civ. Proc. § 1317, on same date, and also showed that on subsequent date court signed formal findings of fact, and entered judgment admitting will to probate and denying application to establish lost will, only judgment rendered or appealable *held* that of latter date; and attempted appeal from granting and denial of applications at time of minute entry would be dismissed.

2. Wills ⚡358—Order denying motion to vacate judgment in will contest held not appealable.

Appeal *held* not to lie from order denying motion to vacate judgment in will contest; the judgment itself being appealable, so that to permit appeal from the order would allow two appeals.

3. Wills ⚡358—Appeal from order denying new trial in will contest held dismissible (Code Civ. Proc. § 939).

Supreme Court will dismiss attempted appeal from order denying motion for new trial in will contest, since the order is not appealable under Code Civ. Proc. § 939.

4. Wills ⚡302(8)—Evidence held to sustain finding that purported lost will was not in fact made.

In will contest, evidence *held* sufficient to sustain finding of trial court that purported lost will was never in fact made.

5. Wills ⚡302(1)—Evidence held to sustain finding that decedent did not intend certain instrument to be his will.

In will contest, evidence *held* sufficient to sustain finding that decedent executed alleged will merely to terminate importuning of another to make a will in her favor, and that he did not intend that it should be his will.

6. Wills ⚡367—Notice of appeal, making general reference to order and judgment admitting will to probate, and denying probate of alleged prior will, held to include order denying probate.

Where notice of appeal made general reference to order and judgment admitting will to probate and denying probate of alleged prior will, it was sufficient to include order denying probate of alleged prior will, though it made no express mention of the order.

7. Witnesses ⚡240(2)—Propriety of putting leading questions to own witnesses rests largely in discretion of trial court.

Whether party should be permitted to ask leading questions of his own witnesses rests largely in discretion of trial court.

8. Appeal and error ⚡971(5)—Permitting leading questions will not be held error, in absence of abuse of discretion.

Appellate court will not hold that it was error to permit parties to ask leading questions of their own witnesses, in absence of abuse of discretion.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Frank H. Dunne, Judge.

Application by Lillian Kuck and others for probate of will of Johann Diedrich Siemers, deceased, opposed by Catherine Raftery, also known as Catherine Buckle, and another, who made application to establish an alleged lost will. From various orders and judgments, Catherine Raftery and another appeal. *Affirmed*.

Clarence A. Henning, of San Francisco, for appellants.

Grant & Zimdars, and William P. Hubbard, all of San Francisco, for respondents.

CURTIS, J. [1] This appeal purports to be from two orders or judgments of Hon. Frank H. Dunne, judge of the superior court of the city and county of San Francisco, in the matter of the estate of Johann Diedrich Siemers, deceased. One of said orders or judgments, it is claimed by appellants, is an order and judgment of said court dated January 30, 1925, admitting to probate an alleged will of said deceased of date November 1, 1922, and denying the application of Catherine Raftery to establish a lost will as the last will and testament of said deceased, alleged to have been dated May 1, 1923. The other of said orders or judgments so appealed from is a judgment rendered on February 27, 1925, denying the probate of an alleged will of date May 1, 1923, being the alleged lost will bearing said date, and also refusing to admit to probate a writing dated October 1, 1922, as the last will of said deceased, and admitting to probate as the last will and testament of said deceased an instrument bearing date No-

vember 1, 1922, and appointing Lillian Kuck executrix of said last will of said deceased. The appeal also purports to be from an order of said court denying a motion for a new trial and from an order denying motion to vacate judgment.

[2, 3] It is contended by appellants that the court rendered two judgments in the same proceeding in the matter of said estate instituted to establish and prove the last will and testament of said deceased; one bearing date the 30th day of January, 1925, and the other of date February 27, 1925. The record, however, on this appeal fails to bear out this contention of appellants. On the other hand, the record shows an entry in the minutes of said court dated January 30, 1925, as follows:

"Application for probate of will dated November 1, 1922, granted. Application to establish lost will said to have been dated May 1, 1923, denied."

On the same day the court signed and annexed to the instrument bearing date November 1, 1922, and filed the same in the papers of said estate, a certificate of the proof and facts found as required by section 1317, Code of Civil Procedure. No other or further order or judgment in said estate was made or entered by the court on said day. On the 27th day of February, 1925, however, the court signed formal findings of fact, and entered judgment in the matter of the contest of the will of said deceased denying the application of Catherine Raftery to establish said alleged lost will of date May 1, 1923, and denying the probate, as the last will of said deceased, of the writing dated October 1, 1922, and admitting to probate, as the last will of said deceased, the instrument dated November 1, 1922, and appointing Lillian Kuck executrix thereof. Therefore the only judgment rendered in said matter was that dated and entered on February 27, 1925. There being no judgment of date January 30, 1925, in said matter, the attempted appeal therefrom is therefore dismissed. No appeal lies from an order denying a motion for a new trial. Code Civ. Proc. § 939. Neither does an appeal lie in this case from the order denying the motion to vacate the judgment, as the judgment itself is appealable, and on appeal therefrom the order denying the motion to vacate said judgment is reviewable. To permit, therefore, an appeal from such an order would be virtually allowing two appeals from the same order. Estate of Baker, 170 Cal. 578, 150 P. 989. The appeals, therefore, from the order denying the motion for a new trial and to vacate the judgment are dismissed. This leaves for our consideration only the appeal from the judgment of date February 27, 1925.

[4] Johann Diedrich Siemers died in the city and county of San Francisco on the 29th day of December, 1923, leaving an estate therein consisting of real and personal property of the value of \$20,000 or thereabouts.

After his death there was found in his safe deposit box in the Mission Bank in said city a document purporting to be a will of said deceased, entirely written, dated, and signed by the said deceased. By the terms of this document \$2,000 was bequeathed to the Union Trust Company of San Francisco in trust to care for the graves of said deceased and his wife, who had predeceased him; \$5,000 to Stiene Kuck, a sister of said deceased; \$2,000 to Lillian Kuck, her daughter; and a number of other bequests of \$500 each to various relatives of himself and his wife; also a like amount to the Masonic Home situated at Decoto, Cal. Said bequests were preceded by a statement that "I * * * hereby dispose of all my property both real and personal upon my death as follows." The said Lillian Kuck was named in said instrument as the executrix thereof. On January 3, 1924, she filed said instrument in the office of the clerk of said court, together with her petition for the probate thereof, and asked that letters testamentary thereon be issued to her. Her petition was regularly set for hearing and notice thereof given of the time and place of the hearing thereof. In due time the contestants, Catherine Raftery and Mary Raftery, filed their opposition to the probate of said instrument as the last will and testament of said deceased, and in their said written opposition they alleged that, subsequent to the execution of said instrument, of date November 1, 1922, said deceased, on May 1, 1923, executed a writing, which they alleged to be the last will and testament of said deceased, by which instrument he disposed of all his estate, and in which the said Catherine Raftery was named as the executrix thereof. It was further alleged by said contestants that said will was entirely written by said deceased in his own handwriting, had never been revoked or destroyed by said deceased or by any one in authority; that it was left by him at the time of his death as his last will and testament; that by the terms thereof said Catherine Raftery was bequeathed the sum of \$10,000, her sister, Mary Raftery, \$2,500; that the same bequests were made to the Union Trust Company of San Francisco and the Masonic Home at Decoto as were mentioned in the instrument of November 1, 1922; and that the remainder of his estate was given to his nieces and nephews residing in San Francisco and Germany. Said contestants also alleged that said will was lost and had been destroyed by a person or persons other than deceased, and without his consent, authority, direction, or knowledge, but was at the date of his death in full force and effect. Upon this petition, the said written opposition thereto, and the answer of said Lillian and Stiene Kuck to the said written opposition, said proceeding came on for trial before said court sitting without a jury. During the trial, which began on October 21, 1924, the proponent, Lillian Kuck,

produced a writing dated October 1, 1922. This writing appears to have been written entirely by the deceased and purported to dispose of all his real and personal property. Its terms were much the same as those claimed by appellants to have been contained in the instrument of May 1, 1923, which appellants sought to establish as the lost will of said deceased. By the terms of the writing of date October 1, 1922, the said Catherine Rafferty was bequeathed the sum of \$10,000, her sister, Mary Rafferty, \$2,500, and the same bequests were made to the Union Trust Company of San Francisco and the Masonic Home at Decoto as were asserted to have been made in said alleged lost will. By its terms \$2,500 was given to said Stiene Kuck, sister of said deceased, and the remainder of his estate was distributed among his nieces and nephews residing in Germany and San Francisco. The said Catherine Rafferty was by said document appointed the executrix thereof. At the time said Lillian Kuck produced said document of October 1, 1922, she testified that some months after the date of the death of said deceased she and her mother, while searching through a pantry in the house which had been the home of said deceased at the time of his death and for some years prior thereto, the mother of said Lillian Kuck discovered this paper of date October 1, 1922, in a "cubby hole" in this pantry, between the house of said deceased and the adjoining house; that it was inclosed in an envelope marked "Missions Lodge, No. 169 F. A. M. Deliver this my last will to the proper authority only after my death, John D. Siemers"; that with this envelope was found a second envelope addressed to Mrs. Catherine Buckle, 440 Chenery street, San Francisco, Cal. (but not in the deceased's handwriting), in which second envelope were two letters, one dated Roxbury, Mass., November 15, 1923, and the other dated New York City, February 14, 1922. (The evidence shows that these two letters were letters of the appellant Catherine Rafferty.)

This document of date October 1, 1922, was never formally offered for probate either by Catherine Rafferty or by anybody else. No question is made but that the writing dated October 1, 1922, and that dated November 1, 1922, respectively, were entirely in the handwriting of the deceased. The court found that the instrument of date November 1, 1922, was the last will and testament of said deceased; that said deceased did not leave a last will and testament or any writing purporting to be his last will and testament dated May 1, 1923, and no such instrument was lost, or destroyed by any person or persons; that no such instrument as the one alleged of date May 1, 1923, ever existed, or was ever in force or effect or of any validity whatever; that Catherine Rafferty for over one year prior to the death of decedent had persistently importuned the decedent to make a last will and testament in her favor; that de-

cedent, for the purpose of bringing to an end the said importuning, signed the writing dated October 1, 1922, for the purpose of making it appear to said Catherine Rafferty that he had complied with her request; "that the said decedent did not in fact at the time of the signing of the paper of October 1, 1922, intend that the said writing should take effect as his will, but executed the same simply for the purpose, as aforesaid, of bringing to an end the importuning of the said Catherine Rafferty; that, after the signing of said writing, he gave the same into the possession of said Catherine Rafferty; that shortly thereafter he executed the will of November 1, 1922, which the court finds to be the last will and testament of said decedent, and said will of November 1, 1922, he placed in his safe deposit box."

Appellants attack these findings on the ground of the insufficiency of the evidence to support them or any of them. We will first consider the contention of appellants that the evidence is insufficient to support the finding that the decedent did not leave a last will and testament of date May 1, 1923. This was the purported lost will which appellants sought to establish. At the time of his death, and for some years prior thereto, the deceased had made his home at 987 Guerrero street, in the city of San Francisco. He was 67 years of age at the time of his death, and had been a widower some 10 or 12 years before he died. His sister, Stiene Kuck, and her daughter, Lillian Kuck, lived across the street from his home, and with them he was on friendly terms. He had known Catherine Rafferty some 7 years prior to his death. Up to about 10 weeks before the death of deceased she had lived at 440 Chenery street, in said city, where she took care of a Mr. Buckle. Just how long she had had the care of Buckle, or in what capacity she was rendering him care and attention, does not clearly appear in the record. There is evidence, however, that her name appeared on his death certificate as his wife, and she often went by the name of Mrs. Buckle, although there is no claim that she was ever legally married to him. He died on October 20, 1923, and immediately thereafter she moved to the home of Siemers, where she remained up to the day before the death of Siemers. Prior to taking up her home with Siemers she was often at his house, and the two were frequently in each other's society. The deceased was taken ill only a day or two before his death, which occurred on December 29, 1923. Regarding the purported will of May 1, 1923, Catherine Rafferty testified that in a conversation with deceased held on May 1, 1923, he said to her: "I am going to make a will, and leave you \$10,000." She then testified:

"And then he wrote the will out. This was in his house after we came back from the park, because he said 'nobody took care of his brother when he was sick.' And he said, 'Mr. Buckle

has somebody to take care of him.' 'I know you will take care of me like that if I am sick.' I was there when he wrote it out. He just sat down and wrote it out. He said he was going to leave it in the Masonic Temple. But he never did leave it there; because he said he was going to write out another one, later on. He didn't say that very day, but he said he was going to show it to some people, and then he left it in the drawer. He took it down to the bank and showed it to Mr. Dunn and Mr. Wood. He said, 'Later on I will write out another one and leave you \$15,000.' He didn't write that. * * * I read the will of May 1, 1923, on the same day, May 1, 1923, that he wrote it. I handed it back to him. He put it in the drawer in his room. He put it into an envelope. He wrote on the envelope this, 'To be distributed by the proper authorities,' on the outside. He put the envelope into the bureau drawer in the bedroom on May 1, 1923. I saw the will again on Tuesday, the 11th of December, 1923. The circumstances under which I saw this particular will, dated May 1, 1923, were, I said, 'Dick, I had better do housework; people are talking because I am staying here with you.' He said, 'Oh, they will talk anyway. You don't have to work. This is for you.' So he opened the will and showed it to me, in his, the same, room. He took it out of the drawer and opened it up so that I could see it, and said, 'This is for you, and you don't have to work.' I looked at it and recognized it as being the same will of May 1, 1923, the same one. He put it in the drawer again. That was December 11, 1923. He showed it to me again, and I didn't open it up any more after that. Just previous to December 11th I was in Los Angeles for a week, away from Mr. Siemers. I came back to San Francisco Friday, December 7th. While in Los Angeles Mr. Siemers wrote me and said for me to come back, that he was lonesome for me, and for me to come back. * * * Q. Preceding the death of Mr. Siemers, what was the last time that you saw in this bureau drawer, where Mr. Siemers placed this will in the envelope upon May 1, 1923, what was the last time you saw the envelope in the bureau drawer preceding Mr. Siemers' death? A. I think that very day, but I didn't pay any attention to it at all. On the day of his death I was continuously with Mr. Siemers. * * *

Nita B. O'Neill, a witness on behalf of the contestants, testified that the deceased, on or about December 6, 1923, showed her a writing which he said was his will, which was dated May 1, 1923, and signed Johann Diedrich Siemers. This witness gave the names of the devisees named in said will, and, as given by her, they were practically the same as those which the contestant, Catherine Raftery testified were in the instrument claimed by her to be the will of May 1, 1923. This witness testified that deceased called on her on said day, December 6, 1923, and requested her to write to Catherine Raftery, in Los Angeles, and ask her to come home. He showed her this writing of date May 1, 1923, and his bank book, and said: "This is what I have done for her in case of my death." The witness took the writing which the deceased

said was his will and read it over three times. This witness was shown the writing of October 1, 1922, and stated, "I recognize that handwriting as being the same handwriting on the will I saw." Her attention was called to the words "without bonds" interlined in the writing of October 1, 1922, and she said that she saw no such words interlined in the writing of May 1, 1923, which she said the deceased had shown to her and stated it to be his will. Percy A. Wood, a witness in behalf of the contestants, testified that he was an attorney at law, and was assistant trust officer of the Union Trust Company; that some 6 or 7 months prior to January 1, 1924, the deceased, Siemers, and Catherine Raftery came to the bank, and Siemers showed him a writing which he said was his last will and testament, and asked the witness whether it was a legal document. Upon being informed by Siemers that it was written, dated, and signed entirely in his own handwriting, the witness advised Siemers that in his opinion the document was legal. He did not remember the date of the writing nor the names of the beneficiaries therein. He was shown the writing of October 1, 1922, and his attention called to the interlined words "without bonds," and he said that he did not believe it was the same instrument shown to him by Siemers, nor were the words "without bonds" interlined in the writing shown to him by Siemers. Another witness testified the deceased prior to his death had told him that he had made a will in which he had left Catherine Raftery some money, and that this will was in the Mission street bank.

As against this evidence the respondents, Lillian Kuck and her mother, Stiene Kuck, each testified that they came over to the home of the deceased on the afternoon of the day just prior to his death and were with him up to the time he died; that besides a Mr. Meissner, a clerk in a nearby grocery store, the two respondents were the only persons with deceased at the time of his death, which occurred at about half past 2 Saturday morning. Very soon after his death these three persons locked up the house and left together; that later on, and during the same morning, Lillian Kuck went over, and put a bolt on the back door; that no one after the death of deceased had access to the house except the respondents, Lillian and Stiene Kuck; that a day or so after his death they examined the bureau drawer in which Catherine Raftery testified the will of May 1, 1923, was left, and made a thorough examination of the whole house, but found no will in the house of date May 1, 1923, or any writing at all purporting to be a will of said deceased, except the instrument dated October 1, 1922, which was not found until some months after his death; that in the bureau drawer they found a bank book belonging to Miss Raftery, but no letters nor papers nor anything that

purported to be a will. Upon this evidence the trial court found that the deceased never made a will of May 1, 1923, and that no such will ever existed. In arriving at such a conclusion, the court must have rejected the evidence of Catherine Raftery and her witnesses in so far as they testified to the existence of such a will and accepted the evidence of the respondents that no such will was found after the death of the deceased. If the deceased ever made a will of date May 1, 1923, according to the testimony of Catherine Raftery, the only person who testified upon this phase of the case, it was kept in the drawer of this bureau, in the room in which he died, and was there on the day of his death. Both Lillian Kuck and her mother testified that it was not there at any time when they first examined the drawer, which was a day or so after the death of deceased. There is nothing in the evidence to lead to the belief or inference that any one had access to said bureau drawer or had removed any paper therefrom between the time fixed by Catherine Raftery as the last occasion on which she said she saw the will of May 1, 1923, in the bureau drawer, and the time when Lillian Kuck and Stiene Kuck said they first examined said bureau drawer. Therefore, if deceased ever left such a document, it must have been in said bureau drawer at the time Lillian and Stiene Kuck first examined the same after the demise of the testator, and would have been found by them on said occasion. As has already been stated, they each testified that no such document was in said drawer, nor was any such document found by them at any time. The trial court undoubtedly accepted their testimony in this regard. In so doing it rejected the evidence of Catherine Raftery that such a writing was left by said deceased in said drawer. The evidence of Lillian Kuck and her mother was sufficient to support the finding of the court that the deceased left no will of date May 1, 1923. The court, having rejected Catherine Raftery's evidence that the deceased left a will of that date in the bureau drawer, was warranted in rejecting all of her evidence bearing upon the execution and existence of such a will and in believing and finding that no such will ever existed.

[5] Reverting now to the finding of the trial court that the document of date October 1, 1922, was not the last will and testament of said deceased and to appellants' contention that this finding is unsupported by the evidence, it will be observed that this will was executed just one month prior to the will of November 1, 1922. The latter will purports upon its face to dispose of "all my property both real and personal upon my death as follows." The testator then proceeded to make a number of specific bequests aggregating the sum of \$15,500. The will, however, contains no residuary clause.

There was no finding by the trial court as to the value of decedent's estate. In respondents' petition it is stated that its value does not exceed \$17,400. In contestants' petition they allege that its probable value is \$22,000, and in the affidavit of Lillian Kuck, designated as "Testimony of Applicant on Probate of Will," the statement is made that the estate "does not exceed the value of \$26,000." The question as to its value had but scant consideration during the trial, and we find but little evidence in the record dealing with the question of its value. The will of November 1, 1922, being subsequent in time, would be a revocation of all former wills made by deceased, but only to the extent that its provisions were inconsistent with those of former wills. Civ. Code, 1296. The bequests of \$15,500 made in the will of November 1, 1922, are undoubtedly valid, and are a first charge against the estate after the payment of the debts of the deceased, his funeral expenses, and the cost of administration. There was no evidence as to the amount of debts left by deceased. The record is also silent as to the amount of his funeral expenses and the cost of administration of his estate. The bulk of the property left by deceased was real property, which would have to be sold in order to pay the bequests created by the will. Upon forced sale the amount this real property would bring would be problematical. It is evident from these facts that there would not be any considerable amount of the estate remaining after the payment of the amounts chargeable against it, including said bequests of \$15,500. This fact, taken in connection with the expression used by the deceased in his will that he hereby disposes of "all my property both real and personal," may well and reasonably lead to the conclusion that said testator, by said will of November 1, 1922, intended to, and did, dispose of all his property. If such were his intention, then the said will was inconsistent with the provisions of the prior will of October 1, 1922, and therefore amounted to, and was, a complete revocation of said prior will.

But whether there was or was not a revocation of the writing of October 1, 1922, the trial court found that the decedent did not at the time of its signing intend that said writing should take effect as his last will, but that he executed the same simply for the purpose of bringing to an end the importuning of Catherine Raftery that he make a will in her favor, and that, after giving the same to said Catherine Raftery, he executed the will of November 1, 1922, which was the last will of said decedent. While the evidence in support of this finding may be somewhat meager, we are not able to say that there is an entire absence of any evidence in the record to justify it. The effect of the testimony of a number of witnesses was that Catherine Raftery greatly annoyed

and bothered deceased, and that he was anxious to get rid of her; that he was greatly annoyed because she was after his property. One witness, a distant relative by marriage of the deceased, testified that some time in December, 1923, about the 17th of the month, she was with the deceased, and that "he said Miss Catherine was in Los Angeles, and he hoped that she would stay there, because she tried to get him to sign all the property he had over to her, and she got mad because he wouldn't do it." The witness, Carl G. Meissner, testified that either in November or December, 1923, the deceased came to him and had him address a letter to Catherine Buckle at Los Angeles, and at that time the deceased said to him that "he wanted to get rid of this woman, who was after his money. * * * He said, 'She is just bothering me to death.'" The witness Julius Bruns testified that "Mr. Siemers told me that Mrs. Buckle or Miss Raftery was a lot of trouble to him. * * * He did not know what to do." Proof that the contestant Catherine Raftery was endeavoring to secure decedent's property, and that the latter was bothered and annoyed by her actions in this respect, followed by the further proof that he executed a will in her favor, which he gave to her, but in a few days thereafter he executed another will in many, if not in all, respects inconsistent with the former will, which latter will he left in his safe deposit box, sufficiently justified the trial court in believing that decedent did not intend that the first of said writings should be or remain his last will and testament. In our opinion, the finding in question was justified by the evidence.

It is conceded that the instrument of date November 1, 1922, was entirely written, dated, and signed by the testator. The court upon sufficient evidence having found that decedent did not leave a last will and testament or any writing purporting to be his last will and testament of date May 1, 1923, and that the writing of October 1, 1922, was not his last will, it of necessity follows that the will of November 1, 1922, was the last will and testament of said deceased.

[6] Respondents make the further contention that appellants cannot be heard to object to this order denying to probate the writing of October 1, 1922, for the reason that they have failed to take any appeal from said order. While the notice of appeal makes no express mention of the writing of October 1, 1922, nor of any order of court concerning it, yet we feel that the general reference made in said notice of appeal to the order and judgment of February 27, 1925, is sufficiently comprehensive to include the order in reference to said writing of October 1, 1922.

[7, 8] The court permitted respondents to ask certain leading questions of their own witnesses, and this action of the court is by

appellants assigned as error. This matter is largely in the discretion of the trial court, and, in the absence of an abuse of this discretion, its action will not be reversed on appeal. There is no showing that the appellants were prejudicially affected by these rulings of the court.

The judgment is affirmed.

We concur: WASTE, C. J.; SEAWELL, J.; RICHARDS, J.; LANGDON, J.; PRESTON, J.; SHENK, J.

202 Cal. 409

PEOPLE v. RABE. (Cr. 3023.)

Supreme Court of California. Nov. 9, 1927.

1. Indictment and information $\S$ 130—Counts of indictment charging obtaining property of different amounts and at different times held not repetitions of same offense.

Where same person was alleged to have been defrauded by accused by employing same false representations in each count of indictment, counts were not repetitions of same offense, where in each count property obtained by accused was obtained at a different time and was different in character and value from property alleged to have been acquired in other counts.

2. False pretenses $\S$ 7(1)—Making of first false representation does not immunize defendant from punishment for subsequently obtaining property from person defrauded.

Where proof shows fraudulent intent or purpose of accused to obtain property from another by false or fraudulent representation which induced person to whom they were made to part with property, making of first false representation does not immunize accused from punishment for subsequently obtaining from same person other property which was parted with under influence of representation which was operating on mind of defrauded person at time he passed property to accused.

3. False pretenses $\S$ 4—One designedly creating in mind of another false belief in existence of material fact is strictly accountable for its effect on person influenced.

Since no person may profit by his fraudulent acts or conduct, if one designedly creates in another's mind false belief in existence of material fact, he will be held to strict accountability of its effect on mind of person influenced.

4. False pretenses $\S$ 39—Burden is on person creating false belief to show it has been removed.

Burden is on person creating false belief in mind of another of existence of a material fact to show that it has been removed, or it is presumed, in absence of proof to contrary, to have influenced action of person imposed upon.

5. False pretenses $\hookrightarrow$ 12—Obtaining property by false or fraudulent means is not complete until defrauding party obtains possession of another's property by fraudulent representations (Pen. Code, § 20).

Since, under Pen. Code, § 20, in every crime there must exist union or joint operation of act or intent, intent to obtain property by false or fraudulent means is shown by plan devised by person contemplating offense, but crime is not complete until he obtains possession of another's property as result of fraudulent representations.

6. False pretenses $\hookrightarrow$ 54—Punishment prescribed for crime of gaining possession of real property by false pretenses is measured by its convertible money value (Pen. Code, § 532).

Where crime of obtaining possession of real property by false or fraudulent representation is punished under Pen. Code, § 532, in same manner and to same extent as for larceny of money or property so obtained, punishment is to be measured by real property's convertible money value.

7. False pretenses $\hookrightarrow$ 2—Since offense of false pretenses is analogous to larceny, Legislature could depart from common-law rule and include real property in list subject to statute (Pen. Code, § 532).

Since offense of false pretenses is analogous to offense of larceny, it was competent for Legislature to depart from common-law rule and include real property in list of property subject to Pen. Code, § 532, providing punishment for defrauding another of property, whether real or personal.

8. False pretenses $\hookrightarrow$ 54—Obtaining property by false pretenses being punishable as for larceny, statute fixing penalty for larceny in its two degrees is applicable (Pen. Code, §§ 4, 532).

Since under Pen. Code, § 532, punishment for obtaining property either real or personal by false or fraudulent representation is in same manner and to same extent as for larceny, provision of statute which fixes penalty for larceny in its two degrees is applicable, under section 4, providing that common-law rule of strict construction of Penal Statutes is inapplicable to Code.

9. False pretenses $\hookrightarrow$ 49(1)—Evidence held to sustain conviction of obtaining property by false pretenses.

Evidence held sufficient to sustain conviction of person, selling stock in corporation, of obtaining property by false pretenses.

10. False pretenses $\hookrightarrow$ 7(5)—Misrepresentations on sale of stock that company had bought land and procured certain individuals as directors held false pretenses (Pen. Code, §§ 950–952).

Misrepresentations in obtaining subscriptions of stock that company had bought harbor land, that bond issue had been arranged for, and that particular individuals had been chosen as directors, and that subscriptions were worth amount charged therefor, held false pretenses as representations of past facts; in-

dictment charging such representations being in conformity with Pen. Code, §§ 950–952.

11. False pretenses $\hookrightarrow$ 15—False pretenses statute covering property real or personal held to extend to real property, despite provision that crime is punishable as for larceny of property so obtained (Pen. Code, § 532, as amended).

Pen. Code, § 532, as amended, providing every person knowingly defrauding any other person of property, whether real or personal, is punishable in same manner and to same extent as for larceny of money or property so obtained, held to include fraudulently obtaining real property, though real property is not subject of larceny; artificial distinction between real and personal property as to actions to quiet title being removed by 1921 Amendment of Code Civ. Proc. § 738.

12. Criminal law $\hookrightarrow$ 1032(7)—Claim of material variance could not be asserted for first time on appeal.

Claim of material variance not presented to trial court could not be asserted on appeal.

13. False pretenses $\hookrightarrow$ 38—Proof of one material misrepresentation will sustain conviction for false pretenses.

Only one material misrepresentation need be proved to sustain conviction for obtaining property by false pretenses.

14. False pretenses $\hookrightarrow$ 38—Where defendant made no claim that he did not receive money under check which he obtained, he could not complain of failure to prove cashing of check.

Where defendant, accused of obtaining property by false pretenses, made no claim that he did not receive money under check given him, he could not complain of failure to prove check had been cashed.

15. False pretenses $\hookrightarrow$ 38—That moneys were paid to defendant in capacity as trustee held not fatal variance in prosecution for obtaining money by false pretenses.

In prosecution for obtaining property by false pretenses, that evidence showed moneys were paid to defendant in capacity as trustee held not fatal variance with proof and allegation that defendant received money and property; it being unnecessary to show what defendant did with money.

In Bank.

Appeal from Superior Court, Los Angeles County; Arthur Keetch, Judge.

Paul B. Rabe was convicted of obtaining money and property by false pretenses, and he appeals. Judgments of the superior court and District Court of Appeal (254 P. 602) affirmed.

Henry C. Huntington, of Los Angeles, Keeler, Fickert & French, of San Francisco, and Frank G. Howe, Gretchen Wellman, and Dena Jacobson, all of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and H. H. Linney, Deputy Atty. Gen., for the People.

SEAWELL, J. The facts of this case are more specifically set out in the opinion of the Court of Appeal, Second District, Division 2, THOMPSON, J., which is appended as a part of our opinion. We will therefore not repeat them in our introductory observations.

[1] The petition for hearing by this court laid much stress upon two points passed upon by said district court. The first is that the defendant stands convicted upon three counts of the indictment which, in fact, are but repetitions of one and the same offense. We think this contention is without merit. It is true that the identical person is alleged to have been defrauded by the accused by employing the same false representations in each count, but this does not reduce the three separate acts to one act. In each count of the indictment the property obtained by appellant was obtained at a different time and was different in character and value from the property alleged to have been acquired by the false representations set out in the other counts of the indictment. The theory of appellant is that a single crime has been split into several parts, and each part of the whole has been made the basis of a criminal action. This contention is not maintainable.

[2] Where the proof in a given case is sufficient to show the existence of a fraudulent intent or purpose on the part of an accused to obtain property from another by false or fraudulent representations, the making of the first false representations which moved or induced the person to whom they were made to part with his property does not immune the defrauding person from punishment for subsequently obtaining from said person other property which was parted with under the influence of the fraudulent representation, which was still operating upon the mind of the defrauded person at the time he passed his property into the hands of said designing person.

[3, 4] No person will be permitted to profit by his fraudulent acts or conduct, and if one designedly creates in the mind of another a false belief in the existence of a material fact he will be held to a strict accountability for its effect upon the mind of the person designed to be influenced thereby, and the burden is upon the person creating such false belief to show that it has been removed, else it will be presumed, in the absence of proof to the contrary, to have influenced the actions of the person imposed upon in his dealings with the person who is responsible for said false belief. It is a statutory rule that in every crime or public offense there must exist a union or joint operation of act and intent. Pen. Code, § 20.

[5] The intent to obtain property by false or fraudulent means is shown by the plan devised by the person contemplating the offense, but the crime is not complete until such person obtains possession of the property of

the other as a result of fraudulent representations. In other words, the crime is accomplished when an accused receives into his possession property which he had planned to fraudulently gain. So in the instant case, while a general intent to defraud may have been formed in the mind of the accused at the time of or before he completed the first offense, the other crimes charged were completed as separate and distinct offenses on the days that he unlawfully took possession of the property described in the several counts of the indictment. If appellant's theory be correct and the value of the property first acquired had been under \$200, the appellant could have been put to his trial for a misdemeanor only, and other subsequent offenses would have been merged into the misdemeanor or prosecution. This anomalous result would of itself cause us to pause in considering appellant's theory if that was all that could be said in rebuttal. Clearly the several counts set out different and distinct crimes. The cases cited by appellant re-announce a well-recognized rule, which is not applicable in the instant case. It is the act of getting possession of or of obtaining property by false and fraudulent representations which the law punishes as a crime.

[6] People v. Cummings, 114 Cal. 437, 46 P. 284, which appellant cites as an authority sustaining his contention, merely interpreted section 532, Penal Code, a statute which defines the crime of obtaining property by false and fraudulent representations and prescribed a penalty therefor, as and of the time that case was written. It was there held that real property was not named as a kind of property that was within the provisions of section 532, Penal Code. That section has now been amended to read:

"Every person who knowingly and designedly, by any false or fraudulent representation or pretense, defrauds any other person of money, labor, or property, whether real or personal, * * * and by thus imposing upon any person obtains credit, and thereby fraudulently gets possession of money or property, or obtains the labor or service of another, is punishable in the same manner and to the same extent as for larceny of the money or property so obtained."

The crime of obtaining possession of real property is punishable "in the same manner and to the same extent as larceny of the money or property so obtained." It is very clear that the punishment prescribed for the crime of gaining possession of real property by false representations is to be measured by its convertible money value. This is the natural meaning of the statute and is such an interpretation as the average citizen would place upon it. The crime is punishable as if the property was capable of asportation according to its value reduced to money or a chattel.

[7] There is no doubt that it was competent

for the Legislature to depart from the common law by including real property in the list of property that shall be subject to the provisions of section 532, Penal Code. The offense of false pretenses has always been construed as largely analogous to and closely bordering upon that of larceny. *People v. Cummings*, supra.

[8] The Legislature has provided the same punishment for gaining the possession of real property by fraudulent means as is provided by law for obtaining personal property by like means. The degree of punishment in each case depends upon the value of the property fraudulently obtained. The punishment is as definitely prescribed as it is for larceny. There is no difficulty in the way of applying the penal provisions of the statute which fixes the penalty for larceny in its two degrees to the crime described by the indictment in the instant case by giving heed to section 4, Penal Code, which provides:

"The rule of the common law, that Penal Statutes are to be strictly construed, has no application to this Code. All its provisions are to be construed according to the fair import of their terms, with a view to effect its objects and to promote justice."

People v. Cummings, supra, cannot, in our view, longer be regarded as authority for the holding which is repeated in *People v. Folcey*, (Cal. App.) 247 P. 916, to the effect that:

"Since real estate is not the subject of larceny, the words 'punishable in the same manner and to the same extent as for larceny of the money or property so obtained' are meaningless in relation to real property."

The statute was adopted with the view of checking a variety of frauds, tricks, and false representations so commonly practiced as to become a menace to the ownership of real property. The punishment, inasmuch as the crime partakes of a larcenous intent, was appropriately fixed by adopting the penal clause of the statute prescribing the penalty for the commission of a larceny.

[9] We have given consideration to appellant's contentions, many of which are extremely technical, and after so doing feel convinced that the evidence is sufficient in substance to sustain the verdict of the jury. An attempt, marked by considerable industry, is made by appellant to show that the alleged representations charged to appellant did not relate to a past or existing fact, and were nothing more than the expression of opinions as to future events, or the expression of hope, or the making of promises, or the expression of opinion on the part of appellant, and, therefore, not actionable at criminal law. The scheme conceived by the appellant, as set out in the exhibits, was quite elaborate in its initiatory stage, and contained language which undoubtedly related to the existence of present facts and conditions, as well as to future probabilities and possibilities. A

representation that a corporation, whether completely formed or in its formative process, has purchased land and is to be conducted or operated according to specific or definite plans and in accordance with a fixed disclosed program, and is to be officered by persons well known for their business probity and integrity, if false, may furnish the basis for the kind of action here prosecuted against the appellant, the essence of which is gaining possession of property by false representations.

The opinion of the District Court of Appeal, adopted as a part of our opinion, follows:

The appellant was charged with the offense of obtaining money and property by false pretenses. The indictment was in four counts, upon all of which the jury returned a verdict of guilty. Judgment was pronounced upon the verdict, the sentence was suspended upon the third and fourth counts, and after denial of appellant's motion for a new trial he instituted this appeal from the judgment and order denying his motion.

The first count charged the obtaining on August 1, 1924, of 200 shares of capital stock of the Moreland Truck Company and 20 shares of the capital stock of the First Federal Securities Company, taken together, of the total value of \$4,000, from Elmer E. Owen. The second and third counts charged the obtaining on August 2 and 5, 1924, from Henrietta McGaw, of \$1,250 and \$4,000, respectively, and the fourth count, of obtaining on August 15, 1924, from the same person, a deed to real property of the value of \$11,000. In each instance the money or property was advanced in payment of subscriptions for what was termed preorganization stock of a proposed corporation to be known and styled the Long Beach Dock & Terminal Company, which company was not incorporated upon any of the dates of the subscriptions or subsequently.

[10] The misrepresentations were the same in each instance and were as follows: (1) That defendant was taking preorganization subscriptions for the purchase of capital stock of the Long Beach Dock & Terminal Company; (2) that the company had bought and practically paid for 140 acres of harbor land, upon which to erect docks and warehouses; (3) that a bond issue of \$6,000,000 had been "arranged for" to cover the cost of construction; (4) that Gen. George W. Goethals had been secured to act as chairman of the board of directors and as supervisor of construction; (5) that the promoters had secured the consent of Senator Shortridge, Congressman Lineberger, and C. H. Windham, city manager of Long Beach, to act as officers and directors of the company; (6) that the subscriptions were worth the amount charged therefor.

At the opening of the trial defendant objected to the introduction of evidence on the ground that the facts stated did not constitute a public offense; that matters were stat-

ed which constituted a justification; and that there was not a compliance with sections 950, 951, and 952 of the Penal Code. He now urges the same objections as insufficiencies of the indictment. His position may be stated as follows: That the indictment shows that the defendant was in fact taking preorganization subscriptions; that there is no allegation that the subscriptions were not of the value charged therefor; and that as to all other representations they relate to future acts, i. e., the organization in the future of a company to take over the land and to be officered by the individuals named. This thought runs all the way through appellant's brief and is the foundation upon which rests most of his argument. Such is not the effect of the allegations. They are very similar to the facts in the case of *People v. Ballard* (Cal. App.) 241 P. 596. From a bare recital of the allegations one would judge that all that remained to constitute the Long Beach Dock & Terminal Company a corporate entity was to comply with legal formalities; that to all intents and purposes the personnel of its directors had been determined; that its promoters were sufficiently financed to have purchased for it most valuable real property holdings and had arranged very extensive financing. All of these things were representations of past acts and present conditions and not outbursts of the prophet looking with optimistic eye into the distant future. They are all alleged to be false, and we can hardly imagine what might be added to bring it more squarely within the condemnation of the statute. The allegation of falsity not only covers the representation that it was preorganization stock, but also that it was worth the price charged.

[11] Outside of these objections, however, we do not find a serious question concerning the fourth count of the indictment. While appellant pays scant attention to the third and fourth counts by reason of the fact that sentence was suspended, there is sufficient in his brief that we have concluded that we must examine and pass upon them. As has been stated, the indictment shows the obtaining of a deed to real property of the value of \$11,000. Counsel says that this count is fatally defective on the authority of *People v. Folcey* (Cal. App.) 247 P. 916, wherein it is held that no penalty is provided for obtaining real property by false pretenses. While a petition for a hearing of this case in the Supreme Court was denied, we feel that under the authority of *People v. Davis*, 147 Cal. 346, 81 P. 718, and *Bohn v. Bohn*, 164 Cal. 532, 129 P. 981, we are not bound to accept the language as precedent, but should give expression to the reasons for our dissent therefrom. The entire history of larceny, it is true, refers to the felonious taking and carrying away of personal property, so that there is no such thing as the larceny of real property. When on account of defects in the common law relative to cheats and expanding commerce it

was found necessary to extend the law by statute, the similarity of the offense to larceny operated to confine the statute to personal property, in which condition section 532 of the Penal Code was found when the case of *People v. Cummings*, 114 Cal. 437, 46 P. 284, came before the Supreme Court. To remedy the deficiency thus existing in the law, and pointed out in this case, the Legislature amended section 532 to read as follows, the amendment being here set forth in italics:

"Every person who knowingly and designedly, by any false or fraudulent representation or pretense, defrauds any other person of money, labor, or property, *whether real or personal*, or who causes or procures others to report falsely of his wealth or mercantile character, and by thus imposing upon any person obtains credit, and thereby fraudulently gets possession of money or property, or obtains the labor or service of another, is punishable in the same manner and to the same extent as for larceny of the money or property so obtained." (Italics ours.)

It will be noted, of course, that the concluding language was not changed, so that if there be a penalty for obtaining real property by false pretenses we must insert the words "like value" or some similar expression, after the word property, where it last occurs in the section, in which event the final portion would read as follows: "Is punishable in the same manner and to the same extent as for larceny of the money or property of like value so obtained." If this construction be not adopted the amendment is fruitless and the words "whether real or personal" mean nothing. It is not our understanding of the rules of construction that such should be the case, but that rather effect should be given to each word and phrase if fairly and reasonably possible. Many cases might be cited to support this rule. It has been said (*Maguire v. Cunningham*, 64 Cal. App. 536, 543, 222 P. 838) that the distinction between real and personal property, so far at least as actions to quiet title are concerned, is purely artificial. This particular artificiality was removed by amendment of section 738 of the Code of Civil Procedure in 1921, and in this age of industrial development, where it is almost as easy to defraud one of real property as of personal property, we think the plain intent of the Legislature to remove the artificiality under discussion should govern and that we should hold the fourth count of the indictment to be sufficient.

[12, 13] The next assertion of appellant is that the evidence is insufficient to support the verdict. We have carefully examined the voluminous transcript and fail to see how the jury could have arrived at any other verdict. Concededly Senator Shortridge, Congressman Lineberger, and Mr. Windham had never consented to become officers and had never consented to the use of their names. The repre-

sentations were freely made that "they," which "they" must mean the organizers or promoters of the proposed company, had purchased from the Union Pacific and practically paid for 140 acres of harbor land—and it was positively established that they had not purchased from the Union Pacific 140 acres or any other land. If the defendant or any one associated with him had purchased 140 acres of land from any other source not covered by his representation, it was his duty to present such evidence after proof of the falsity of the representation. *Shemwell v. People*, 62 Colo. 146, 161 P. 157. Instead, on the stand he denied having made the representation. Nor can the defendant avail himself of the claim that the proof shows a false representation that the purchase of 140 acres was made of the Union Pacific and that this proof is at variance with the allegation that they had purchased 140 acres, on this appeal, for the reason that if such amounts to a material variance, and we do not so believe, it was not presented to the trial court. *People v. Fraser* (Cal. App.) 253 P. 340; *People v. Gonzales*, 69 Cal. App. 609, 231 P. 1014; *People v. Fuski*, 49 Cal. App. 4, 192 P. 552. It is sufficient if one material misrepresentation be proved. *People v. Fraser*, supra; *People v. Griesheimer*, 176 Cal. 44, 167 P. 521. In this case several misrepresentations were conclusively established.

[14] Nor can it be seriously argued that the subscribers received what they paid for. As has been indicated, every representation of fact, every suggestion, the entire scheme, was based upon the immediate organization of the corporation, which was never done. The subscribers got nothing except a subscription agreement which likewise was so artfully drawn as to leave out a time limit for incorporation, apparently because the actual incorporation was represented to be almost a closed incident. Lured on by the imposing distribution of a supposedly large capital, the subscribers parted with their money and property and received what they paid for only on the theory that they were subscribing for the "hole in the doughnut."

Attack is next launched upon the testimony specially directed toward count one, and it is claimed to be insufficient to show the obtaining from Mrs. McGaw of \$1,250 in cash. The testimony shows that she had invested \$1,500 with Harry C. Weist Company, with whom the defendant was at the time of investment associated. She executed an assignment of her claim for the return of the money to the defendant. Then when the check was made out to her—Mr. Farrell, an associate of the defendant, brought the check to her—she indorsed it; delivered it to Mr. Farrell, who in turn says he delivered it to the defendant. On August 18 the defendant wrote to Mrs. McGaw, saying that he had received confirmation of her subscription of August 1, which is the subscription in question. Under

these circumstances we think the jury were fully justified in believing that the defendant had cashed the check. In the case of *People v. Whalen*, 154 Cal. 472, 98 P. 194, which was a case of obtaining money by false pretenses, it appeared that Mrs. Martin was induced to buy 100 shares of stock at the price of \$1,000 and gave the defendant a check for \$1,200 in payment for the 100 shares, plus 20 shares purchased by her sister. "The check was given on May 3, 1905. The defendant remained in Sacramento, where this transaction occurred, for several weeks thereafter, and, while there, hired men to go with him to the mines, which were in the state of Nevada, and for more than six months thereafter he was in charge of the affairs of the mining company, either at the mines or at Sacramento." The court says:

"There was nothing disclosed by the evidence to indicate that the defendant experienced any difficulty or delay in obtaining payment of the check. The facts concerning the payment of the money were all elicited upon the examination in chief of the two witnesses. There was no cross-examination on that subject, nor any attempt, at any stage of the case, to show that the check had not been paid in the usual course of business. Under the circumstances, the jury were justified in construing the testimony of the prosecuting witness and her sister to mean that the money called for by the check had actually been paid."

While we think that this case is decisive of the question here, we call attention to another case where the charge was obtaining money by false pretenses and the check was drawn bearing a general indorsement the same as in the instant case, and the court says:

"Before passing this phase of the case it might be well to call attention to the fact that the check bears a general indorsement, and there is nothing in the record inconsistent with the fact that it was paid in due course. The least that can be said, under the circumstances, is that the prosecution made out a prima facie case, and assuming, without deciding, that the defendant might properly make out a defense by showing that the maker was ultimately relieved from payment, the burden to do so, after the prima facie showing on the part of the prosecution, was cast upon him, and, not having done this, he cannot now complain." *People v. Steffner*, 67 Cal. App. 1, 11, 227 P. 690, 695.

No claim was made by the appellant here that he did not receive the money upon the check and for the reasons stated he cannot be heard to complain. Also, in the case of *People v. Hutchings*, 56 Cal. App. 397, 205 P. 480, it was held that proof of receipt of check sufficiently supports the charge of obtaining money in the absence of evidence that the check was not cashed.

Counsel argues that there is no causal connection between the false pretenses and the obtaining by defendant of the money and property of complaining witnesses. What has

been said heretofore with respect to the immediate organization of the proposed corporation is applicable at this juncture. Furthermore, we think that the case of *People v. White*, 7 Cal. App. 99, 93 P. 683, is not at all in point for the reason that there is a connection alleged and proved in this case. There was a natural connection between the pretenses and the parting with their money and property by the complaining witnesses. Industrial corporations of the character contemplated in the scheme of the defendant owe their success or failure in many instances to the character, integrity and genius of the men composing the organization and to their ability to finance the organization with large sums of money, such as was proposed here. There can be no doubt that the representations here made were the inducing cause of the investment the complaining witnesses supposed they were making.

[15] The last argument advanced by appellant, that the subscription agreement, having recited that the moneys were paid to the defendant as trustee, that there is a fatal variance between the proof and the allegation that the defendant obtained the money and property is fully answered by the cases of *People v. Bryant*, 119 Cal. 597, 51 P. 960, and *People v. Griesheimer*, supra, in which last case this language is used:

"The crime charged against this defendant was complete upon his obtaining the money from Muck by false and fraudulent representations, and it was not necessary to show what defendant did with it."

Also, in the case of *State v. Balliet*, 63 Kan. 707, 66 P. 1005, quoting from an Indiana case:

"The law does not make it an element of the offense of obtaining money or property under false pretenses that it shall be obtained for the person making the pretenses himself, or that it shall be intended to obtain it for another, for it is provided that 'whoever shall obtain money or property' by false pretenses shall be guilty of a felony."

The judgment and order appealed from are affirmed.

We concur: WASTE, C. J.; RICHARDS, J.; SHENK, J.; CURTIS, J.; LANGDON, J.; PRESTON, J.

36 Cal. App. 646

PEOPLE v. CRONEVITCH. (Cr. 1508.)

District Court of Appeal, Second District, Division 1, California. Nov. 10, 1927.

1. Burglary § 41(1)—Evidence held to sustain conviction of burglary.

Evidence held sufficient to sustain conviction of burglary.

2. Criminal law § 516—Admissions of defendant, made on officers' suggestion that defendant might as well clear up matter, held not confession improperly induced so as to preclude use as evidence.

Where officers, in attempting to get from defendant a statement or confession of his connection with the crime of burglary, stated to him that, "You might as well clear it up, take a dirty slate that you have dirtied and clean it up and start on a new one," and made additional remarks wherefore defendant made reversal statements or admissions relative to the stolen property, such admissions held not a confession improperly induced so as to preclude use as evidence.

3. Criminal law § 1169(12)—Court could not say, as matter of law, that defendant was injured by evidence of his admissions, even if admissions were improperly obtained, in view of other evidence.

In trial of defendant on charge of burglary where there were in evidence certain admissions by defendant and other strong evidence suggestive of guilt was shown, court could not say, as matter of law, that the admission in evidence of certain statements or admissions of defendant caused injury to defendant, even if such admissions were improperly obtained.

4. Criminal law § 516—Defendant's statements to officers relative to taking stolen property and location thereof held only admissions, and not confession.

Where defendant while detained on a burglary charge made statements to officers relative to the taking of certain property from hotel rooms, the location of such stolen articles, and other statements relative to the stolen property, held, that such statements were only admissions, and not a confession.

5. Criminal law § 409—That admission, as distinguished from confession, was voluntarily obtained need not be shown preliminary to its introduction in evidence.

The rule is well settled that with reference to admissions, as distinguished from confessions, it is unnecessary to show preliminarily to their introduction in evidence that they were made voluntarily by the defendant without the use of coercion or intimidation or without promise of reward or immunity from punishment.

6. Criminal law § 1186(4)—Admitting in evidence defendant's statement to officer relative to another crime held not reversible error, in view of other evidence of guilt (Const. art. 6, § 4½).

Admission in evidence, in defendant's trial upon burglary charge, of statements made by defendant to an officer relative to a different crime from that upon which defendant was being tried, held not reversible error because of Const. art. 6, § 4½, relative to the reviewing court's examination of the entire cause, including the evidence, when passing upon errors, since there was in the record much other strong evidence of guilt.

Appeal from Superior Court, Los Angeles County; Albert Lee Stephens, Judge.

John Cronevitch was convicted of burglary, and he appeals. Affirmed.

Richard Kittrelle, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and John L. Flynn, Deputy Atty. Gen., for the People.

HOUSER, J. Defendant appeals from a judgment of conviction on each of three several charges of burglary against him, and from an order of the trial court denying his motion for a new trial thereon.

It is first urged by appellant that the evidence was insufficient to support the verdict. The case against defendant was the burglarizing of rooms in certain hotels in the city of Los Angeles. Among other things, it was shown in evidence that the stolen property, consisting of money and jewelry, was taken without the consent of either of the several owners thereof; that at the time each of the burglaries was committed defendant was registered as a guest at the particular hotel from a room of which the property was stolen; that when defendant was arrested, among other things, the following articles were found in his possession, to wit, three files and a small pinch bar, besides two talcum powder cans, each having a false bottom and containing some of the stolen property and the complete parts of seventeen detachable skeleton keys. Defendant stated that the stolen property in his possession had been taken from the designated rooms in the hotels which had been burglarized. He also gave the location of other of the stolen articles. In addition thereto, with regard to a certain conversation had between him and defendant, a police officer testified, in part, as follows:

"I asked him at what time of the day or night did he enter the room of the Biltmore Hotel or the Rosslyn Hotel. He said that all the rooms were entered between 2 and 4 o'clock, as people were sound asleep at that time."

[1] Appellant contends that such evidence merely shows possession of stolen property, and that it is insufficient to support a verdict of guilty of the crime of burglary. It will be noted that the evidence against defendant includes the following circumstances which tend toward the conclusion of his guilt, namely, his presence in the hotel at the time the burglary was committed; the possession by him of tools and appliances well calculated to enable him to commit the crime; his personal possession of a part of the stolen property and its concealment, together with skeleton keys, underneath a false bottom in a talcum powder can; his knowledge of the location of other articles of the stolen property; together with an admission by defendant as to the hours between which the several burglaries were committed. While it is possible that

even in such circumstances defendant might be innocent, it is clear that the evidence was sufficient to leave no reasonable doubt of his guilt.

In the course of the trial, over the objection of defendant, each of several police officers testified to conversations theretofore had with defendant. Appellant raises the point that admissions made by defendant were illegally procured in that some benefit or reward was held out to defendant as an inducement to him to make the admission or admissions regarding his knowledge of the commission of each of the several offenses of which he was accused. In that connection, appellant directs attention to the following statements made by one of the witnesses:

"* * * I asked him several questions about the burglaries, and on this particular day and time I asked him why it was that he resorted to a measure of silence in the face of knowing that there was a lot of reason for his having his name placed on the register of these here different hotels, and I said, 'Now, John, we are interested chiefly in the return of the property that has been taken, and this will never profit you a bit, and you need never think that is going to do you any good. It will go from you just like you got it. It will never benefit you. *You might as well clear it up, take a dirty slate that you have dirtied and clean it up and start on a new one.*'"

[2] Generally speaking, it is a well-recognized rule that a confession induced by means of a promise of reward, or of immunity from punishment, cannot be received in evidence. The following cases support appellant's contention: *People v. Barric*, 49 Cal. 342; *People v. Thompson*, 84 Cal. 598, 24 P. 384; *People v. Siemsen*, 153 Cal. 387, 95 P. 863.

However, in the later case of *People v. Castello*, 194 Cal. 595, 601, 229 P. 855, 857, where it appears that prior to the confession the officers made statements to defendants in effect that they "had the goods on them," and that they (defendants) "had just as well come clean," it was held that such remarks presented no legal obstacle to the introduction of a confession in evidence. And a similar ruling was made in *People v. Haney*, 46 Cal. App. 317, 189 P. 338, where the inducing statement made to the defendant was that "the truth would not hurt him, and he better come out and tell it."

In the *Castello* Case, 194 Cal. 595, 601, 229 P. 855, 857, among other things, the court said:

"In the light of the decisions of the courts of this state it cannot be said that error was committed in the reception of the confessions in evidence even though we accept as true, as we must, the statements of the arresting officers made to the defendants, which were to the effect that they had the goods on them and that defendants 'had just as well come clean.' The statement carried no threat with it or hope of reward or promise of immunity whatsoever.

Neither was it sufficient to create terror or fear in the minds of defendants. It was nothing more than an accusatory remark. The officers made no promise that they would aid or assist defendants in obtaining any immunity whatsoever, nor did they hold out any inducements which could properly be said to have brought forth the confessions. * * *

[3, 4] With the exception as to results obtained in the way of a confession, as distinguished from an admission, the situation there presented exactly fits the situation in the instant case. But aside from the admissions made by defendant, the other evidence was so strong and so suggestive of the guilt of defendant that, as a matter of law, it may not be said that any injury resulted to defendant by reason of the introduction in evidence of such admissions. In addition thereto, the facts stated by defendant did not amount to a confession. At most, they were simply admissions of certain facts which, taken with others, indicated the guilt of defendant. As is pointed out in the case of *People v. Ferdinand*, 194 Cal. 555, 568, 229 P. 341, 346:

"An admission as applied to criminal law is something less than a confession, and is but an acknowledgment of some fact or circumstance which in itself is insufficient to authorize a conviction, and which tends only toward the proof of the ultimate fact of guilt. On the other hand, a confession by a defendant leaves nothing to be determined, in that it is a declaration of his intentional participation in a criminal act, and must be a statement of such a nature that no other inference than the guilt of the defendant may be drawn therefrom [citing cases]. * * *

[5] The rule is well settled that with reference to admissions, as distinguished from confessions, it is unnecessary to show preliminarily to their introduction in evidence that they were made voluntarily by the defendant, without the use of coercion or intimidation of any sort, and without promise of reward or immunity from punishment. It must therefore be concluded that the contention of appellant cannot be sustained.

Finally, it is urged by appellant that prejudicial error was committed by the trial court in admitting evidence of the commission of other offenses by the defendant.

[6] While from the record it appears that, over the objection of defendant, a separate statement made by defendant to one of the police officers was admitted in evidence which contained admissions in effect that defendant had committed burglaries other than those of which he was accused, and while in the circumstances the introduction of such evidence constituted error on the part of the court, we are constrained to hold that, in view of the great weight of other evidence in the case which pointed almost conclusively to the guilt of defendant, the error of which

complaint is made did not result in a miscarriage of justice. In other words "after an examination of the entire cause, including the evidence" (section 4½, art. 6, Const.), we are of the opinion that had evidence of the commission by defendant of other burglaries not been presented to the jury, no verdict other than "guilty as charged in the information" could have been reached.

The judgment and the order denying a motion for a new trial are affirmed.

We concur: CONREY, P. J.; YORK, J.

86 Cal. App. 631

ACKLEY v. MAGGI. (Civ. 5883.)

District Court of Appeal, First District, Division 2, California. Nov. 10, 1927.

1. Pleading ⇨403(2)—Averments of answer may supply vital allegations omitted from complaint.

Averments of an answer may supply vital allegations omitted from the complaint, but such effect is usually obtained only by affirmative or new matter, and not by mere denials.

2. Divorce ⇨316—Divorced wife might be sued directly for doctor's services furnished her during existence of marital relationship, regardless of property liability (Civ. Code, § 171).

Divorced wife might be sued directly for services rendered by physician under Civ. Code, § 171, regardless whether property received by her on marital settlement was subject to seizure for satisfaction of a judgment obtained.

3. Appeal and error ⇨1122(3)—Stipulation of facts contained in record and embracing all the evidence makes unnecessary new fact findings on review.

Where, on review, the record contains a stipulation of facts agreed on by the parties to the suit, such statement of facts in itself will suffice as findings of fact so as to make unnecessary new fact findings by the reviewing court.

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by Edward Ackley against Irene Porcari Maggi, also known as Irene Porcari, Judgment for defendant, and plaintiff appeals. Reversed, with directions.

Franklin T. Poore, of San Francisco, for appellant.

Frank T. Deasy, of San Francisco, for respondent.

KOFORD, P. J. Plaintiff appeals from a judgment in favor of defendant, a married woman.

The complaint alleged "that the defendant became indebted to plaintiff's assignor, A. W. Morton (a physician and surgeon), upon an open book account for medical and surgical services rendered to said defendant

upon the special instance and request of said defendant." The proof failed to show any book account except one with the defendant's husband, who was not a party to the action. This statement might seem to dispose of the case, but the defendant's answer and the proceedings at the trial were such that we must consider whether the plaintiff is entitled to a judgment against the wife for debt irrespective of the absence of any book account with her.

[1] The defendant's answer denied "that she ever became indebted to said physician upon an open book account or upon any other account or in any other manner," etc. It is true, as contended for by appellant, that averments of an answer may supply vital allegations omitted from the complaint, but it is doubtful whether a mere denial in the answer, however sweeping, has this effect. Such effect is usually only obtained by affirmative allegations or new matter, and not by mere denials. *Vanalstine v. Whelan*, 135 Cal. 232, 67 P. 125; *Windsor v. Miner*, 124 Cal. 492, 59 P. 386; *Pomeroy's Code Remedies* (4th Ed.) § 470 (*579). The defendant's answer, however, went further and set up a special defense, alleging that she had no separate property; and she was not living with her husband at the time the services were rendered, obviously pleading herself out from the provisions of Civil Code, § 171, which provides for what debts a married woman's separate property is liable. The answer also alleged that she was divorced from her husband, but this, according to the briefs, was at a date after the physician rendered the services.

The trial was very brief, and amounted substantially or in large part to an agreed statement of facts. As soon as the case was called, counsel for the defendant made the following statement:

"I think I can shorten the proceedings by admitting most of the facts. This is a case for services rendered to the wife during the time that the husband and wife were living together. There is no question of the services or the reasonable value, nor any question of the doctor's performing them. The only question herein is a point of law, and that is: Before this suit was commenced, there was a divorce suit instituted between the husband and wife in which the wife got the divorce and got the custody of the child and an allotment of property of \$5,350. There was a settlement of property rights. After that suit was tried, this suit was instituted, and the point of law that I am raising is the question of the liability of the wife for an obligation that was made during the time the marital relations existed, and whether this award, or gift, or otherwise, of property is in lieu of alimony and property rights. The property, \$5,350, came from community funds before the divorce. The husband owned and controlled and operated a business known as a bakery, and sold it before the divorce took place. There was a part payment on this bill; the court allowed that particular sum of money. So the only difficulty we

have is the question, the point of law, and, if satisfied on that, Mr. Prosek and myself will submit authorities on that."

Counsel for plaintiff then called the doctor, and asked only one question, which brought out the fact that the services were performed at the request of the defendant's husband. A brief cross-examination established that the book account was with the husband alone; that bills were sent to him; and that he had made a \$200 payment on account of the bill. This was all the testimony, except that the record of the defendant's divorce from her husband was also received in evidence. When this action was commenced, according to the briefs, an attachment was levied on the fund awarded the defendant from her husband in the divorce action.

This record fairly shows that the action was treated by both the parties as trying the issue of whether the defendant was liable for the debt whether upon an open book account or otherwise, and we also shall so treat it.

The points raised by respondent here and as defendant in the trial court follow: (1) That the evidence does not show an express contract upon the part of the wife. This is undoubtedly true. (2) That the law does not imply a promise or a contract upon the part of a married woman for family expenses or necessities, but such contract is implied upon the part of the husband only. In this she is supported by *Chaffee v. Browne*, 109 Cal. 211, 219, 41 P. 1028. (3) That, before plaintiff can obtain a judgment against her by virtue of whatever liability is created by Civil Code, § 171, he must prove that she owns the particular kind of separate property made liable for such a debt by that section.

In *Turner v. Talmadge*, 42 Cal. App. 794, 187 P. 969, it was stated that this section did not impose a personal liability upon the wife. The statement does not appear to have been a necessary part of the decision.

In *Evans v. Noonan*, 20 Cal. App. 288, 123 P. 794, the section received a very full and careful consideration. It was held there that judgment should be given against the wife for necessities of life furnished while she was living with her husband. The suggestion that such procedure might result in having the judgment satisfied out of her property not made liable by the section was disposed of by saying that that question could be disposed of after execution issued. This case is cited and followed in *Wisnom v. McCarthy*, 48 Cal. App. 697, 192 P. 337, and quoted upon this point in *Nielsen v. Richards*, 75 Cal. App. 680, at page 686, 243 P. 697.

[2] We think the result of the section is to permit an action to be brought directly against the wife for necessities of life furnished as described in the section; and

whether the wife has, or in the future may obtain, property legally liable for the satisfaction of the judgment so obtained, is a matter which may or may not be considered in the form of the judgment, but must in any event be considered at the time of an attempted satisfaction of the judgment out of her property.

[3] The statement of facts contained in the record will do away with the necessity of our making additional or new findings of fact herein. That statement in itself will suffice as findings of fact. *Stanwood v. Carson*, 169 Cal. 640, 147 P. 562; 23 Cal. Jur. 913.

Regardless of the nature of the fund attached in this action, and irrespective of whether the wife presently owns separate property liable for this debt under the terms of Civil Code, § 171, judgment should be for the plaintiff herein for the amount of the bill, less the \$200 payment, to wit, \$800.

There are insufficient facts in the record to enable us to determine whether the fund attached is liable for the debt here sued upon under the doctrine and procedure pointed out in the case of *Frankel v. Boyd*, 106 Cal. 608, 39 P. 939.

It is ordered that the judgment be reversed, and judgment entered in favor of plaintiff in the sum of \$800, together with trial costs and costs of appeal.

We concur: STURTEVANT, J.;
NOURSE, J.

86 Cal. App. 591

STEHLI SILKS CORPORATION v. DIRECTOR et al. (Civ. 5945.)

District Court of Appeal, First District, Division 2, California. Nov. 5, 1927.

1. Sales $\S$ 379—Complaint in action for breach of sales contract, purporting to plead performance, held not to tender issue of what excuses performance (Civ. Code, § 1511, subd. 3).

Complaint in action for breach of contract, alleging that defendants purchased and plaintiffs agreed to deliver during certain months an invoice of silks, and that during those months plaintiff prepared balance of merchandise for delivery to defendants and tendered delivery, but defendants refused to accept delivery and refused to pay value, thus purporting to plead performance, did not tender issue of what facts will excuse performance, under Civ. Code, § 1511, subd. 3.

2. Trial $\S$ 86—In action on two sales contracts covering silk, admitting evidence of value of silk without showing to which contract it referred, held not error in face of general objection.

In action for failure to accept goods under two sales contracts covering silk, admitting evidence of value of silk which, under terms of

second contract, should have been delivered on certain date, without showing whether it was silk described in either first or second contract, held not error, where defendants did not ask for order directing application of evidence.

3. Trial $\S$ 199—Court should construe papers relating to cancellation of contract (Code Civ. Proc. § 2102).

Under Code Civ. Proc. § 2102, in action for breach of sales contract, court should have construed letters and telegrams relating to cancellation of contract, instead of directing jury to do so.

4. Trial $\S$ 251(4)—Giving instruction on excuse for nonperformance of contract held error where it was not an issue.

In action for damages for breach of contract, giving of instruction on excuse for nonperformance held error where excuse for nonperformance was not involved in issues in case.

Appeal from Superior Court, Los Angeles County; Benjamin F. Warner, Judge.

Action by the Stehli Silks Corporation against H. Director and others for damages for a breach of contract. From a judgment for plaintiff, defendants appeal. Reversed.

Isaac Pacht and Clore Warne, both of Los Angeles, for appellants.

Wetherhorn, Hoyt & Jones, of Los Angeles, for respondent.

STURTEVANT, J. The plaintiff commenced an action against the defendants to recover damages. The defendants answered, and a trial was had in the trial court before the court sitting with a jury. The jury returned a verdict on which a judgment in favor of the plaintiff was entered. From that judgment the defendants have appealed and have brought up a bill of exceptions.

In its complaint the plaintiff pleaded two separate causes of action involving two separate and distinct contracts. On the submission of the cause, acting upon request of counsel, two special verdicts were submitted to the jury. When the jury returned its verdicts and the trial court had duly considered the same, judgment was ordered in favor of the plaintiff on the first cause of action, and not on the second cause of action. The plaintiff has not appealed, and it becomes unnecessary to further refer to the second cause of action.

[1] As to the first cause of action, the plaintiff nowhere alleges that it has performed. It is alleged that the defendants purchased and plaintiff agreed to deliver, "during the months of May and June, 1920," an invoice of silks. It is also alleged that:

"During the months of May and June, 1920, plaintiff prepared the balance of said merchandise for delivery to defendants herein and tendered delivery thereof to defendant corporation, but to accept delivery thereof defendant

corporation refused and still refuses and have further refused and failed and now refuses and fails to pay the value thereof. * * *

The defendants filed an answer denying all of the allegations of the plaintiff's complaint. The defendants contend that the verdict is not supported by the evidence, and in this behalf they contend that the evidence is all one way, and that the undisputed facts are that the plaintiff never tendered delivery of the merchandise, and that the defendants never refused to accept the merchandise. In making this contention they are supported by the record. In reply the plaintiff cites authorities as to what facts will excuse performance. Civ. Code, § 1511, subd. 3. It is unnecessary to go into that subject. The plaintiff's complaint did not tender the issue. The allegation as tendered by the plaintiff's complaint at least purported to plead performance. They certainly did not make any attempt to plead nonperformance and a valid excuse therefor. The two theories are entirely different. *Peek v. Steinberg*, 163 Cal. 127, 133, 124 P. 834.

The defendants assert that no damages were shown. In making this assertion we think they have overlooked the testimony given by the witness Levanthal. His testimony seems to have been free and clear of the objections that were interposed regarding other witnesses, and his testimony was of such a nature that this point must be ruled against the defendants. The defendants in the next place contend that the court erred in admitting evidence of an attempted compromise. In answer to this point the plaintiff picks up a telegram dated July 17, 1920, and contends that the telegram was not an attempted compromise. Be that as it may, the telegram was merely one part of the evidence to which the defendants objected. Prior to the month of June, 1920, the defendants had asked the plaintiff to cancel their order which was the subject matter of this action. There had been some oral conversation, and there had been some written communications. No agreement had been reached. On the 29th of June, 1920, Mr. Scher was in the office talking to Mr. Barlow, the manager of the plaintiff. When Mr. Scher was on the stand as a witness he was asked and was compelled to answer, over the objection of the defendants, the following questions:

"Didn't you also make the same request early to Mr. Barlow and at the same time ask him what he would accept in settlement and release the corporation? * * * Then, when you saw Mr. Barlow 3½ months later, did you make a similar request upon him? * * * Didn't you take up with Mr. Barlow the proposition of paying a certain amount to the Stehli Silks Corporation for a release from your contracts? * * *

And, finally, when Mr. Barlow was on the stand:

"Q. I show you what purports to be a telegram dated July 17th, addressed to plaintiff, signed A. C. Scher, and ask you if plaintiff received that telegram?"

The last question being answered in the affirmative and the telegram being identified, it was admitted in evidence and read to the jury. In this manner there was introduced all of the evidence concerning the attempted compromise. In this connection, at least in one place, some of the defendants stated that they were willing to pay the plaintiff for the requested release and cancellation, but they were unwilling to pay \$10,000.

[2] The fourth point made is that the trial court erred in admitting, over the objection of the defendants, evidence as to damages. As recited above, the plaintiff's complaint contained two counts. The first count was predicated on an order calling for delivery during May and June, 1920. The second count was predicated on an order calling for delivery during July, August, September, and October, 1920. If a breach of the first contract occurred, necessarily it occurred in May or June, 1920. Nearly all of the questions propounded by the plaintiff regarding values were addressed to the date August 23, 1920. As such questions were asked, the defendants interposed a general objection and as "not showing whether it was the silk described in either the first or second contract. * * *

As we understand the record, a certain quantity of a special article was the subject-matter of the first contract, and another quantity of the same article was the subject-matter of the second contract. If so, the question was not objectionable, but the evidence was applicable to goods which under the contract should have been delivered on August 23, 1920, and was not applicable necessarily to goods which should have been delivered in May and June, 1920. If the defendants had asked for an order directing the application of the evidence, the request would probably have been granted. At any rate, the record does not sustain the point.

[3, 4] The last point made by the defendants is that the court erred in instructing the jury. Under this point they designate several different instructions which the court gave and several instructions which the court refused to give. We think that several of the contentions made under this head must be sustained. Before we proceed, it should be stated that the plaintiff is a New York house; that the defendant corporation was doing business at Los Angeles; and that the most of the communications prior to the 1st day of July, 1920, were in the form of letters or telegrams. The trial court did not of its own motion construe, and it was not requested to construe, any of the writings. But when it came to instructing the jury in the first instruction which the trial court gave, it di-

rected the jury that it might construe the letters and telegrams, and that it had the power to find that such letters and telegrams amounted to a refusal. The court should have itself construed those writings. Code Civ. Proc. § 2102; Jones on Evidence, § 175a. The instruction as a whole is an instruction on excuse for nonperformance. As noted above, excuse for nonperformance was not involved in the issues in the case. It should not have been given. The criticism last made is equally applicable to other instructions objected to.

The judgment is reversed.

We concur: KOFORD, P. J.; NOURSE, J.

86 Cal. App. 459

MOELLER v. PACKARD. (Civ. 3303.)

District Court of Appeal, Third District, California. Oct. 31, 1927.

1. Pleading ⚡427—Evidence of contributory negligence, received without objection, put in issue defense though not specially pleaded in answer.

Although answer did not specially plead contributory negligence, where evidence addressed to that plea was introduced and received without objection, defense of contributory negligence was sufficiently put in issue.

2. Highways ⚡174—Automobile driver had no duty to assume girl of 8 years would leave place of safety to expose herself to peril.

Where automobile driver struck girl 8 years of age who suddenly ran on to the highway, driver had no duty to assume that she would suddenly leave place of safety to expose herself to peril by running in front of his automobile.

3. Highways ⚡184(3)—Whether girl of 8 years possessed intelligence to know pedestrians are exposed to risk of injury held for trier of facts.

In action for death of girl of more than 8 years of age run down by defendant's automobile on a public highway, whether deceased at time of accident possessed intelligence and mental capacity to appreciate fact that pedestrians using public highways were always exposed to risks of physical injury, and therefore are required to use reasonable care for their own safety, *held* under evidence for trier of facts.

4. Trial ⚡267(3)—Charge that girl had right to return to highway held abstract and subject to qualification on duty of care to protect herself.

In action for death of a girl of more than 8 years of age run down by defendant's automobile on a public highway, charge that deceased had right to return to highway after she had gotten off was abstract statement and subject to qualification that she was charged by law with duty of using reasonable care to protect herself against injury by passing vehicles.

5. Highways ⚡174—Doctrine of last clear chance held inapplicable where child ran onto pavement 30 or 40 feet ahead of automobile.

In action for death of a child of more than 8 years of age run down by defendant's automobile on a highway, doctrine of last clear chance was not, as matter of law, applicable where deceased left place of safety and ran onto highway about 30 or 40 feet ahead of defendant's approaching car.

6. Highways ⚡174—Automobile driver held not negligent, as matter of law, in failing to sound horn before girl ran onto pavement.

In action for death of a girl of more than 8 years of age run down on highway by defendant's automobile, where defendant, having increased speed of his car from 15 to 25 miles an hour after he saw deceased and her companions leave pavement when he was 100 feet from them, was not required to anticipate they would return to highway unless he warned them of his approach, and hence was not negligent, as matter of law, in failing to sound his horn before reaching point within 30 or 40 feet of point from which decedent ran onto pavement.

7. Highways ⚡173(2)—Automobile driver must anticipate probability of encountering persons using highways.

Operators of motor vehicles have duty to constantly keep in mind probability of encountering other persons using streets and highways either as pedestrians or motorists, and must anticipate that such situation may arise at any moment.

8. Highways ⚡173(1)—Pedestrians when using highways must use reasonable care for own safety.

Pedestrians must, when using highways and streets, use reasonable quantum of care for their own safety.

9. Highways ⚡173(2)—Automobile operator need not indulge presumption that persons using highway will not exercise care.

Operators of automobiles are not required to indulge in presumption, when driving over public highways, that persons using highway in front of him, whether pedestrians or motorists, will not exercise requisite care for their own safety.

10. Highways ⚡173(2)—Automobile driver may assume persons using highway are sufficiently intelligent to know duty to exercise care necessary for safety.

Operators of automobiles, if they be not negligent in their use of the highway, have legal right to assume motorists or pedestrians using highway and in front of him, going in either direction, are sufficiently intelligent to know it is their duty to exercise necessary care for their own safety and that they will do so.

11. Highways ⚡184(3)—Court cannot hold, as matter of law, that particular rate of speed of automobile constitutes negligence.

Unless speed limit is specifically fixed by statute, or, in absence of statutory speed limit, evidence unquestionably shows automobile was driven at outrageously high rate of speed, appellate court cannot say that particular rate of

speed is unlawful per se or constitutes negligence of driver.

12. Highways  **174**—Increasing automobile's speed to 25 miles an hour after observing children leaving pavement held not unreasonable, as matter of law (Motor Vehicle Act 1923, § 113).

In action for death of a girl of more than 8 years of age run down by defendant's automobile on highway, evidence that defendant increased rate of speed to 25 miles an hour after he observed deceased and companions pass from pavement ahead of him *held* not unreasonable rate of speed, as matter of law, within state Motor Vehicle Act, § 113 (St. 1923, p. 553).

13. Appeal and error  **1010(1)**—Trial court's finding that deceased's injuries were due to her own negligence, sustained by evidence, is conclusive on appeal.

In action for death of a girl of more than 8 years of age run down by defendant's automobile, finding of trial court that direct cause of injuries to decedent was her own negligence, sustained by evidence, is conclusive on appeal.

Appeal from Superior Court, Yolo County; J. O. Moncur, Judge.

Action by H. J. Moeller against C. E. Packard. From a judgment for defendant, plaintiff appeals. Affirmed.

Grant & Bailey, of Woodland, for appellant.

Charles W. Thomas and J. G. Bruton, both of Woodland, for respondent.

HART, Acting Presiding Justice. Upon a record prepared in accord with the provisions of section 953a of the Code of Civil Procedure, and after a motion for a new trial was made by him and denied by the court, the plaintiff prosecutes an appeal from the judgment rendered and entered against him in an action in which he claims damages for injuries alleged to have been negligently inflicted by defendant upon the person of his (the plaintiff's) infant daughter and for her death resulting therefrom, the cause having been tried by the court, sitting without a jury.

[1] The complaint, after describing the manner in which the injuries were caused and charging that they were the direct result of the negligence or culpable carelessness of the defendant, declares that as the result of such negligence the plaintiff suffered damage as measured in money in the aggregate sum of \$3,121.85, said sum including expenditures by plaintiff in payment of the bills of doctors, nurses, sanitarium at which the minor was treated for her injuries up to the time of her death, funeral expenses, and also for loss to plaintiff of the services of the infant.

The answer consists of general denials of the allegations of the complaint, contributory negligence on the part of the deceased not be-

ing specially pleaded, yet evidence addressed to that plea was introduced and received without objection. This sufficiently put in issue the defense of contributory negligence. *Coffman v. Singh*, 49 Cal. App. 342, 193 P. 259; *Hoffman v. S. P. Co. et al.* (Cal. App.) 258 P. 397.

There is but one point upon which the plaintiff relies for a reversal, and that is that the evidence does not give sufficient support to the finding that the proximate cause of the injuries received by the child was the negligence of the former.

At the time of the accident, the deceased and three other children (Leonard Clark, Johnny and Frances Melgar, the two last named being brother and sister) were walking together in a northerly direction on a public highway in Yolo county, later to be described. The child who was injured in the accident was named Maybelle Moeller, and, as above stated was the daughter of the plaintiff. At the time of the accident she was 8½ years of age.

It is expressly conceded by the defendant's counsel that there is no conflict whatever in the evidence. The testimony from which principally the court educed its findings was that of the defendant himself. Finding No. 1 quite fully sets forth the facts to which defendant testified, he having been called to the witness stand by the plaintiff under section 2055 of the Code of Civil Procedure. We quote said finding as setting forth a general statement of the circumstances under which the accident occurred:

"That on the 17th day of October, 1923, defendant was in the possession of and was driving one Dodge automobile northerly on the county highway between Woodland and Knight's Landing; and that at a point between the intersection of McGriff's land on the east side of said highway and the road going westerly on the south side of the Charles Laugenour place and on the east side of the paved portion of said highway in the county of Yolo, state of California, and that at said time and place Maybelle Moeller, a daughter of the plaintiff of the age of 8½ years, was walking northerly on said highway and off of, and to the east of, the paved portion thereof; that defendant was driving at a speed of about 25 miles per hour when he observed several children on the highway at a distance of about 400 feet ahead of him, and that when he observed said children, he removed his foot from the throttle of the automobile and gradually slackened his speed until he was driving at a rate of about 15 miles an hour; that another automobile was approaching from the opposite direction and the children got off of the paved portion of the highway, upon which defendant was driving, onto the unpaved portion of the highway at defendant's right and to a position of safety; that defendant did not sound his horn, but, on observing that the children had gotten off of the paved highway and to a position of safety, he gradually increased his speed until he was again driving at the rate of

about 25 miles per hour; that when he had reached a point within about 30 or 40 feet of where the children were at the side of the road, plaintiff's daughter suddenly ran out onto the paved portion of the highway to recover some article that had blown from her hand; that upon observing her, defendant immediately pulled his automobile to the left to avoid striking her, but that he did not succeed in entirely missing her, and that some portion of the rear part of the automobile struck her; that said automobile continued to the left and overturned on the left-hand side of said highway; that by reason of some part of said automobile striking said daughter of said plaintiff, she thereby sustained injuries from which she thereafter died."

[2] In said finding the court also found that:

"Said injuries were caused solely and entirely by the negligence of said Maybelle Moeller in suddenly and negligently, and without warning, running from a place of safety off of the paved portion of said highway and to the right thereof to a place of danger on the paved portion of said highway and in front of defendant's approaching automobile, and that said injuries were not caused by any negligence on the part of defendant whatsoever."

In addition to the testimony of Packard, as set forth in the foregoing finding, he further stated that when he was about 30 feet from the children they were about 5 feet off the road or pavement; that it was at that time that he observed something "blow across the road" and immediately thereupon he saw Maybelle "run out" upon the road. Packard said that the reason he did not sound his horn was because the children, when he was about 100 feet from them, were entirely off the road and that there was then nothing in front of him to call for a warning of his approach. He further testified that, so far as he could observe, the children were facing north when he was at a point on the road about 100 feet from them, but when he reached a point about 30 feet from where the children were he noticed "a little boy looking at me." Further testifying, he said that the reason he did not "blow his horn" immediately upon the child running onto the road was because he had no time to do so; that he was then directing his attention and energies to the guiding of his car off the pavement so as to avoid striking the child; that, after the car upset, he "climbed out," ran to where the child was lying on the highway, which was about "5 feet from the right-hand edge of the pavement going north" and took her into his arms and so held her until a Mr. Sheridan came along, when he (Packard) requested Sheridan to convey her to the sanitarium in Woodland; that Sheridan consented, and that he (Packard) held the child in his arms until they reached the hospital.

Leonard Clark, an 11 year old boy, and referred to above, and called as a witness by the defendant, stated that Packard, driving

his car, was, when he (Leonard) first observed him on the highway, between a third and a half a mile from where he and his companions were walking on the highway; that within a brief time thereafter a car coming from the opposite direction from that in which Packard was traveling was approaching, and that thereupon he and his companions left the paved portion of the highway to permit the passing of said car with safety to themselves; that all four of the children, including the deceased, looked back, and that he saw Packard within a short distance from them; that before Packard reached the point at which they were walking, Johnny Melgar grabbed his sister by the arm, although she was still off the highway proper, and pulled her further away from the paved portion thereof and "in the ditch"; that when the car was within a very few feet from where they were, a paper was blown from the hand of deceased onto the highway, and that the latter immediately started after it by stepping on the highway in the way of Packard's car; that simultaneously with that movement by deceased, Johnny Melgar "hollered, 'Look out, Maybelle.'"

"Q. What did Maybelle do? A. She just ran out and stooped over, and the hind end of the car of Mr. Packard hit her."

Testifying further, Leonard said that the car "tipped over"; that Packard then got out of the car and rushed to where the child was lying on the pavement and took her into his arms. He also testified that when the impact happened the deceased was about in the center of the paved portion of the highway, and that it was then that she stooped to pick up the paper which had blown from her hands. He further said that he "walked backwards" a part of the time, which would mean that thus he was enabled to see motor vehicles traveling in the direction in which he and his companions and Packard's car were going. It is only fair to state that this witness, responding categorically to questions by one of the attorneys for the defense, stated that he and his companions left the paved portion of the highway on observing a car traveling towards them, and at that time he (witness) did not know that "Mr. Packard was right close there."

The Mr. Sheridan above mentioned, testifying for defendant, stated:

"When we went back there (referring to the fact of his return to the scene of the accident after he conveyed the child to the sanitarium), I stopped and examined those tracks there very carefully, and the machine, to my estimation now, was probably $2\frac{1}{2}$ or 3 feet from the edge of the highway—from the right-hand side. * * * The car swerved right straight across the road, almost as straight as you could turn a car, into the ditch, and turned over on its side. It was a Dodge car with the body made of light material and the body probably was 4 feet high and the length of the Dodge truck."

Mrs. Moeller, mother of the deceased minor, testified that the latter, at the time of the accident, was 8½ years of age; that the child was at that time in her third term of school; that "she was very bright in school. She was above the average of girls at her age, but she was quiet and didn't talk very much but she thought deeply;" that she was perfectly capable of taking care of herself in passing along the highway, as "she had been going back and forth all the time." Mrs. Moeller further testified that the child had always been healthy; that the child was sufficiently developed to be able to assist her (the mother) in disposing of work in the kitchen at their home and in sweeping and dusting about the house, and that she (the child) did so assist the mother.

The plaintiff, father of the child, testified, as did his wife, relative to the ability of the girl to take care of herself in traveling as a pedestrian over the highway on which the accident happened, and also as to the capability of the deceased of assisting her mother in some of the latter's household duties and that the child, at and for some time prior to the accident, did render such assistance.

The above statement, in substance, encompasses all the essentially vital testimony in the case, and upon that testimony we are asked to declare and hold, as a matter of law, that the findings and the judgment thereupon entered and appealed from are not fortified by sufficient evidentiary support. We have with solicitous care examined the evidence as it has been presented here and considered the point suggested, but have not thus been persuaded to the conclusion that this court, with legal justification, can hold that the decision does not rest upon a sound evidentiary foundation. To the contrary, it has been found to be one of those cases with which the reviewing courts have oftentimes been confronted and as to which they have been compelled to hold that the evidence, upon its face, was sufficient to support a verdict or findings either for or against the party complained of. The case of *Hoy v. Tornich*, 199 Cal. 545, 250 P. 565, in which Presiding Justice Finch of this court, acting as Justice pro tem. of the Supreme Court, prepared the opinion, is, in many particulars, a parallel case to this, and therein, while not expressly so declaring, the necessary implication from the analysis and the nature of the discussion of the evidence by the author of the opinion is that had the verdict been for the defendant (the plaintiff having prevailed at the trial) the court would, upon the evidence as it was presented in the transcript, have been required to sustain the result thus arrived at below. There is, however, a significant distinction between that case and this in certain particulars, to wit: There the injured minor was but 6 years of age, and started to walk across the paved portion of the highway at

a time when the defendant's view of the pavement in front of him was unobstructed for a distance of over 100 feet from the point where the disaster occurred, while in the present case the minor was 8½ years of age and dashed suddenly from the unpaved portion of the road onto the pavement when defendant's car was only 30 or 40 feet from her, thus creating an emergent situation which called for quick or sudden action on the part of the defendant to avert a collision with the child, if, under the circumstances, a collision could have been avoided. The rule applicable to circumstances such as are existent in the instant case is well stated in *Depons v. Ariss*, 182 Cal. 485, 188 P. 797. There the deceased stepped in front and in the path of the defendants' truck while the machine, operated by an employee of defendants, was traveling at a low rate of speed on a street in the city of Oakland. The general circumstances of that case it is not necessary to recite herein. It is sufficient to say that there was evidence strongly tending to show that the deceased took the perilous step without exercising the moderate care which would have at once suggested the dangerous consequences of such an act. After stating the facts in detail the court, on page 487 (188 P. 798) of the report, said:

"Under the facts stated we are asked to reverse the judgment. This we cannot do. It was shown that deceased left a position of safety and put himself directly in the path of the approaching truck. This evidence was sufficient to support the conclusion of the trial court. Under these circumstances no duty was imposed upon the driver of the truck to assume that deceased would suddenly expose himself to imminent peril. On the contrary, he had a right to conclude that he would not recklessly move directly in front of the approaching machine. *Green v. Los Angeles Terminal Ry. Co.*, 143 Cal. 31, 44, 76 P. 719, 101 Am. St. Rep. 68; *Basham v. Southern Pacific Co.*, 176 Cal. 320, 168 P. 359."

It is true that in the case from which the foregoing excerpt is taken the party who was injured and who passed out from the effects of the injuries received was an adult, but it cannot justly be set down as a matter of law or an abstract proposition that the rule therein invoked and applied is any the less applicable to the case of a minor past the age of 8 years injured under like circumstances. In this case both the mother and the father of the child testified, as seen, that she was physically robust and of unusual intelligence, always maintaining a standard of excellence in her studies in school. Moreover, it appears from the testimony of the parents that she had been for some period of time accustomed to walking to and from school over the highway upon which she received the fatal injuries. Her father, who naturally knew her ability and capabilities, stated that he had always regarded her as

being able to take care of and protect herself against the menacing perils of the automotive traffic over and along the highway on which she was injured when walking to and likewise returning from school along said highway. It would seem unreasonable to conceive that a child of her age, intelligence, and her experience as a pedestrian over a public highway, acquired while she was daily walking to school and likewise returning to her home, would not, as well as an adult, know of the heavy motor traffic on the highways of the state and of the risks and hazards to which pedestrians as well as motor or other vehicles traveling over such highways are constantly exposed, or that she did not, when using the highway over which she unfortunately received the injuries which resulted in her death, anticipate the passing of automobiles at any time from any direction of said highway, and that it did not behoove her, when using the highway as a pedestrian, to exercise ordinary or that amount of care necessary for her own safety or protection against being struck by a passing automobile.

[3] Thus have we ventured our own views regarding the evidence and its apparent effect upon the question of the intelligence and mental capacity of the child in the relation of that question to the issue of contributory negligence arising from the intrinsic character of the testimony introduced to prove the negligence of the defendant, for the purpose of emphasizing the proposition suggested at the outset of this opinion, that whether or not the child at the time of the accident was possessed of such a degree of intelligence and mental capacity as to know, understand, and appreciate the fact that pedestrians passing over and along public highways, while so using such thoroughfares, are always exposed to the risk of serious or fatal physical injury, and are therefore required, in such circumstances, to use reasonable and proper care for their own safety, was a question which, under the state of the evidence in this case, it was peculiarly within the province of the trial court, as the trier of the questions of fact, to determine. Of course there may arise, and doubtless have arisen, cases where it may be held as a matter of law that to a child contributory negligence may not, in cases of personal injury, be imputed. "An infant," said Judge Finlayson in *Todd v. Orcutt*, 42 Cal. App. 687, 690, 183 P. 963, 964, "may be so very young that, like an idiot or a lunatic, no negligence may legally be imputed to him. But not all infants are in that class. 'It is,' says Mr. Beach, 'a question of capacity, and it has been found a very difficult question, and has been, in many cases, a very fruitful source of controversy as to what age is sufficient to constitute an infant sui juris. Unless the child is exceedingly young it is usually left to the jury to determine the measure of care required of the particular

child in the actual circumstances of the case. Where there is no doubt as to the capacity of the child, at one extreme or the other, to avoid damage, the court will decide it as a matter of law.' Beach on Contributory Negligence, § 117. It has been held that a child 7 or 8 years of age is capable of taking ordinary care of himself, and may be guilty of negligence. *Gillespie v. McGowan*, 100 Pa. 144, 45 Am. Rep. 365; *Messenger v. Dennie*, 137 Mass. 197, 50 Am. Rep. 295. The rule is that the defense of contributory negligence may be invoked in actions by or on behalf of children who are of an age sufficient to exercise discretion for the avoidance of injury to themselves. The law does not fix this age of discretion. It may depend upon the character of the injury, the circumstances under which it occurred, and the size, intelligence, and capacity of the child."

[4] Taking up now the charge that the defendant himself was guilty of negligence in operating his car and that such negligence was the proximate cause of the accident, it is to be conceded, as counsel for plaintiff declare, that the children had the right to use the highway, and that the mortally injured child had "the right to return to the highway after she had gotten off." This, however, is a mere abstract statement of a sound rule, and is manifestly subject to the qualification that when a pedestrian of an age and mental capacity to exercise intelligent discretion, for any reason, leaves a highway over which he has been traveling and then returns thereto, or when using the highway, is charged by the law with the duty of using or exercising a reasonable amount of care to protect himself against being injured by passing vehicles. As is said in *Hatzakorjian v. Rucker-Fuller Desk Co.*, 197 Cal. 82, 95, 239 P. 709, 714 (41 A. L. R. 1027):

"Pedestrians, as is true of every person who travels over the highways by whatsoever means or mode, must exercise reasonable or the due amount of care, considering the conditions existing as to the highways, for their own safety. If they fail in the exercise of such care and themselves thereby contribute proximately to the cause of any injury they may sustain at the hands of one having an equal right to use the highways, or if such failure is the sole cause of the damage they have suffered, then, of course, they have no ground upon which to base just complaint."

[5] It cannot be held, upon the face of the evidence, or as a matter of law, that there is justification for invoking the doctrine of the last clear chance. The evidence shows (and we say it "shows" because the trial court, as must be presumed, accepted it) that the child ran onto the pavement as the defendant was about 30 or 40 feet from her, and thus, so it seems, and as the trial court at least impliedly found, there arose a situation of sudden peril in which, if, indeed, the de-

fendant could therein by any act or movement of his have averted collision with the child, the exhibition of error of judgment will, in cases of this general character, exonerate the accused from actionable responsibility. It is difficult to conceive what other course the defendant could have adopted under the circumstances. The court could well have concluded from the situation as the evidence exposed it, as it may be presumed that it did conclude, that had not the defendant swerved his car to the left immediately upon observing the sudden darting of the child onto the pavement, the latter would have been struck by the fore part of the machine, with immediate fatal result. And, in this connection, it may further be suggested that the evidence—the testimony of Leonard Clark—tends strongly to warrant the inference that had the child not stooped to pick up the paper which had blown from her hands to the pavement, the swerving to the left of the car by the defendant would have saved her from being struck and injured. To the complaint that the defendant was negligently remiss in his duty, under the circumstances, by failing to sound the horn attached to his car on observing the child, when about 30 or 40 feet ahead of him, suddenly run back to the pavement, is sufficiently answered by the suddenness of the situation thus produced and the obvious inference following therefrom as well as from his own testimony that his mind, with a suddenness equal to and contemporaneously with the suddenness of the production of the situation, was charged more with concern as to how to manage or manipulate the car so as to avoid disaster than with the less important matter (at that particular point of time) of sounding by means of the horn what appears would have been a belated warning. It was thus a case in which the judge could reasonably have expressly found, and impliedly did find, that:

"An emergency existed in which the exercise of ordinary care demanded an immediate stopping [or, as here, the swerving] of the car, and not the sounding of a warning." *Neff v. United Railroads of S. F.*, 188 Cal. 722, 725, 726, 207 P. 243, 244.

[6] But the plaintiff goes farther than this and insists that it was the duty of the defendant, having increased the speed of his car from 15 to 25 miles an hour, after he saw the children, including the deceased, leave the pavement when he was about 100 feet from them, and proceed to walk on the unpaved portion of the highway, to anticipate that the children would return to the highway unless he warned them of his approach, and that, therefore, he should have sounded warnings long before he reached a point within 30 or 40 feet only of the point from which the little girl ran onto the pavement. In this connection, counsel cite the case of *Hat-*

zakorzian v. Rucker-Fuller Desk Co., supra, and the cases therein cited as follows:

"That it is the duty of a driver of an automobile to anticipate the presence of pedestrians upon the highway over which he is thus traveling, is thoroughly settled as a part of the law of the road and is emphasized in *Zarzana v. Neve Drug Co.*, 180 Cal. 32, 37, 179 P. 203, 15 A. L. R. 401, and in *Reaugh v. Cudahy Packing Co.*, 189 Cal. 335, 340, 208 P. 125. In the first named of these cases it is said: 'Aside from the mandate of the statute the driver of a motor vehicle is bound to use reasonable care to anticipate the presence on the streets of other persons having equal rights with himself to be there.' In the case last mentioned the court said: 'He (the driver) still remains bound to anticipate that he may meet persons at any point of the street, and he must, in order to avoid a charge of negligence, keep a proper lookout for them and keep his machine under such control as will enable him to avoid a collision with another person using proper care and caution, and if the situation requires he must slow up and stop. *Kessler v. Washburn*, 157 Ill. App. 532; *Zarzana v. Neve Drug Co.*, 180 Cal. 32, 179 P. 203, 15 A. L. R. 401.'"

[7, 8] It is, of course, the duty of operators of motor vehicles over the streets and highways of the state constantly to keep in mind the probability of encountering other persons using such streets and highways either as pedestrians or motorists. They must anticipate that such a situation may arise at any moment. In other words, they will not be permitted to close their eyes to the fact, of common knowledge in these days of dangerously "rapid transit" over the common highways of the state, that they may at any instant of time meet or overtake motorists or pedestrians traveling in or from the same direction in which they are going. Pedestrians, too, as is obvious and has already been shown above, must, when using the highways and streets of the state, use a reasonable quantum of care for their own safety. In the present case, "anticipation" had passed into actual knowledge of the presence upon the highway in front of him of pedestrians moving in the direction in which he was traveling; but, at the time he observed this, he also saw those pedestrians (the children including the deceased), upon the near approach of an automobile towards them, pass from the pavement to the side thereof or the unpaved portion of the highway, a place of safety for pedestrians; that he thereupon accelerated the speed of his car to 25 miles an hour upon the assumption that, they having shown, as he noticed, that they fully appreciated the danger of using the pavement by their act in leaving it and moving to a place of safety when they saw the approach of a car from the opposite direction, the children would either proceed on their way on the unpaved portion of the highway, or, if desiring or intending to return to the pavement, would, before doing so, take the precaution to ascer-

tain whether, at that time, any motor vehicle was in sight and approaching them from either direction. And the evidence shows that all the children remained in the place of safety to which they had taken refuge until the deceased, when the car was within so short a distance from her that it could not be stopped, save, as it clearly appears, in the manner employed by the defendant, suddenly ran onto the pavement. Under these circumstances, with which the defendant was familiar before the accident happened, we cannot say that he was not justified in assuming that the children would remain on the unpaved portion of the highway.

[9, 10] We agree that it would have been the safer, and, indeed, a highly proper course, for the defendant to have sounded his horn and slackened his speed, as he was approaching the children, so that he could have stopped his car in time to prevent an accident in case the children or any of them suddenly returned to the pavement, but we cannot, under the circumstances of this case, hold, as a matter of law, that it was negligence for him not to have done so. As stated, he had the right to assume that the children left the paved portion of the highway because they regarded it safer to walk along the unpaved portion and that they would not return to the pavement without exercising such reasonable care as would assure them that no motor vehicle was approaching and in near proximity to them. There is no presumption which the operator of an automobile is required to indulge, when driving over the public highways, that persons using the highway in front of him, whether pedestrians or motorists, will not exercise the care requisite to their own safety, or that such persons are without intelligence and discretion enough to do so. While the contrary presumption may not be indulged by such operator or driver of an automobile, he, nevertheless, if he be not at the time himself negligent in the use of the highway, has the legal right to assume that such motorists or pedestrians using the highway and in front of him, going either in the same or an opposite direction, are intelligent enough to know that it is their duty while so using the highway to exercise the amount of care necessary to their own safety, and that they will do so. Such an assumption follows from the probability that a thing which naturally ought to be done in circumstances peculiarly common to a particular situation will be done by a person of average intelligence when surrounded or enveloped by such circumstances.

[11] Nor can this court, without arbitrarily exercising the power of review to which it is limited in instances such as this, hold, as a matter of law, unless the speed limit is specifically fixed by statute, or unless, in the absence of a provision of law specifically limiting the rate of speed at which an auto-

mobile may be driven over the public highways, the evidence in a particular case unquestionably shows that the operator of the car has driven it at an outrageously high rate of speed over a highway where the intrinsic or other conditions of the thoroughfare render such speed abnormally dangerous to other persons traveling over such highway, that a particular rate of speed is unlawful per se or constitutes negligence on the part of the driver. Traveling at a speed of 25 miles an hour over a highway under certain conditions might justly be found to constitute a rate of speed amounting to gross negligence. On the other hand, a rate of speed in excess of 25 miles an hour might not under other conditions, subject other persons using the highway at the same time to unusual hazards or perils and, therefore, not amount to negligence. The law regulatory of automotive traffic in force at the time the accident involved herein occurred fixed no definite speed limit at which automobiles might be operated over the public highways of the state. Section 113 of the state Motor Vehicle Act of 1923 (Stats. 1923, p. 553) provided:

"Any person driving a vehicle on the public highways of this state shall drive the same at a careful and prudent speed not greater than is reasonable and proper, having due regard to the traffic, surface and width of the highway, and no person shall drive any vehicle upon a public highway at such a speed as to endanger the life, limb or property of any person."

In *Hatzakorjian v. Rucker-Fuller, etc., Co.*, supra, the Supreme Court said that the language of the above section, to wit:

"'Careful and prudent manner and at a rate of speed not greater than is reasonable and proper,' is relative and contemplates the peculiar circumstances and conditions under which a car may be operated over a public highway at a particular time—whether it be after nightfall and dark or in the daytime and light, the width of the highway and whether it is one which, by reason of its connections, is or may naturally be expected to be at all times subject to a heavy or light traffic. In other words, said section requires the exercise of that amount of care in driving a motor vehicle over the highways which the circumstances or conditions of the particular occasion exact, having in view the character of the highway and the use to which it is then being put."

[12] In the instant case, the record affords no warrant for holding, as a matter of law, that the rate of 25 miles an hour to which the defendant gradually increased the rate of speed of his car, after he had observed the children pass from the pavement to the dirt portion of the road, with the purpose, as he (defendant) stated, of "skipping" by them before they returned to the pavement, if they intended to do so, was or was not an unreasonable rate of speed under all the circumstances and the general conditions then existing on and about the highway, or did or did

not constitute negligence. This question, upon the record before us, was for the court to decide upon all the testimony revealing the circumstances under which the misfortune happened—the circumstance that the accident happened in the broad light of day, the traffic conditions existing on the highway immediately preceding and at the time of the accident, and the general situation characterizing the highway with respect to the rate of speed at which a car might safely be driven just preceding the moment of time at which the fatal injuries were received by the child.

[13] While thus we have considered, from the several viewpoints from which it has been here presented, the proposition that it was the defendant's negligence which was the proximate or efficient cause of the accident and its regrettable consequences, nevertheless, we again emphasize our conclusion that the trial court's finding that the direct cause of the fatal injuries received by the child was her own negligence is sufficiently fortified to preclude interference therewith by a court of appeal. The consideration of that point and the conclusion following therefrom, as above indicated, would have sufficed for the disposition of this appeal, but counsel for the plaintiff, in their briefs, have presented the case to this court as we have herein considered it, and, we may add without impropriety, in an able and exhaustive fashion, and for that reason we conceived that they were entitled to have the cause reviewed from all the several angles of their argument.

For the reasons stated in the foregoing discussion, the judgment is affirmed.

We concur: WEYAND, Justice pro tem.; PLUMMER, J.

86 Cal. App. 493

DENIKE v. METROPOLITAN LIFE INS. CO. et al. (Civ. 5403.)

District Court of Appeal, First District, Division 2, California. Nov. 1, 1927.

1. Insurance ⚡587—Where life policy specifically reserves right to change beneficiary, insured can make such change without consent of beneficiary named in policy.

Where policy of life insurance specifically reserves to insured the right to change beneficiary, he has right to change beneficiary without securing consent of beneficiary named in policy, since such beneficiary has no vested right in policy.

2. Insurance ⚡587—Where life policy does not reserve right to change beneficiary, insured cannot change beneficiary without consent of beneficiary named in policy.

In ordinary life insurance policy, which contains no reservation authorizing insured to change beneficiary, insured has no power to change beneficiary without securing consent of

beneficiary named in policy, since such beneficiary has vested right in policy.

Appeal from Superior Court, San Mateo County; George H. Buck, Judge.

Action on life insurance policy brought by Josephine Denike against the Metropolitan Life Insurance Company and Isabelle Denike. From a judgment in favor of the last-named defendant, plaintiff appeals. Reversed.

A. Kincaid and Jos. R. Fitzpatrick, both of Redwood City, for appellants.

W. P. Caubu, of San Francisco, for respondent Isabelle Denike.

THOMPSON, Justice pro tem. This is an appeal from a judgment against the beneficiary named in an endowment policy of insurance which contained no provision for substitution of beneficiaries. The judgment was rendered on the theory that the interest of the beneficiary had been assigned and relinquished, which is without support in the record.

July 19, 1906, the Metropolitan Life Insurance Company of New York issued a 20-year endowment policy of insurance for the payment of \$500 on the life of Willitt Denike, naming his mother, Josephine Denike, as beneficiary thereof. The policy contained no provision for changing the beneficiary at the option of the insured, except in the event of the death of the beneficiary. The policy provided that, if the insured should die within the period of 20 years, the policy would be paid to the plaintiff, Josephine Denike, "if living, or otherwise to the beneficiary designated by the insured, after her death." The only other provision of the policy with reference to the changing of the beneficiary was the condition that:

"If the beneficiary under this policy shall die previous to the death of the insured * * * this policy shall revert to the insured * * * who may subsequently designate another beneficiary. * * *"

The insured was 19 years of age, and was living with his mother at the time this policy was issued. She retained possession of the policy for 10 years, paying the premiums thereon. June 2, 1917, the insured married the respondent, Isabelle Denike, and subsequently removed his personal belongings from his mother's home, including the policy, which had been kept among her private papers. August 22, 1917, he signed a written request for the insurance company to pay the proceeds of said policy, in the event of his death, to his wife, Isabelle Denike. This request was accompanied with a signed acceptance on the part of his wife. Upon forwarding this request to the insurance company, the proposed change of beneficiaries was refused by the company upon the ground

that it was necessary for the insured to first procure the consent of the beneficiary named in the policy. This consent the beneficiary refused to grant, and it was never obtained. August 16, 1922, the insured was committed to the Napa State Hospital for the Insane, where he remained as an inmate until his death, which occurred March 6, 1924.

Demand was subsequently made upon the insurance company by the respective claimants for the payment of the policy, upon the refusal of which this action was commenced to determine the ownership of the proceeds of the policy. By consent of respective parties the proceeds of this policy was paid to the clerk subject to final disposition by the court, and the action was then dismissed against the insurance company. Upon trial, the court found that the plaintiff had "assigned, transferred, surrendered, and relinquished all her right, title, and interest in the policy," and thereupon rendered judgment in favor of the defendant, Isabelle Denike. There is no evidence to support an assignment of the beneficiary's interest in the policy.

The sole question involved in this appeal is whether, under an ordinary life insurance policy which contains no reservation of right to change the beneficiary, a substitution may be made by the insured without the consent of the beneficiary named in the policy. This question is scarcely open to controversy.

[1, 2] If the insurance policy specifically reserves to the insured the right to change the beneficiary, this may be done without the consent of the beneficiary named in the policy, for under such circumstances the beneficiary secures no vested rights. *Estate of Castagnola*, 68 Cal. App. 732, 230 P. 188; 14 R. C. L. 1388, § 554; 4 *Cooley's Insurance Briefs*, 3755.

But in an ordinary life insurance policy which contains no reservation authorizing the insured to substitute beneficiaries, this may not be done without the consent of the beneficiary named in the policy, who, by the very designation as beneficiary, acquires a vested right in the policy. *Yore v. Booth*, 110 Cal. 238, 42 P. 808, 52 Am. St. Rep. 81; *Simmons v. Miller*, 171 Cal. 23, 151 P. 545; *Griffith v. New York Life Ins. Co.*, 101 Cal. 627, 36 P. 113, 40 Am. St. Rep. 96; 14 R. C. L. 1388, § 554; 4 *Cooley's Insurance Briefs*, 1355, 1359; 7 *Cooley's Insurance Briefs* (supplement) 1355-1359; *Mutual Life Ins. Co. v. Swett* (C. C. A.) 222 F. 200, Ann. Cas. 1917B, 298; *In re Drenth* (D. C.) 221 F. 796. In the case of *Yore v. Booth*, supra, Mr. Justice Beatty says:

"The decided weight of authority * * * [holds that] a person who procures a policy upon his own life, payable to a designated beneficiary, although he pays the premiums himself and keeps the policy in his exclusive possession, has no power to change the beneficiary, unless the policy itself, or the charter of the insurance company, so provides. * * * The ben-

eficiary named in the policy, although he has parted with nothing, and is simply the object of another's bounty, has acquired a vested and irrevocable interest in the policy."

In the instant case, the appellant acquired both a legal and an equitable interest in the policy; first, by virtue of having been originally named by the insured as beneficiary, and, second, by the subsequent payment of premiums for a period of 10 years. Since the policy made no provision for changing the beneficiary, appellant could not be divested of her interest in the policy without her consent.

Respondent relies upon the case of *Jory v. Supreme Council A. L. H.*, 105 Cal. 20, 38 P. 524, 26 L. R. A. 733, 45 Am. St. Rep. 17. This case involved a mere certificate of a mutual benefit society, and not a standard policy of a regular insurance company. The by-laws of the mutual society specifically provided that a member in good standing might surrender his certificate at any time, and have a new one issued, payable to any beneficiary whom he desired to designate. In the opinion, Mr. Justice Garoutte said:

"For the purpose of changing the beneficiary, the insured complied in detail with every rule of the society, save the single one of surrendering the certificate, and this she was unable to do after using due diligence to that end."

An entirely different rule prevails with respect to the right of an insured to change his beneficiary under the provisions of a regular standard life insurance policy and a mere certificate in a mutual benefit society. In the former the beneficiary immediately acquires vested rights, while in the latter such rights accrue only upon the death of the insured.

In 4 *Cooley's Insurance Briefs*, 3758, it is said:

"The interest of a beneficiary in the certificate on the life of a member of a beneficial society is a mere expectancy, which becomes vested only on the death of the insured."

Likewise, in 14 R. C. L. 1388, it is said:

"A different rule (from that covered by an ordinary life insurance policy) applies in practically every jurisdiction with reference to the certificates of benefit societies. Owing to the fact that the beneficiary in such a certificate has no vested right therein, it is the general rule that a member of such a society may change the beneficiary in the absence of some restriction in the certificate or laws of the society, and of course a member's rights are clear where the right to change the beneficiary is reserved."

In the *Jory Case*, above cited, the by-laws authorized the change of beneficiary, while

in the instant case no such right was reserved in the policy, or otherwise.

The judgment is therefore reversed.

We concur: KOFORD, P. J.; STURTEVANT, J.

86 Cal. App. 636

UNION TERMINAL WAREHOUSE CO. v. ROBERTI et al. (Civ. 5961.)

District Court of Appeal, First District, Division 2, California. Nov. 10, 1927.

1. Trover and conversion §40(4)—Testimony held to support judgment that defendants converted plaintiff's cotton stolen by witness.

In action for conversion of 26 bales of cotton, testimony of thief, who stole cotton from plaintiff's yard adjacent to its cotton compress, that he sold 22 bales to defendant, though containing contradictions and uncertainties, held to sustain judgment that defendant converted plaintiff's cotton.

2. Appeal and error §1010(1)—Appellate court cannot disregard trial court's findings, which are sustained by evidence.

The appellate court cannot disregard findings of trial court, which are sustained by evidence.

3. Trover and conversion §40(4)—Finding defendants converted plaintiff's cotton, on contradictory and uncertain evidence, held not abuse of discretion.

In suit for conversion of cotton, trial court's finding that defendants converted 22 bales of plaintiff's cotton, on evidence of thief that contained contradictions and uncertainties, and on evidence that cotton stolen was long staple, whereas defendants' evidence showed cotton purchased from thief was not long staple, held not abuse of discretion, since reviewing court could assume that all matters of evidence were fully argued to and considered by trial court.

4. Estoppel §72—Evidence not showing that plaintiff was negligent, rule that, where innocent must suffer, he who is negligent must be sufferer, was inapplicable (Civ. Code, § 3543).

In action for conversion of cotton, which was stolen from plaintiff's yard and sold by the thief to defendants, since evidence did not show that plaintiff was negligent, rule of Civ. Code, § 3543, that, where one of two innocent persons must suffer by act of third, he by whose negligence it happened must be sufferer, was inapplicable.

5. Trover and conversion §40(2)—Evidence of identification of cotton converted held sufficient.

In action for conversion of cotton stolen from plaintiff's yard and sold by the thief to defendants, evidence of thief that he took 22 bales of cotton from plaintiff and delivered them to defendants held sufficient evidence of identification.

6. Trover and conversion §40(6)—Judgment for cotton converted at average of 483 pounds per bale held, under evidence, favorable to defendants.

In action for conversion of cotton stolen from plaintiff's yard and sold by thief to defendants, awarding judgment for plaintiff at average of 483 pounds per bale held favorable to defendants, where weight of cotton received by defendants averaged 560 pounds per bale.

Appeal from Superior Court, Los Angeles County; F. C. Valentine, Judge.

Action by the Union Terminal Warehouse Company against Edward I. Roberti and others. From a judgment for plaintiff, defendants appeal. Affirmed.

E. F. Gerecht, of Los Angeles, for appellants.

Le Roy M. Edwards and O. C. Sattinger, both of Los Angeles, for respondent.

STURTEVANT, J. The plaintiff commenced an action against the defendants asking damages for the conversion of 26 bales of cotton. The defendants appeared and answered, and the action was tried in the trial court, before the court sitting without a jury. Findings in favor of the plaintiff were filed, and a judgment was entered thereon in its favor. From that judgment the defendants have appealed, under section 953a of the Code of Civil Procedure.

The plaintiff is a corporation conducting a warehouse at San Pedro. During the latter part of 1922 it had on storage several thousand bales of cotton. The cotton was stored one bale high in tiers and rows in a yard adjacent to a cotton compress. The yard was not fenced, and on one side a highway was not far removed. The plaintiff had a watchman on duty to watch the yard. Roberti Bros., the defendants, were engaged in the manufacture of mattresses, and had a place of business in Los Angeles. During the months of November and December, 1922, a negro, E. L. McAllister, commenced a series of thefts. Later, after certain investigations had been made, he was arrested for stealing 26 bales of the plaintiff's cotton. He pleaded guilty to a charge of grand larceny and was sent to Requa. While there his deposition was taken by the plaintiff. At times he hesitated about answering questions, but after long conferences with the plaintiff's attorney he consented to proceed.

In the deposition he testified that at times he drove a Ford truck, and at times he drove a Republic truck; that in the nighttime he would time the plaintiff's watchman, and when the watchman would be at a distant point McAllister would proceed to take a load of cotton, 4 or 8 bales at a time, and then drive to the neighborhood of the defend-

ants' place of business. At that point he would remain until the defendants opened their doors, and then he would enter, negotiate his sale, weigh the load, get a receiving slip, and immediately thereafter a check in payment for the load. In this manner he took from the plaintiff 26 or 27 bales. In this manner he sold and delivered to the defendants all except 4 bales which he sold to another house. He testified that in the beginning he informed the defendants that he was a dealer in cotton at Imperial. He gave the defendants his name as E. L. Richardson. Thereafter all business was transacted with the defendants under that assumed name. He testified that each bale that he took had a tag attached to it; that he tore off one tag and read what was on it, but that he did not tear off any other tags. He testified that the defendants made no request of him for any personal identification, but paid him 22 or 23 cents a pound for the cotton. There was evidence given by other witnesses that the market price of cotton at that time was as high as 28 cents. On the trial of the case the plaintiff introduced in evidence the receiving slips and paid checks, each and all confirming the testimony of McAllister. The plaintiff introduced evidence from its own records as to its weights of the 26 bales of cotton. The receiving slips showed the weights as weighed by the defendants.

There was testimony to the effect that cotton produced in dry climates, and brought to the coast and stored in the coast climate, would take on weight. The evidence showed a variance in weights, so that the weights of the bales as shown by the records of the plaintiff did not tally with the weights of the bales as shown by the records of the defendants; but there was no evidence introduced in the record from which this court can identify any particular bale and in that manner compare the weights.

During the period that the thefts were being committed, the plaintiff commenced to surmise that some of the cotton was being stolen. It thereupon caused a check to be taken, thus verifying its suspicions. Later it employed detectives, who proceeded to investigate the case. When the investigation had been completed, it was ascertained what bales had been stolen and what owners had deposited in the warehouse each of the stolen bales. Before the action was commenced, the plaintiff paid the detectives and paid each owner the market price of the cotton stolen. After all of the proof was adduced, the trial court awarded the plaintiff judgment as for 22 bales, and not 26 bales. This was done, because McAllister, whether truly or falsely, testified that only 22 bales, so stolen from the plaintiff, were by him sold to the defendants.

[1, 2] The first point made by the defendants is that there was no evidence before the

trial court that in any way sustains the judgment of that court in holding that the defendants had converted 22 bales of cotton belonging to the plaintiff. The point is without merit. E. L. McAllister fully testified to all of the facts. Even though, as contended by the defendants, his testimony contained contradictions or uncertainties, or came from one convicted of a felony and then serving his time, those infirmities were addressed to the trial court. The trial court having made its finding against the defendants, this court is not at liberty to disregard the finding.

[3] That finding is not broken down because one of plaintiff's officers testified that the cotton stolen from it was "long staple," whereas the defendants offered evidence that the cotton which they purchased from McAllister was not "long staple." The fact that the weights did not agree is another feature that is not conclusive against the plaintiff. We may assume that all of these matters were fully argued to the trial court and were duly considered by it. Evidently the trial court did not consider them as being persuasive. We do not mean to state that we disagree with the trial court. However, we are clearly of the opinion that it may not be said that the trial court abused its discretion.

[4] The defendants cite and rely on section 3543 of the Civil Code. The section has no application to the facts. The evidence does not disclose that the plaintiff was negligent. The evidence, therefore, does not justify a ruling against the plaintiff based on its alleged negligence.

[5] The defendants earnestly contend that there is no evidence identifying the 22 bales. There is no evidence in the nature of marks, brands, etc.; but, as recited above, McAllister testified that he took 22 bales from the possession of the plaintiff and delivered them into the possession of the defendants. This was certainly pointed identification.

[6] In making up its judgment the trial court awarded judgment in favor of the plaintiff for 10,630 pounds; that is, an average of 483 pounds per bale. The receiving slips show the delivery to the defendants by McAllister of 10 bales cotton, low grade lint, and again 12 bales linters. The plaintiff's testimony was that it did not have any linters in storage. The slips show five loads of 4, 4, 4, 8, and 3 bales respectively—23 bales in all—which are not marked linters, but are marked staple, long staple, etc. The total weight of the 23 bales was 12,363 pounds; that is, 560 pounds per bale. In whatever way the trial court made up its figures, it is manifest that they were favorable to the defendants rather than to the plaintiff. As to the price per pound, the trial court followed the testimony of Mr.

Munson, one of the officers of the plaintiff, and the only witness who gave testimony on market values.

We find no error in the record. The judgment is affirmed.

We concur: KOFORD, P. J.; NOURSE, J.

86 Cal. App. 651

WICKSTROM v. McGRATH. (Civ. 5317.)★

District Court of Appeal, Second District, Division 1, California. Nov. 10, 1927.

Hearing Denied by Supreme Court Jan. 9, 1928.

1. Landlord and tenant ⇨291(1)—Notice to pay rent or deliver up possession meant that landlord had exercised option to terminate lease unless rent was paid (Civ. Code, § 791; Code Civ. Proc. § 1161).

Landlord's notice, that within 3 days after service of notice tenant was required to pay rent in certain amount or to deliver up possession within 3 days, or landlord would institute legal proceedings, required by Code Civ. Proc. § 1161, meant that landlord had exercised option to terminate, given in lease, unless rent was paid, so that tenant, failing to pay rent, did not hold possession with permission of landlord at time action, under Civ. Code, § 791, to recover possession of premises was commenced.

2. Landlord and tenant ⇨290(1)—Lessee's unlawful detention of premises did not cease when receiver was appointed, where lessee was collecting rentals through tenant in possession without paying rent.

Lessee's unlawful detention of premises did not cease on July 1 when receiver was appointed, where lessee had abandoned premises about June 1 and was collecting rentals through tenant left in possession without making any payments on rent.

3. Landlord and tenant ⇨184(2)—Deposit given as security for payment of rent should have been applied in satisfaction of judgment, in unlawful detainer action.

Where court's finding that deposit of certain fund was given as security for payment of rent was supported by provisions of lease, such deposit should have been applied in satisfaction of judgment, in unlawful detainer action.

4. Landlord and tenant ⇨291(17)—Where lessee was guilty of unlawful detainer after default in payment of rent, judgment should have declared forfeiture of lease (Code Civ. Proc. § 1174).

Where lessee was guilty of unlawful detainer after default in payment of rent, judgment in unlawful detainer action should have declared forfeiture of lease, under Code Civ. Proc. § 1174.

Appeal from Superior Court, Los Angeles County; L. H. Valentine, Judge.

Action in unlawful detainer by Anna Wickstrom against Kathryne McGrath. From the judgment, defendant appeals. Affirmed, as modified.

Edgar L. Martin, of Los Angeles, for appellant.

D. P. Hatch, of Los Angeles, for respondent.

McLUCAS, Justice pro tem. This is an action in unlawful detainer. Defendant appeals from the judgment.

Plaintiff and defendant entered into a written lease whereby the plaintiff leased to defendant a certain apartment building for the term of 10 years, beginning November 1, 1923, at a total rental of \$97,920, payable in monthly installments of \$816 each. The lease contained the following provisions:

"Receipt is hereby acknowledged of the sum of \$3,264, being in payment of the first, and last three months' rents under this lease, of which said sum the amount of \$2,448, being the amount of rent owing for the said last three months' rental, shall be held without interest, for at least one year and a half from this date, and said second party shall have the right thereafter, of drawing down said cash deposit of \$2,448 when said second party can give to first party a good and sufficient first lien chattel mortgage on the furniture and furnishings in said building in the sum of \$10,000 and in any event said mortgage must be given to lessor within three years.

"It is expressly understood and agreed that the fact that the said first party holds security does not impair or affect, in any manner, the right of said lessor, in the event of default on the part of the said second party, to terminate this lease and re-enter and take possession of the said premises as hereinbefore provided, or to maintain an action at law, for the recovery of any rent that may be due or unpaid under this lease. Should any of the rents herein reserved be due and unpaid, or should the parties of the second part be in default in any of the other obligations herein undertaken by the party of the second part, the party of the first part may, at her option, terminate this lease forthwith and re-enter and take possession of the premises and remove all persons therefrom.

"And it is understood and agreed that the fulfillment and due observance of the various terms, provisions, promises, agreements, covenants, and conditions of this lease constitute the condition on which the continuance of this lease shall depend, at the option of the party of the first part."

On June 1, 1925, and prior to the commencement of this action, defendant left the apartment house in charge of one Mrs. E. Ruhl. At the trial it was stipulated that no rent was paid by the defendant for the month of June or thereafter. It was also stipulated that a notice to pay rent or deliver possession of the premises within three days from the service of said notice, a copy of which was attached to the complaint, was served upon Mrs. Ruhl, who was managing the apartment house, on June 13, 1925, before the filing of the action. On July 1, 1925, a receiver was appointed on the application of the plaintiff. At the time the judgment and findings were signed by the court there was due and

owing by the defendant, under the terms of the lease, rental for the months of June, July, August, and September, 1925, and judgment was rendered in the sum of \$3,264, together with \$34.90 accrued interest. The findings provided that the defendant was entitled to have the judgment satisfied by the plaintiff from the said sum of \$2,448, paid by the defendant to plaintiff at the time of the execution of said lease as security for the faithful performance thereof by the defendant as lessee, to the extent that the same might be adequate therefor.

Appellant urges that the findings and decision that the defendant unlawfully continued in possession of the premises in default in the payment of rent, without permission of the plaintiff, are not justified by the evidence. It is contended that the right of re-entry given in the lease does not accrue upon default in the payment of rent, but accrues to the lessor only when the lessor has elected to terminate the lease by giving the tenant notice indicating an election of the option to terminate the lease. Section 791 of the Civil Code reads as follows:

"Whenever the right of re-entry is given to a grantor or lessor in any grant or lease, or otherwise, such re-entry may be made at any time after the right has accrued, upon three days' notice, as provided in sections eleven hundred and sixty-one and eleven hundred and sixty-two, Code of Civil Procedure."

[1] The lease herein expressly provides that, should any rents be due and unpaid, "the party of the first part may, at her option, terminate this lease forthwith and re-enter and take possession of the premises and remove all persons therefrom." According to the evidence, the lessee was in default in the payment of rent, and we believe the lessor did terminate the lease forthwith by serving the notice to pay the rent or deliver possession, as required by section 1161 of the Code of Civil Procedure. The terms of this notice necessarily meant that the plaintiff had exercised the option to terminate the lease unless the rent was paid, and that the defendant was not remaining in possession with the permission of the plaintiff unless such rent was paid within three days after service of the notice to quit possession. The notice read:

"Within three days after the service on you of this notice, you are hereby required to pay the rent of the premises hereinafter described, * * * amounting to the sum of \$816, * * * or you are hereby required to deliver up possession of the herein described premises within the said three days after service on you of this notice, * * * or I shall institute legal proceedings against you to recover possession of the said premises."

This notice was both a demand to pay the rent and a notice to quit possession in the event of failure to pay the rent, or legal proceedings would be instituted. Section 793 of the Civil Code authorizes the maintenance of Cal.Rep. 261-263 P.—3

an action for the possession of real property leased or granted with the right of re-entry, at any time after the right to re-enter has accrued, without the notice described in section 791 of the Civil Code. The case of *Mossi v. Fairbanks*, 19 Cal. App. 355, 125 P. 1071, relied upon by appellant, goes no further than to hold as a general rule that a demand for unpaid rent is a condition precedent to any action to enforce a forfeiture of a lease for such nonpayment, and that section 793 of the Civil Code simply makes clear by statute that if the landlord does not desire to avail himself of the summary proceeding provided by the Code, it will not be necessary for him to serve three days' notice, but it does not relieve him from the necessity of making a demand, verbal or otherwise, for the rent, unless the lease dispensed with a demand or that the lessee has waived the same. That case was alleged to have been brought under section 793 of the Civil Code, and no demand was alleged. The present case is brought under section 791 of the Civil Code, and demand is both alleged and proved. We conclude that appellant's contention that the possession of the lessee was with the permission of the lessor at the time the action was commenced is without merit.

[2] Likewise the argument of appellant that the unlawful detention of the premises by the defendant ceased on July 1, 1925, when the receiver was appointed, must fail, since the record shows that the defendant had abandoned the premises about June 1 and was collecting the rentals through a tenant left in possession, without making any payments on the rent or on the furniture installments.

Appellant's objection that the court erred in its rulings are necessarily disposed of by the foregoing conclusions.

[3] Appellant's contention that the judgment is not authorized by the findings should be sustained. An allowance or credit was not given in the judgment for the sum of \$2,448, as provided in the findings. The finding that the deposit was given as security is well supported by the provisions of the lease, and the amount should have been applied in satisfaction of the judgment, in accordance with the decision. *Rez v. Summers*, 34 Cal. App. 529, 168 P. 156; *Burke v. Norton*, 42 Cal. App. 705, 184 P. 45; *Parish v. Studebaker*, 50 Cal. App. 719, 195 P. 721; *City Investment Co. v. Pringle*, 73 Cal. App. 782, 239 P. 302.

[4] Appellant's contention that the judgment should declare a forfeiture of the lease should also be sustained. Section 1174 of the Code of Civil Procedure provides that if the defendant is guilty of unlawful detainer after default in the payment of rent, a judgment shall be entered for the restitution of the premises, and "the judgment shall also declare the forfeiture of such lease or agreement."

In accordance with the foregoing it is ordered that the judgment be modified by add-

ing to paragraph 2 thereof the following words:

"But that the defendant is entitled to have the judgment herein satisfied by the plaintiff from the sum of \$2,448 deposited with plaintiff by the defendant as security for the faithful performance of the lease of said premises entered into between the parties thereto, to the extent that the same may be adequate therefor. Upon full satisfaction of said judgment, and upon the plaintiff being restored to the possession of said premises by the defendant, it is ordered that said lease be forfeited."

The judgment is affirmed as modified.

We concur: CONREY, P. J.; YORK, J.

86 Cal. App. 277

PILGER v. CITY OF PARIS DRY GOODS CO. (Civ. 6000.)★

District Court of Appeal, First District, Division 1, California. Oct. 24, 1927.

Hearing Denied by Supreme Court Dec. 22, 1927.

1. Master and servant ⇨330(1)—One suing corporation had burden of establishing negligent chiropodist was its servant.

One suing department store corporation for negligence of chiropodist, on ground that it was employer of chiropodist at time of injury, had burden of establishing existence of relation of employer and employee.

2. Master and servant ⇨301(1)—Relation of "master and servant" exists when master can control work and direct manner of doing it; "employer and employee" (Civ. Code, § 2009).

Relation of "master and servant" or "employer and employee" exists whenever one claimed to be master stands in such relation to another that he can control work of latter and direct the manner in which it shall be done, and it is essential that he shall have the direction and control of all of its details, under Civ. Code, § 2009.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Employer; Second Series, Master and Servant.]

3. Evidence ⇨65—Patient of chiropodist was chargeable with knowledge that under statute corporation had no power to practice chiropody (St. 1913, p. 722, as amended; St. 1921, p. 995).

Court was bound to hold that patient of chiropodist knew the law, and therefore knew that under St. 1913, p. 722, as amended, and St. 1921, p. 995, department store corporation had no power to practice chiropody.

4. Master and servant ⇨301(1)—Corporation cannot be master over chiropodist concerning whose acts it could have no power of supervision (St. 1913, p. 722, as amended; St. 1921, p. 995).

Since corporation cannot be licensed to practice chiropody under St. 1913, p. 722, as amended, and St. 1921, p. 995, it cannot in contemplation of law be a master over a serv-

ant concerning whose acts it could have no power of supervision.

5. Master and servant ⇨332(1)—Evidence on issue whether negligent chiropodist was employed by store held insufficient for jury.

Evidence that chiropodist for whose negligence in treating plaintiff's feet department store was sought to be held liable, merely showing chiropodist had an office in the store, and that fees for services rendered were charged on books of store at plaintiff's request and for her convenience, held insufficient for jury on question whether chiropodist was in employ of store.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action for personal injuries by Lucy Pilger against The City of Paris Dry Goods Company. From a judgment of nonsuit, plaintiff appeals. Affirmed.

Wal J. Tuska, of San Francisco, for appellant.

Walter H. Linforth, of San Francisco, for respondent.

CAMPBELL, Justice pro tem. This is an appeal from a judgment based upon a motion for nonsuit made by defendant at the close of plaintiff's case.

The facts disclosed by the evidence are as follows: The respondent the City of Paris, a corporation, is a retail store in the city of San Francisco, dealing in dry goods and various kinds of merchandise, and having different departments. In the month of September, 1923, appellant, Lucy Pilger, employed the services of Dr. Robbins, a chiropodist who had an office in the store of respondent corporation, and whose office adjoined the beauty parlor conducted on the second floor of the building occupied by respondent for the sale of merchandise and commodities. The name of the chiropodist and the location in the building where the office of the chiropodist was located were unknown to appellant, she being directed to the chiropodist's office by one of the salesmen employed in the store. Appellant went to the place to which she had been directed, and, after waiting there a little time while the chiropodist was finishing some work for another lady, was treated by the chiropodist, which consisted of trimming the nails and trimming callous off the soles of appellant's feet. In the course of the treatment the chiropodist discovered that there was callous on the bottom of the little toe of appellant's left foot, and proceeded to remove it, but, while so attempting to remove the callous, the knife or other instrument the chiropodist was using entered the flesh of the little toe of appellant's left foot, causing a flow of blood, and, as described by appellant, causing severe pain. The chiropodist immediately

bandaged the bleeding foot, later removing the bandage, and, putting on some medicine submitted the foot to violet ray, and again bandaged it; appellant in the meantime, according to her testimony, suffering acute pain. The chiropodist tried different methods at different times to heal the wound and to alleviate the pain and suffering; she sprayed the wound, used an antiseptic, probed the wound, and squeezed out pus. As stated by appellant, the pains continued from September, 1923, until the middle of the following January, when a regular medical practitioner was called in. The physician, Dr. Marston, after examining the foot found it infected, that mortification had set in, and determined, after consultation with another physician, to amputate the little toe of the left foot to prevent the poison from spreading, and the toe was accordingly amputated. Appellant testified that she endured months of suffering following the chiropodist's treatment. Prior to that time appellant had no disease in either of her feet, and did not suffer from any disease at the time she had her nails trimmed and the callous removed from her left foot and toe, and her blood was in good condition. According to the testimony of appellant, she had been buying goods at defendant's store for a number of years, and maintained a charge account there, and that, when the chiropodist first treated her, she told the chiropodist that she had a charge account at the store, and requested the chiropodist to have the charges for the treatment charged to her on the books of the store and to have the charges put on her bill. Accordingly, when appellant received her next bill from respondent, there appeared upon the bill, among various items for goods sold appellant, the following items: September 7th, 1 chiropody treatment, \$2; September 17th, 1 chiropody treatment, \$2; December 12th, 1 chiropody treatment, \$2.50; December 22d, 1 chiropody treatment, \$1.

Appellant has assigned twelve specifications of proof made under the heading "Appellant has made a clear case and produced sufficient evidence to go to the jury," all of which are covered by specification 12—"that sufficient evidence was produced as to the injury, neglect, carelessness, and responsibility of the respondent to require explanation and evidence on the part of respondent to offset the case made by appellant," and we shall therefore address ourselves to this specification.

[1, 2] In order to hold respondent liable for the negligence of the chiropodist it must be made to appear from the evidence that the relation of master and servant existed at the time of the alleged negligence, and the burden of establishing this relationship is upon the party asserting it. There is no evidence in the record to show that respondent operated the chiropody department, or

that the chiropodist was in any way employed by respondent, or that the entries of the charges for such service on the books of respondent corporation were otherwise than at the request of, and for the convenience of, appellant. "A servant is one who is employed to render personal service to his employer, otherwise than in the pursuit of an independent calling, and who in such service remains entirely under the control and direction of the latter, who is called his master." Civ. Code, § 2009.

[3] The relation of master and servant or employer and employee exists whenever one person stands in such relation to another that the master or employer may control the work of the servant or employee and direct the manner in which it shall be done (*Boswell v. Laird*, 8 Cal. 469, 68 Am. Dec. 345; *McCulligan v. Penn. R. Co.*, 214 Pa. 229, 63 A. 792, 6 L. R. A. (N. S.) 544, 112 Am. St. Rep. 739; *Hand v. Cale*, 88 Tenn. 400, 12 S. W. 922, 7 L. R. A. 96), and the essential elements are that the master or employer shall have control and direction, not only to the employment to which the contract of employment relates, but of all its details. (*McCoy v. Griffith*, 196 Ky. 406, 244 S. W. 871; *Flaherty v. Helfont*, 123 Me. 134, 122 A. 180). "It is well settled that, in order to hold the master responsible for the negligence of a servant, he must have the power of supervision of the servant's conduct. Indeed, the words master and servant imply such power." *Cotter v. Lindgren*, 106 Cal. 607, 39 P. 950, 46 Am. St. Rep. 255. There is no evidence that respondent in any manner controlled the work of the chiropodist's business. As a matter of law, appellant could not direct or control such work, not being a licensed chiropodist as required under the law of this state, which expressly requires a chiropodist to be licensed after having passed an examination and having pursued a course of study, and which law does not authorize the licensing of a corporation to practice chiropody. Stats. 1913, p. 722, as amended; Stats. 1921, p. 995. Appellant must be held to have known the law, and therefore to have known that a department store could not practice chiropody.

[4, 5] The statute cited, after creating a board of medical examiners, provides "for the purpose of this act chiropody shall be held to be the medical, mechanical or surgical treatment of the human feet," and defines surgical treatment as follows:

"Surgical treatment shall be held to mean the surgical treatment of abnormal nails, corns, callosities, bunions, and other minor foot ailments, not involving the bony structure."

The same statute provides that a person, in order to obtain a license as a chiropodist, must have pursued a course of study, and also that any person practicing medicine in this

state without at the time possessing a license issued in accordance with the act shall be guilty of a misdemeanor.

A corporation cannot be licensed to practice chiropody, and therefore cannot in contemplation of law be a master over a servant concerning whose acts it could have no power of supervision. *Cotter v. Lindgren*, supra.

The statute requiring an examination as to the qualifications and knowledge of an applicant to practice chiropody and requiring a license from the state board places him, in so far as the question of master and servant is concerned, in the same category with lawyers, doctors, and dentists, and the authorities seem to be uniform that a corporation can neither practice nor hire lawyers, doctors, or dentists to practice for it. "A corporation can neither practice law nor hire lawyers to carry on the business of practicing law for it any more than it can practice medicine or dentistry by hiring doctors or dentists to act for it. *People v. Woodbury Dermatological Institute*, 192 N. Y. 454, 85 N. E. 697; *Hannon v. Siegel-Cooper Co.*, 167 N. Y. 244, 246, 60 N. E. 597, 52 L. R. A. 429. The Legislature in authorizing the formation of corporations to carry on 'any lawful business' did not intend to include the work of the learned professions. Such an innovation with the evil results that might follow would require the use of specific language clearly indicating the intention. Recent legislation simply emphasizes and protects the established policy of the state and although *ex post facto* tends to show that no such object was in contemplation when the general term 'lawful business' was used in the statute to authorize the formation of business corporations. * * * Business in its ordinary sense was aimed at, not the business or calling of members of the great professions, which for time out of mind have been given exclusive rights and subjected to peculiar responsibilities." In *re Co-operative Law Co.*, 198 N. Y. 479, 92 N. E. 15, 32 L. R. A. (N. S.) 55, 139 Am. St. Rep. 839, 19 Ann. Cas. 879. No action for malpractice can be maintained against a corporation because of contract of employment of a physician. As is said in *Youngstown Park & Falls St. R. Co. v. Kessler*, 84 Ohio St. 74, 95 N. E. 509, 36 L. R. A. (N. S.) 50, Ann. Cas. 1912B, 933:

"A contract to perform medical or surgical services by a corporation organized for the purpose of constructing, owning and operating a street railway, is not only *ultra vires* but is in direct conflict with the laws of this state regulating the practice of medicine and surgery and is, therefore, void. Such a corporation cannot be directly liable for damages for malpractice of medicine or surgery."

Counsel for appellant concedes the law to be as stated, but argues that it is not applicable here, stating in his reply brief:

"The cases cited by counsel for respondent and the law quoted by him may undoubtedly govern actions by duly accredited physicians, whether or no they have been licensed by the state to practice their profession, the mere state's license for a certain fee per certificate does not create or give him the ability of a physician or surgeon. He must possess the ability and must have passed a prescribed examination before a license is issued to him to practice."

That is precisely the case with the chiropodist. Adopting appellant's language, "he must possess the ability and must have passed a prescribed examination before a license is issued to him to practice"; that is, he must be found by the examining board issuing his license to possess the requisite qualifications concerning the "medical, mechanical or surgical treatment of the human feet," as a dentist must possess the requisite qualifications to clean and extract teeth, repair them, when diseased, by artificial ones, and perform surgical operations upon the teeth and jaw and incidental thereto upon the flesh connected therewith. *People v. De France*, 104 Mich. 563, 62 N. W. 709, 28 L. R. A. 139; *State v. Beck*, 21 R. I. 288, 43 A. 366, 45 L. R. A. 269.

A corporation cannot be held liable upon the theory of master and servant in the case where injury results to a patient treated by a chiropodist through his negligence any more than it can where the injury results from the negligence of a lawyer or a physician or surgeon, as the chiropodist—like those of the learned professions mentioned—is certified by the state board as having acquired the requisite knowledge to practice, and which knowledge the corporation does not possess, and, consequently, cannot have the power of supervision over the chiropodist's conduct, which is essential to establish the relation of master and servant. *Cotter v. Lindgren*, supra.

There can be no doubt that a corporation may undertake to furnish the services of a competent physician or the services of a competent chiropodist, and that it may under certain circumstances be liable in damages—as, for instance, the person employed was not authorized to practice; that he was incompetent, and the corporation had knowledge of his incompetency, or in the exercise of due care could have obtained such knowledge, etc. No such case, however, is presented here. Neither the complaint nor the evidence supports such a theory.

This seems to be a case of first impression, not only in this state, but the question has not, so far as we are advised, been directly passed upon in any jurisdiction.

In our opinion the evidence presented by appellant is not sufficient to support a finding that the chiropodist was in the employ of respondent corporation—the evidence

merely showing that the chiropodist had an office in respondent's department store, and that the fees for the service rendered were charged on the books of respondent corporation at appellant's request and for appellant's convenience, and, further, that the relation of master and servant under the circumstances disclosed by the evidence did not exist.

The motion for a nonsuit was properly granted, and the judgment is therefore affirmed.

We concur: TYLER, P. J.; CASHIN, J.

86 Cal. App. 610

CONNELL v. BROWNSTEIN-LOUIS CO.
(Civ. 5959.)

District Court of Appeal, First District, Division 2, California. Nov. 8, 1927.

1. Landlord and tenant ⇨152(4)—Cost of attempt to remove painted sign held not occasioned by ordinary wear and tear within exception to tenant's covenant to keep in repair.

Cost of short attempt to remove advertising sign, painted on side of building by tenant, held not occasioned by ordinary wear and tear within exception to tenant's covenant to keep in repair and yield up premises in good condition and repair.

2. Landlord and tenant ⇨152(4)—Cost of patching plaster, repairing elevators, tinting walls, and painting metal work, etc., held not occasioned by ordinary wear and tear within exception to tenant's covenant to keep in repair (Civ. Code, §§ 1644, 1928, 1929).

Cost of patching plaster broken by tenant's careless removal of shelving, repairing elevators operated without sufficient lubrication, tinting walls discolored partly by shelving removed, and painting metal work, sills, and pipes and tanks of sprinkling system, which were never painted during tenant's 10 years' occupancy, held not occasioned by ordinary wear and tear within exception to tenant's covenant to keep in repair and yield up premises in good condition and repair, in view of Civ. Code, §§ 1644, 1928, 1929.

3. Landlord and tenant ⇨37—Words of leases, as of other contracts, must be understood in ordinary popular sense (Civ. Code, § 1644).

Leases should be interpreted no more technically than other contracts, words of which are to be understood in their ordinary and popular sense, rather than their strict legal meaning, under Civ. Code, § 1644.

4. Landlord and tenant ⇨150(1)—Tenant, allowing metal parts of building to decay for lack of repainting for 10 years, is not using ordinary care for its preservation (Civ. Code, §§ 1928, 1929).

A tenant, allowing metal parts of building to decay for lack of renewal coat of paint for

10 years, is not using ordinary care for its preservation, within Civ. Code, §§ 1928, 1929.

5. Landlord and tenant ⇨152(4)—Exception of ordinary wear and tear in tenant's covenant to keep in repair contemplates deterioration in spite of ordinary care (Civ. Code, §§ 1928, 1929).

Exception of ordinary wear and tear in tenant's covenant to keep in repair and yield up premises in good condition and repair contemplates deterioration by reason of time and use, in spite of ordinary care, required by Civ. Code, §§ 1928, 1929, for their preservation.

6. Accord and satisfaction ⇨26(3)—Finding of no accord and satisfaction held based on conflicting evidence and hence not unsupported.

In action for damages by tenant's breach of covenant to keep and yield up premises in good repair, finding of no accord and satisfaction by leaving electric wiring equipment installed by tenant and other personality in leased premises when yielding possession at end of term held based on conflicting evidence as to whether they were to remain as matter of right or pursuant to claimed accord and satisfaction, and hence not unsupported.

Appeal from Superior Court, Los Angeles County; Carlos S. Hardy, Judge.

Action by M. J. Connell against the Brownstein-Louis Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Loeb, Walker & Loeb, of Los Angeles, for appellant.

Hunsaker, Britt & Cosgrove, of Los Angeles, for respondent.

KOFORD, P. J. Plaintiff recovered judgment for damages for breach of a covenant of a 10-year lease by which defendant agreed to keep the leased premises in good repair and to yield up said premises upon the termination of the lease in good condition and repair, loss by fire and ordinary wear and tear excepted. The court found in response to the issues presented that:

"Said defendant has allowed said building and premises to become and remain in a condition of impair, waste, and deterioration by reason of the failure of said defendant to paint said building and the fire escapes thereon and to paint out signs placed by the defendant upon said building, and the failure to paint the sprinkling pipes located within and the water tanks connected therewith located upon said buildings, and the failure of said defendant to paint the walls within said buildings and to repair the floors of said buildings, and upon the termination of said lease the failure of the defendant to remove iron pipes and iron pins protruding from the surface of the cement floors of said buildings, and the failure of the defendant to cover or fill in holes cut by the defendant in the concrete floors of said buildings; by the defendant removing and failing to replace window sashes in said buildings, and by breaking and failing to replace window glass

in the windows of said buildings, and by breaking and otherwise destroying and failing to repair the plaster broken and destroyed upon and in the walls, ceilings, and columns within said buildings; by failing to repair boilers, elevators, and parts of the boilers and elevators located in and forming a part of said demised premises."

The precise clause of the lease involved here is as follows:

"And that said party of the second part will keep said premises in good repair, replacing all broken glass with glass of the same size and quality of that broken, and will keep said premises and appurtenances and all things connected therewith, including the adjacent alleys, in a clean and healthy condition and good repair according to the city ordinances of the city of Los Angeles, and the direction of the proper public officers during the term of this lease at their own expense; and upon the termination of this lease, in any way, will yield up said premises to said party of the first part in good condition and repair, loss by fire and ordinary wear and tear excepted."

Appellant assumes that this clause is to be treated as one covenant, and not as two distinct ones separated by the semicolon. Assuming this to be true, without so holding, then "ordinary wear and tear excepted" is a qualification of the tenant's covenant to "keep in repair" as well as of his covenant to "yield up in good condition and repair."

It is appellant's contention that certain of the items charged to it by the judgment appealed from have the effect of making it responsible for repairs made necessary only by ordinary wear and tear. These items are: (1) Item of \$40, cost of a short attempt to remove the tenant's advertising sign painted upon the side of the leased building. (2) Patching plaster where broken from interior of building, \$39.35. (3) Repairing two elevators, \$120 and \$226.32, respectively. (4) Tinting discolored walls, \$488. (5) Painting metal work and sills on front of building, \$190. (6) Scraping and painting pipes and tanks of sprinkling system, \$648. In order to get a sense of proportion, it should be stated that the rent reserved was 6 per cent. per annum upon the cost of the buildings (\$160,000), and 5 per cent. per annum upon the agreed valuation of the land (\$85,000), making \$13,850 per year.

[1, 2] The first item can hardly be said to have been occasioned by ordinary wear and tear, as the sign was put there by the tenant. As to the second and third items, there was evidence tending to show that the state of impair was caused by the abuse and neglect of the tenant by removing shelving from the plastered walls in a careless manner and by operating the machinery of the elevator without sufficient lubrication. This evidence, so far as concerns the elevators, is not so clear as to amount to demonstration, but our examination of it convinces us that the court's

finding in this respect is not unwarranted by the evidence. As to the fourth item, there was evidence that the walls were "badly stained," "quite discolored," "needed calcimining," but no especial cause of this is pointed out by either respondent or appellant except that at least part of the discoloring was caused by the lines of shelving used by the tenant and removed by it when surrendering. As to the fifth and sixth items, the evidence was that these metal parts had never been painted during the 10 years of the tenant's occupancy; that they were covered with rust and scale and badly in need of painting, not merely for decorative purposes, but for the purpose of properly protecting and preserving the metal. There was testimony that the metal parts on the outside of the building should be painted at least every 4 or 5 years. Do these repairs fall to the duty of the tenant, or are they excepted by the clause ordinary wear and tear? The few authorities cited in the briefs seem to us to fall short of giving any satisfactory test for determining the question. Our examination for authorities has disclosed several comprehensive collections of authorities. They are 95 Am. Dec. 115, at page 121, under *Polack v. Pioche*, 35 Cal. 416; 64 L. R. A. 648, and 45 A. L. R. 12.

All of the items of repair here are within the tenant's duty under a general covenant to keep in repair without qualification, according to the earlier decisions. *Polack v. Pioche*, supra; *Egan v. Dodd*, 32 Cal. App. 706, 164 P. 17. With respect to painting, a distinction has sometimes been made between painting for decoration and painting for protection and preservation of the building. The latter has uniformly been held to be the tenant's duty, and the former only when the painting is reasonably necessary to make the building tenantable, having regard to the purpose for which it is to be used, its location, and the usual requirements of the class of tenants using such premises. *Jones on Landlord and Tenant*, § 401.

[3] Many of the early decisions interpreting covenants of leases applied such a strict legal meaning to the language used that unexpected hardships often resulted. In the case of *Realty & Rebuilding Co. v. Rea*, 184 Cal. 565, 575, 194 P. 1024, it was held that leases should be interpreted no more technically than other contracts; that more attention should be given to the rule of interpretation of contracts declared in Civil Code, § 1644, which states that words of a contract are to be understood in their ordinary and popular sense, rather than according to their strict legal meaning.

[4, 5] Applying this rule of interpretation, together with other Code provisions applicable to the question now before us, we reach the conclusion that the items of repair

charged against the tenant by the trial court properly fall within the duty of the tenant under the terms of the lease. The hirer of a thing must use ordinary care for its preservation in safety and good condition (Civ. Code, § 1928) and repair injuries and deteriorations caused by his failure to do so (Civ. Code, § 1929). The buildings here leased were new—built expressly for the tenant. The term of the lease was 10 years. A tenant who sits by for 10 years and allows the metal parts of the building to decay for lack of a renewal coat of paint is not using ordinary care for its preservation. The exception of ordinary wear and tear contemplates that deterioration will occur by reason of time and use in spite of ordinary care for its preservation.

Herboth v. American Radiator Co., 145 Mo. App. 484, 123 S. W. 533, relied on by appellant, did not contain, as here, a covenant to keep in good repair. The part of the covenant there held to be binding upon the lessee under a 2-year renewal of an old lease was to repair any damage done to the buildings by negligence of its employees, careless usage, or any other cause. The phrase "any other cause" was interpreted in connection with the surrender clause as excepting "natural wear and decay." The rusted guttering and leaky roof there mentioned apparently were of a nature which required reconstruction rather than protection, and were not of such a nature as to have been caused by neglect during the 2-year renewal lease to which period the defendants' responsibility was confined by other principles considered in the decision.

[6] The court also found against the special defense of accord and satisfaction pleaded in the answer. By this plea defendant claimed that the plaintiff had agreed to waive his claim for damages in return for the defendant's leaving in and on the leased premises, when yielding possession at the end of the term, certain personal property as agreed compensation for such damages. Appellant also claims this finding is unsupported by the evidence. Toward the end of the lease term plaintiff voiced his claim for damages. Defendant disputed some of the claim and admitted parts of it. Defendant several times offered to leave on and in the premises for the plaintiff certain property, particularly certain electric wiring equipment installed by defendant in the building, in full satisfaction of the plaintiff's claim for damages. This offer was apparently never flatly and directly rejected by the plaintiff. His reply was that such personal property constituted a part of the realty and therefore could not be removed by the tenant either legally, or, on account of the method of its installation, profitably. Plaintiff also replied that he did not want such personal property and that the

new tenant would install his own. Finally, towards the very end of the term, on December 27 or 28, 1921, according to the testimony of Mr. Brownstein of the defendant company, a Mr. McKee, an employee of the plaintiff, in response to Brownstein's request for a final answer, stated that he had seen the plaintiff and, without reporting what the plaintiff had said, told Brownstein "to leave the personal property there and that the proposition would be all right as outlined by me (Brownstein)." Although this Mr. McKee was a witness at the trial, he was not asked the direct question whether he had made this statement to Brownstein and, on objection of counsel for defendant, was not permitted to state what the plaintiff had told him to report to the defendant. He did, however, testify to conversations with Brownstein. One of these was evidently the same one as that said by Brownstein to have occurred on December 27 or 28, although McKee said it occurred on January 5, 1922. It follows:

"I said, 'Mr. Brownstein, I have just seen Mr. Connell, and we do not want you to take the material that you referred to out of the building,' and he said that he would not."

Appellant claims the above does not present a conflict of evidence.

There was also testimony that defendant during the last week of the term was endeavoring to sell this personal property to one of the new tenants and to several others. Brownstein testified that he ceased trying to sell after receiving word from McKee as above stated. That date, according to his testimony, was December 27 or 28, 1921. One of the new tenants testified that certain conduit, drops, wiring, and fixtures were purchased by him from the defendant for \$262.50 on January 7, 1922, together with other personal property, aggregating \$771.25. Brownstein denied selling any. There was also testimony that Brownstein, on being presented on March, 1922, with a bill for damages claimed by plaintiff, declined to pay, stating only that the material left by defendant practically offset all the claims. Brownstein denied hearing anything about the bill for damages from December 27 or 28, 1921, until February, 1923.

There are, therefore, very sharp conflicts in the testimony in some of the important details of the matters testified to by Brownstein. The trial court evidently did not believe Brownstein's statement that McKee had said to him that "the proposition would be all right," but evidently believed that McKee had only said not to take the material out of the building—meaning thereby that the plaintiff insisted that defendant had no right to take it out. We hold, therefore, that the finding of no accord and satisfaction is based upon conflicting evidence and is not unsup-

ported within the meaning of familiar rules binding upon appellate courts.

The evidence that plaintiff's engineer told the new tenant that certain wiring and conduits would remain is emphasized by appellant, but this testimony is just as consistent with plaintiff's claim that they must remain as a matter of right as with defendant's claim that they were to remain pursuant to the claimed accord and satisfaction.

The judgment is affirmed.

We concur: STURTEVANT, J.;
NOURSE, J.

86 Cal. App. 627

TIBURNE et ux. v. BURTON. (Civ. 5963.)

District Court of Appeal, First District, Division 2, California. Nov. 9, 1927.

1. Appeal and error ⇨930(4)—Appellate court must presume that jury, returning verdict against truck driver, found him negligent.

Jury having returned a verdict against driver of truck, in action against him and owner for damages from collision with plaintiffs' automobile, appellate court must presume that jury found driver negligent.

2. Master and servant ⇨301(1)—Respondent superior doctrine applies only when relation of master and servant exists at time and in respect to thing causing injury arose.

The doctrine of respondent superior applies only when the relation of master and servant exists between the wrongdoer and person sought to be charged for result of some neglect or wrong at very time and in respect to very thing from which injury arose.

3. Master and servant ⇨332(1)—Whether city or contractor had exclusive control of driver of truck colliding with automobile held for jury.

Whether city or one contracting to furnish it trucks with drivers to collect refuse from streets had right, either express or implied, to exercise exclusive direction and control of driver's conduct while truck was in transit, held for jury on conflicting evidence in action for damages from collision between truck and plaintiffs' automobile.

4. Appeal and error ⇨882(12)—Instruction to find for defendant owner, if truck's operation and route at time of collision was under city's direction, held not prejudicial in view of instruction given at plaintiffs' request.

In action for damages from collision between plaintiffs' automobile and defendant's truck, rented to city for collection of refuse on streets, instruction to find for defendant, if driver turned truck to wrong side of street by direction of city and its agents and operation and route of truck was under their direction at time, held not prejudicial to plaintiffs, in view of instruction, given at plaintiffs' request, leaving question of direction and control with jury in practically the same language.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by Edward O. Tiburne and wife against James R. C. Burton, doing business under the firm name and style of the Burton Transfer & Storage Company, and another. From a judgment for defendant Burton, plaintiffs appeal. Affirmed.

Mark L. Herron and Russell Graham, both of Los Angeles, for appellants.

Randall, Bartlett & White and C. W. Byrner, all of Los Angeles, for respondent.

NOURSE, J. Plaintiffs sued for damages arising from a collision between an automobile operated by plaintiffs and a truck operated by defendant Gepperd, who, plaintiffs contended, was an agent and employee of defendant Burton. The cause was tried before a jury, and resulted in verdict in favor of plaintiffs against defendant Gepperd and against the plaintiffs as to defendant Burton. The plaintiffs appeal from the portion of the resulting judgment adverse to them. The appeal is presented on a bill of exceptions.

At the time of the collision the truck was owned by defendant Burton, but was rented by him to the city of Los Angeles under a written contract whereby Burton undertook to furnish the city seven trucks with drivers for the collection of refuse. The proposal and specifications under which the contract with the city was made (offered in evidence by defendant as a part of the agreement) called upon the defendant to furnish the machines and provide drivers for them, to furnish all fuel and supplies, to make all necessary repairs, and to provide garage. Every driver was required to perform his work in a satisfactory manner, and as may be specified by the city engineer, and "any driver whose services are not satisfactory to the city engineer shall be discharged by the contractor" (defendant). Payment was to be made at the rate of \$10.85 per day for each truck and driver. The contractor had the power to employ and discharge the driver, and was alone responsible for the fixing and payment of his wages. He was also required to carry indemnity insurance "covering his full liability of compensation under said act (Workmen's Compensation Act [St. 1917, p. 831 as amended]) for any person injured while performing any work" under the contract.

The city undertook to direct the routes the drivers should cover in collecting the rubbish, and general directions were given by the city's representative to all drivers that they should zigzag from the right-hand side of the road to the left and back again to pick up the rubbish as they found it. The defendant Burton testified that he satisfied himself that this particular driver was a competent and courteous driver, and that he in-

structed all his drivers to be careful and prudent, and that he would discharge them if they were reckless.

There is some conflict in the evidence as to what was the actual cause of the collision. The witnesses for the plaintiffs testified that the truck was proceeding slowly near the middle of the highway; that, as plaintiffs appeared from the rear they sounded their horn, and attempted to pass to the left of the truck, but that the truck swerved suddenly to the left as plaintiffs were about midway, and caught the rear wheel of plaintiffs' car, causing it to upset. The driver of the truck did not appear as a witness, but two "swampers" who were riding with him at the time testified that the truck had gone to the left-hand curb about 200 feet back of the place where the collision occurred, and they had there picked up a barrel of rubbish; that it continued slowly along the left-hand side of the highway, the left wheels running in the dirt to the left of the pavement; and that plaintiffs endeavored to pass the truck while traveling at a high rate of speed, and without giving any warning signal.

[1] The jury having returned a verdict against the driver of the truck, we must presume on this appeal that it found him negligent. The only point raised by appellants on their appeal is whether the jury was properly instructed as to the liability of the respondent Burton. The only instruction which the appellants complain of reads:

"If you find that defendant Gepperd did turn his truck to the wrong side of the street, but that he did so by direction of the city of Los Angeles and its agents, and that at the time he did so the defendant Burton had no control of direction over the route or direction of the truck, but that the operation and route of the truck was under the direction of said city of Los Angeles and its agents, then I instruct you that you should find a verdict in favor of the defendant James R. C. Burton."

[2, 3] The issue was drawn bringing forth the inquiry whether the driver continued liable to the direction and control of his original master or became subject to that of the city to which his services were let. 26 Cyc. 1522. The "doctrine of respondeat superior applies only when the relation of master and servant is shown to exist between the wrongdoer and the person sought to be charged for the result of some neglect or wrong at the very time and in respect to the very thing out of which the injury arose." *Billig v. S. P. Co.*, 189 Cal. 477, 483, 209 P. 241, 243. Evidence had been offered to show that the city had full power to direct the course of the drivers during the period of employment; that it had the power to direct the contractor to discharge any of them if his work was unsatisfactory; and that it had given special directions for them to zigzag across the highway to pick up the rubbish. It was for the

jury to determine whether, under these circumstances, the city or the contractor "possessed the right, either express or implied, to exercise exclusive direction and control of the conduct of [the driver] * * * while [the truck] was in transit." *Billig v. S. P. Co.*, supra.

[4] The jury had been instructed at the request of the plaintiffs that, if they found that the "driver was not employed by Burton, or was not subject to his orders and control as to the manner in which he operated the truck, * * * he (Burton) would not in that event be liable." And, also, that, if they found that the driver "was selected and employed by the defendant, James R. C. Burton, and that his qualifications to drive that truck were passed upon by the defendant, Burton, or those acting for him, and further that at the time of the acts constituting the negligence the truck driver was governed by or subject to the orders and control of the defendant, Burton, as to the manner in which he operated the truck * * * then the defendant, Burton, is responsible as such employer for such negligence." These instructions, taken with the one complained of, left with the jury the determination of the question who was the master of the driver, and as such responsible for his conduct at the time of the collision. If the court had been asked to determine this relation as a matter of law, as was done in the *Billig Case*, the correctness of the ruling in view of the conflicting evidence in this case would present a difficult problem. But, in view of the fact that the instruction requested by the plaintiffs and given by the court left the question of direction and control with the jury in practically the same language as is found in the instruction complained of, the plaintiffs could not have been prejudiced by this latter instruction.

It is said in *Stewart v. California Improvement Co. et al.*, 131 Cal. 125, 131, 63 P. 177, 179 (52 L. R. A. 205):

"The test in all these cases is, Who conducts and supervises the particular work, the doing of which, or the careless and negligent doing of which, causes the injury or damage?"

Both the *Stewart* and *Billig Cases* have been cited by appellants. In both cases the general employer was held responsible for the negligence of the employee on the undisputed evidence that the hirer had no power of direction or control over the conduct of the servant, and no power to discharge if his work proved unsatisfactory. Here the evidence of the power of direction and control was conflicting, and the city retained the right to demand the discharge of the servant if his work proved unsatisfactory, and the contractor agreed to comply with this demand.

Judgment affirmed.

We concur: KOFORD, P. J.; STURTEVANT, J.

86 Cal. App. 662

GAIRAUD v. SILVA. (Civ. 5866.)

District Court of Appeal, First District, Division 2, California. Nov. 12, 1927.

Brokers — 8(3)—Evidence held to sustain findings that owner did not execute written contract for broker's commission, relying on confidential relationship without knowing terms.

In action by real estate broker for commission, evidence held to sustain findings that broker and owner did not, prior to execution of written contract, make an oral agreement that no commission should be due unless exchange of lands was completed, and that owner did not execute written contract in reliance upon confidential relationship existing between parties without knowing that the contract provided for payment of commission upon broker securing written acceptance of owner's offer.

Appeal from Superior Court, Santa Clara County; F. B. Brown, Judge.

Action on written contract for services as real estate broker by L. Louis Gairaud against Joseph A. Silva. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

J. S. McGinnis, of San Jose (George W. Patterson, of San Jose, of counsel), for appellant.

Owen D. Richardson, of San Jose, for respondent.

NOURSE, J. Plaintiff sued upon a written contract whereby the defendant promised to pay for services rendered by the plaintiff as a real estate broker. Plaintiff had judgment, and the defendant has appealed upon a type-written transcript.

The complaint alleged that the defendant employed plaintiff to negotiate the exchange

of certain land owned by the defendant and promised to pay to the plaintiff a commission for such services when the latter had procured an acceptance in writing of defendant's offer of exchange; that the plaintiff procured such acceptance and defendant accepted all the terms and conditions of the proposed exchange. The answer set up special defenses pleading the confidential relationship between the plaintiff and defendant running over a period of years. It was alleged that prior to the execution of the written agreement the plaintiff and defendant had orally agreed that no commission would be due from defendant to the plaintiff unless the exchange of the lands was completed; that defendant, who was unable to read or write, relying upon the confidential relationship between the parties, did not ask to have the written contract read to him, but executed the same by inscribing his mark thereto at the special request of the plaintiff, and without knowing that the writing called upon him to pay the commission upon the plaintiff's procuring a written acceptance of his offer.

The trial court found that all the allegations covering these special defenses were untrue, and the only question upon this appeal is whether these findings are supported by the evidence. The defendant and appellant admitted upon the witness stand that no prior oral negotiations covering the payment of a commission were had. He testified that the respondent explained the terms of the agreement to him, and for that reason he did not request that the written instrument be read to him. Three witnesses called by the respondent testified that the written agreement was read to the appellant word for word before the appellant signed it, and that the matter of the payment of the commission was fully explained to him. There is no merit in the appeal.

Judgment affirmed.

We concur: KOFORD, P. J.; STURTEVANT, J.

202 Cal. 474

LAGOMARSINO v. MARKET ST. RY. CO.
et al. (S. F. 11645.)★

Supreme Court of California. Nov. 22, 1927.

Rehearing Denied Dec. 22, 1927.

1. Damages ☞131(4)—\$5,120.25 for concussion of brain and cranial fracture, producing eight months' deafness and dizziness, and for impaired strength, held not excessive.

\$5,120.25 damages for injuries causing severe cut, concussion of brain, cranial fracture, and deafness and dizziness for eight months' period, and loss of strength, from which plaintiff had not recovered at time of trial, held not so excessive as to show passion or prejudice of jury.

2. Street railroads ☞114(5, 13)—Finding of negligence and freedom from contributory negligence sustained by evidence as to injuries to occupant of truck colliding with street car.

In action by occupant in truck against street railroad for injuries resulting from collision with street car, claimed to be due to motorman's failure to keep lookout, jury's implied findings of defendant's negligence and plaintiff's freedom from contributory negligence held sustained by evidence.

3. Negligence ☞136(10)—Contributory negligence is for jury on conflicting evidence.

Issue of contributory negligence is for jury, when evidence thereon is conflicting.

4. Negligence ☞89(4)—Truck driver's negligence is not imputed to fellow servant riding with him.

Negligence of truck driver colliding with street car is not imputed to fellow servant riding with him.

5. Trial ☞233(2)—That jury did not hear complaint read does not establish that they were not aware of material issues alleged therein.

Fact that jury did not hear complaint read does not conclusively show that jury were not aware of material issues alleged therein.

6. Damages ☞143—In action for injuries, complaint alleging damages generally, except as to hospital and medical care, held sufficient.

Allegation of damages in complaint in general terms, except as to hospital and medical care, held sufficient in action for injuries.

7. Street railroads ☞113(2)—Ordinance requiring equipment of motor cars with sand boxes to facilitate stopping cars held admissible against street railroad.

In action against street railroad for injuries at crossing after hailstorm, admission in evidence of city ordinance requiring equipment of motor cars with sand boxes for use in stopping cars held not prejudicial, inasmuch as failure to equip particular car with boxes or to use sand therefrom in case equipment was furnished would tend to prove negligence.

8. Street railroads ☞113(5)—Permitting examination of motorman as to possible speed of street car held not error.

Where, in action against street railroad for injuries, it was claimed that motorman had vio-

lated speed limit as fixed by city ordinance, permitting lengthy examination of motorman as to speed which it was possible for similar street car to attain, held not error.

In Bank.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by J. L. Lagomarsino against the Market Street Railway Company and another. Judgment for plaintiff, and defendants appeal. Affirmed.

Wm. M. Abbott, K. W. Cannon, and Walter H. Linforth, all of San Francisco (Enid Childs, of Berkeley, of counsel), for appellants.

Ford, Johnson & Bourquin, and Ralph H. Lachmund, all of San Francisco, for respondent.

SEAWELL, J. [1, 2] This appeal is from a judgment in the sum of \$5,120.25 entered upon the verdict of a jury trying said cause against appellants and in favor of respondent on account of injuries and damages sustained by respondent as the proximate result of a collision between a heavy automobile truck owned and operated by the Shell Company of California, and upon which respondent, while engaged in the course of his employment, was seated by the side of the driver of said truck, and a street car operated by defendant corporation, which was in charge of appellant Harpe, the motorman.

The collision occurred at the intersection of Ninth avenue and Clement street, in the city and county of San Francisco, at about the hour of 11 o'clock a. m. on November 8, 1922. It was rather a dark day, and hail had fallen but a short time before the collision occurred. The street car was eastbound on Clement street, and the truck was northbound on Ninth avenue. The street car came to a stop at the Eleventh avenue intersection, but made no other interstreet stop, and at the time it reached the middle of the block bounded by Tenth and Ninth avenues, where it was first observed by plaintiff, it was moving at a rate of speed variously estimated from 17 to 30 miles an hour. It was the testimony of the plaintiff that the motorman was not looking ahead of the car, but was engaged in conversing with a person, standing by his side. The driver of the truck, upon observing the peril of the situation at a time when the street car was some distance from the point where the truck was crossing Clement street, blew a shrill whistle to engage the motorman's attention, but the motorman failed to arrest the momentum of said street car, and it struck the truck with violent force a few feet past its midsection, throwing both occupants of the truck to the ground with such force that respondent suffered concussion of

the brain, sustained a cranial fracture 4 inches in length on the right side of the head, and received a severe cut on the left ear. He was incapacitated for several months, and suffered from temporary deafness, dizziness, and loss of general strength for something like eight months. He had not at the time of the trial regained his former vigor, and, while given lighter work by his employer at the same salary which he formerly received, he was not fully restored to his former robust health. We have given consideration to the objection made to the amount of damages awarded, but we are not able to say as a matter of law that the verdict in that respect is the result of passion or prejudice. There is some evidence that respondent has suffered from recurrent headaches, dizziness, and other ailments since his injuries, which did not distress him before the collision. Under this state of the record we cannot disturb the jury's implied findings.

[3, 4] If it could be said that the driver of the truck was guilty of contributory negligence, and this we are not permitted to say in view of conflicting evidence on the point, the negligence of the fellow servant was not attributable to respondent. Neither do we find any error in the instructions which could have prejudiced the rights of appellants. The instructions fairly state the law of the case, and the jury must have believed appellants guilty of actionable negligence upon the evidence adduced upon the trial, and was not misled to its prejudice by any claimed uncertainty, or want of clarity, or incorrect statement of the law by the trial court.

[5-8] We think there is no substantial merit in the point that the jury was not informed as to the issues of the case. The fact that the jury did not hear the complaint read, as stated by the court in its offer to permit the jury to take into the jury room certain papers and exhibits, is not conclusive of the assumed fact that the jury was not aware of the material issues alleged therein. The court in its instructions sufficiently informed the jury as to the issues presented by the case. The complaint alleged damages, except as to hospital and medical care, in general terms. This is a sufficient pleading under the authorities in this class of cases. 8 Cal. Jur. 885 et seq. The admission in evidence of the ordinance of the city requiring motor cars to be equipped with a sand box containing sand at each end of the car, and so arranged as to release sand upon the rails as weather conditions required, was without prejudice under any phase of the case. If the car was equipped with sand appliances, and they were not used in bringing the car to a stop, such a failure might tend to establish negligence. On the other hand, if there were no such appliances, and the city ordinance required them, that, too, would be a circumstance for the jury to consider with reference to the ability of the

motorman to stop his car on a wet track within reasonable distances. We find no error in permitting a rather lengthy examination of the motorman as to the speed which it was possible for a car such as was in his charge to attain. One of the principal questions in the case was whether or not the motorman had violated the speed limit as fixed by the city ordinance, and the capability of the car, or a similar car to acquire speed had some relevancy to the position assumed by appellants on that issue. We find no reversible error in the record.

Judgment affirmed.

We concur: WASTE, C. J.; RICHARDS, J.; SHENK, J.; CURTIS, J.; PRESTON, J.

202 Cal. 454

FORD MOTOR CO. et al. v. INDUSTRIAL ACC. COMMISSION et al. (S. F. 12503.)★

Supreme Court of California. Nov. 18, 1927.

Rehearing Denied Dec. 15, 1927.

1. Master and servant ☞385(11)—In computing percentage of permanent disability caused by second injury, disability caused by first may not be deducted (Workmen's Compensation Insurance & Safety Act 1917, § 9[b] 2[10]).

Percentage of permanent disability caused by second compensable injury must be computed by Industrial Accident Commission without reference to previous injury or permanent disability caused thereby, and without deducting percentage of disability resulting from previous injury, under Workmen's Compensation Insurance and Safety Act (St. 1917, p. 839) § 9(b) 2(10).

2. Master and servant ☞417(7)—Industrial Accident Commission's finding of percentage of permanent disability is conclusive, if justified by any evidence.

Computation of percentage of permanent disability resulting from injury is matter within exclusive jurisdiction of Industrial Accident Commission, and its finding thereon may not be disturbed by Supreme Court, if there was any evidence before the Commission to justify it.

3. Master and servant ☞385(11)—"Average annual earnings" of employee sustaining second injury must be based on earning capacity in labor market, and not on wages received (Workmen's Compensation, Insurance & Safety Act 1917, § 9[b] 2[7], and §§ 11[f], 12).

In determining average annual earnings of employee sustaining second compensable injury for purpose of ascertaining proper compensation, average annual earnings at time of injury must be fixed at such sum as will reasonably represent his earning capacity if he were forced to compete in an open labor market, and it was improper to determine average annual earnings by amount of wages actually received when wages received exceeded this by generosity of employer under Workmen's Compensation, In-

insurance & Safety Act (St. 1917, pp. 837, 842) § 9(b) 2(7), and §§ 11(f) and 12.

In Bank.

Proceeding under the Workmen's Compensation Insurance & Safety Act of 1917 by William Shortall, employee, opposed by the Ford Motor Company, employer, and the General Accident, Fire & Life Assurance Corporation, insurer, and others. To review an order of the Industrial Accident Commission awarding compensation, the employer and the insurer apply for certiorari. Award annulled, and case remanded.

R. P. Wisecarver and Redman & Alexander, all of San Francisco, for petitioners.

G. C. Faulkner, of San Francisco, for respondent commission.

William F. Humphrey, of San Francisco, and Morgan J. Doyle, of Washington, D. C., for respondent William Shortall.

CURTIS, J. Proceedings in certiorari to review an award of the Industrial Accident Commission in favor of William Shortall, who was employed as a mechanic by the Ford Motor Company. While so employed, and on the 29th day of July, 1921, he sustained an injury to his back. This injury arose out of and in the course of his employment, and consisted of a fracture of the spine, with a series of sprained ligaments and membranes about the spine at or near its juncture with the sacrum. In proceedings instituted before the Industrial Accident Commission for an award for compensation for the injury thus sustained said commission found that he was permanently disabled as a result of said injury, and fixed the percentage of his disability at 80¾ per cent. Upon this finding an award against the United States Fidelity & Guaranty Company, the insurer of the Ford Motor Company, was made in favor of William Shortall in the sum of \$5,000, payable at the rate of \$20.83 per week from the date of the injury, exclusive of the waiting period, for the period of 240 weeks and thereafter the additional sum of \$6.55 per week during his lifetime. After sustaining this injury, he returned to the employ of the Ford Motor Company wearing a steel jacket to sustain his spine. His main work after his return was passing out tools over the counter. This was light work which he was able to perform in his disabled condition. The Ford Company, following a rule of re-employing its disabled employees, paid Shortall for these services after his return to its employ the same wages that it had paid him as a mechanic before his injury. On September 16, 1924, and during his employment after his return following the first injury, he sustained a second injury to his spine. This injury was caused by his attempt to move a counter, and resulted in again straining his spine at the point of its first injury. Thereupon

he filed a second application before the commission, and upon the hearing thereof the commission found:

"1. Applicant, William Shortall, on the 16th day of September, 1924, at San Francisco, California, while in the employ of the defendant, Ford Motor Company, at which time the employer was insured against liability under the Workmen's Compensation, Insurance and Safety Act of 1917, by the defendant, General Accident, Fire and Life Assurance Corporation, Ltd., sustained an injury arising out of and in the course of said employment, consisting of a strain of the back. * * *

"3. The employee had, prior to said injury, sustained a strain of the back, while in the employ of said defendant Ford Motor Company, on the 29th day of July, 1921, resulting in permanent disability amounting to 80¾ per cent. of total disability, for which, in proceeding numbered 11176 before this commission, an award was entered against the defendant United States Fidelity & Guaranty Company. As a combined result of said injuries, the employee now has a permanent disability, * * * amounting to 95¼ per cent. total disability, and entitling him to compensation from the defendant General Accident, Fire and Life Assurance Corporation, Ltd., at the rate of \$20.83 per week, for a period of 240 weeks, beginning with the eighth day after said injury of September 16, 1924, and thereafter at the rate of \$11.30 per week, during the remainder of the employee's life; amount accrued to January 25, 1927 (122 weeks), exclusive of the waiting period of seven days, is \$2,541.26; payments on account, \$280.30; balance due as of said date \$2,260.96. The foregoing benefit is based upon the maximum wage permitted by law as a basis for compensation."

This award was against the General Accident, Fire & Life Assurance Corporation, the insurer of the Ford Motor Company at the date of the second injury. The Ford Motor Company and the United States Fidelity & Guaranty Company, the insurer at the time of the first injury, were made parties to the second proceeding, as well as the first, but were relieved of all liability under the second award. After a denial of a petition for a rehearing by the commission, the Ford Motor Company and the General Accident, Fire & Life Assurance Corporation have by these proceedings brought the record of the commission to this court for review. Just what standing the Ford Motor Company has in this proceeding is not apparent, as the commission by its award relieved it of all liability thereunder. This fact is not of material importance, however, as all the questions pertinent to the issues here can be, and have been, raised by the General Accident, Fire & Life Assurance Corporation, who is a proper party hereto.

[1] Petitioners assail said award upon various grounds, the principal one being that the award is contrary to the provisions of the Workmen's Compensation Act. The proper designation of this act is "Workmen's Com-

pensation, Insurance and Safety Act of 1917" (Laws of 1917, p. 831). We will refer to it herein as the Workmen's Compensation Act. It is contended by petitioners that the commission found that Shortall, as a result of the two injuries, suffered a permanent disability amounting to 95¼ per cent. of total disability, and that, as it had previously found as a result of the first injury his permanent disability was 80¼ per cent. of total disability, the commission in effect awarded Shortall compensation based upon a 176 per cent. total disability. Petitioners further contend that Shortall as a result of the second injury, only sustained a 14½ per cent total disability, and that the commission should have taken this percentage of total disability as a basis, and, in connection with the wages he was receiving at the time of sustaining this second injury, made an award of compensation due him as a result of this second injury. As we understand the Workmen's Compensation Act, the commission was right in computing the percentage of total disability caused by the second injury without reference to any injury previously suffered or any permanent disability caused by the previous injury. We are in doubt, however, as to the correctness of the action of the commission in taking the wages Shortall was receiving at the time he sustained the second injury as a basis for awarding compensation for the latter injury. The sections of the Workmen's Compensation Act governing this matter are as follows:

Section 9(b) 2(7): "In determining the percentages of permanent disability, account shall be taken of the nature of the physical injury or disfigurement, the occupation of the injured employee, and his age at the time of such injury, consideration being given to the diminished ability of such injured employee to compete in an open labor market."

Section 9(b) 2(10): "The percentage of permanent disability caused by any injury shall be so computed as to cover the permanent disability caused by that particular injury without reference to any injury previously suffered or any permanent disability caused thereby."

Section 11 (f): "The fact that an employee has suffered a previous disability, or receives compensation therefor, shall not preclude him from compensation for a later injury, or his dependents from compensation for death resulting therefrom, but in determining compensation for the later injury, or death resulting therefrom, his average annual earnings shall be fixed at such sum as will reasonably represent his annual earning capacity at the time of the later injury."

[2] Section 9 (b) 2 (7), it is apparent, sets forth the matters to be taken into account and considered by the commission in determining generally the percentage of permanent disability caused by an injury without reference to whether such injury is the first or a subsequent injury. Section 9 (b) 2 (10), on the other hand, contains a direction for

computing the percentage of permanent disability caused by an injury after an injury previously suffered. By this provision the commission is directed to compute the percentage of permanent disability caused by any particular injury without reference to any injury previously suffered by said employee or without reference to any permanent disability caused by said previous injury. It would be a direct violation of said section of the statute, as construed by this court in *Liptak v. Industrial Accident Commission* (Cal. Sup.) 251 P. 635, for the commission in computing the percentage of permanent disability caused by the second injury to take into consideration any former injury of said employee and to deduct the percentage of disability caused thereby from the disability found to exist in the injured employee after sustaining the second injury. The commission, therefore, acted in accordance with the requirements of the Workmen's Compensation Act in computing the percentage of permanent disability sustained by reason of the second injury without reference to any former injury. In making this computation the commission fixed the percentage of permanent disability sustained by Shortall at 95¼ per cent. of total disability. This was a matter within the exclusive jurisdiction of the commission, and this court has no power to disturb such action provided there was any evidence before the commission to justify such a finding. It is not claimed by the petitioner that the evidence was insufficient if the above construction is given to section 9 (b) 2 (10).

[3] The commission, however, after fixing the percentage of permanent disability sustained by the employee after receiving the second injury, based the amount of compensation he was entitled to receive on account of such injury upon the wages he was receiving at the time of his second injury. That is, the commission took the amount of wages he was receiving at the time he received the second injury as a basis under section 12 of the act in determining his average annual earnings at that time. The evidence shows that both before and after the first injury the employee was receiving \$6.96 per day for six days per week, or \$41.76 per week. The commission on each occasion took the highest average weekly earnings, that is, \$31.05, permitted by section 12, in computing the average annual earnings of the employee. The evidence shows without conflict that the Ford Motor Company, the employer, in keeping with a rule adopted by it, had employed the injured employee after his first injury, and was employing him to do light work which he was able to perform in his injured state, and was paying him the same wages he received as a mechanic before he was injured on the first occasion. The commission, as we have seen, took the wages the injured em-

ployee was receiving at the time of his second injury as a basis for determining his compensation for the second injury. Ordinarily the compensation awarded to an injured employee would be computed with reference to the average weekly wages the injured employee was receiving at the time of sustaining an injury within the limitation fixed by section 12, but in our opinion the provisions of section 11 (f) must be taken into consideration by the commission in fixing the compensation for a second injury. This section prescribes the rule for fixing compensation in such cases. It is there provided that:

"The fact that an employee has suffered a previous disability, or receives compensation therefor, shall not preclude him from compensation for a later injury, or his dependents from compensation for death resulting therefrom, but in determining compensation for the later injury, or death resulting therefrom, his average annual earnings shall be fixed at such sum as will reasonably represent his annual earning capacity at the time of the later injury."

In determining the meaning of the words "annual earning capacity," as used in this section, reference must be made to section 9 (b) 2 (7), wherein it is provided that "consideration being given to the diminished ability of such injured employee to compete in an open labor market." Reading these two sections together, the meaning of section 11 (f) we think, is clear. Upon receiving a second injury, the injured employee's average annual earnings at the time he received such injury is to be fixed at such a sum as will reasonably represent his annual earning capacity as he is forced to compete in an open labor market after sustaining his first injury. As a rule, the commission may safely take the amount of wages which the injured employee was receiving at the time of sustaining his second injury as a basis for determining his annual earning capacity at that time. The facts produced before the commission, however, in this proceeding show that the commission should not have followed that course in fixing the compensation of the injured employee herein. The earnings received by Shortall at the time he received the second injury were not based upon his earning capacity in competition in an open labor market, but upon the wages paid him by a generous employer in compliance with its policy to re-employ and pay to its injured employees the same wages after an injury as were paid before said injury. In such a case, before the commission can determine the amount of compensation to which such an injured employee would be entitled, it must first comply with the provisions of section 11 (f) and fix his average annual earnings by the method provided therein. While the commission in computing the percentage of permanent disability caused by an injury must

do so without reference to any previous injury, yet in determining the compensation for a later injury no such restrictions are placed upon the commission. On the other hand, by section 11 (f) the commission is expressly directed to fix such compensation for a later injury upon the earning capacity of the injured employee at the time of such injury. After ascertaining his earnings by this process, and having determined the percentage of permanent disability in the manner in which we have already indicated, it is then merely a matter of mathematical computation to determine in conformity with other provisions of the act the amount of compensation the injured employee is entitled to receive for his second or later injury. Instead of adopting this method, the commission, after correctly determining the percentage of permanent disability, sustained by the injured employee by reason of his second injury, took the amount of wages the employee was receiving at the time as the basis of fixing the compensation for this injury. These wages, as we have already observed, were not paid on the basis of his earning capacity, but in compliance with a policy of his employer to re-employ injured employees at the same wages received by them before the injury. It is obvious that an employee who has sustained an injury causing a percentage of disability amounting to 80% per cent. of total disability has not, as a general rule, the same earning capacity after sustaining such an injury as he had before he was so injured. That is what we would expect generally. Of course, if the injured employee had rehabilitated himself after his injury so that his earning capacity after the injury was equal to that before the injury, then a different question would be presented. For illustration, if any employee was a machinist at the time of his first injury and as such was receiving machinist's wages, and compensation had been awarded him for such injury, but after such injury, he had made himself proficient as a telegrapher, and as a telegrapher he was able to command a salary equal to the wages he received before his injury, such an employee on receiving a second injury resulting in permanent disability would be entitled to receive compensation based upon the salary he received as a telegrapher within the limits fixed by section 12 of the act, if the commission should find that his earning capacity at the time of the second injury was equal to the salary received at that time. But we have no such a condition before us in the present proceeding. There is no showing that the injured employee had rehabilitated himself to any extent whatever after the first injury. In fact, all the evidence in the record is against any such inference. It became the duty, therefore, of the commission before awarding him compensation for his second injury, to fix his

average annual earnings based upon his annual earning capacity at the time of the second injury, and not upon the wages he was then receiving, and, upon the sum so fixed, and the percentage of permanent disability determined, compute the compensation due for the later injury. This the commission failed to do, and for this reason the award is illegal.

The award is annulled, and the case is remanded for further proceedings before the commission not inconsistent with this opinion.

We concur: WASTE, C. J.; SHENK, J.; RICHARDS, J.; SEAWELL, J.; LANGDON, J.; PRESTON, J.

202 Cal. 450

In re BACIGALUPI'S ESTATE.

ARATA v. CANALE et al. (S. F. 11964.)★

Supreme Court of California. Nov. 18, 1927.

Rehearing Denied Dec. 15, 1927.

1. Wills ⇨55(10)—Purpose of former testaments to distribute property equitably is of much weight on issue of disposing mind, where final will makes similar disposition.

Fact that dispositions in testatrix's final will showed continuity of purpose, running through all her former testaments, to distribute her property among numerous relations according to needs and claims of each on her bounty, is entitled to much weight in determining whether she was in possession of disposing mind in making final bequests.

2. Wills ⇨50—Final will, devising to principal beneficiaries same properties as prior wills, and differing therefrom only in joining additional residuary legatee, subject to precatory suggestions, held not void for mental unsoundness.

Final will, devising to testatrix's niece, as principal beneficiary, and her immediate family, same properties as by prior wills, and containing residuary clause differing from such wills only in joining close friend of testatrix and her deceased husband with such niece's son as legatee, subject to precatory suggestions as to use of properties bequeathed, held not void for mental unsoundness, though testatrix was old, feeble, and afflicted by fatal disorder at time of executing it.

3. Wills ⇨159—Will devising to principal beneficiary, attending testatrix in last years, less than former wills held not void for undue influence.

Will devising to testatrix's niece, who ministered to testatrix in her last helpless years, a lesser amount of estate than that given her by former wills, though more than shares of other relatives of same degree, held not void for undue influence by such niece.

4. Wills ⇨163(2)—Testatrix's friend held not to occupy confidential relation, raising presumption of undue influence.

An old and trusted friend of testatrix and her deceased husband held not to occupy such confidential relation toward her as to raise presumption of undue influence over her mind and purposes in making final will, joining him with son of testatrix's niece as residuary legatee.

5. Wills ⇨166(4)—Residuary legatee's procurement of his attorney to draw will held not to show undue influence.

That attorney, procured by one of two residuary legatees to draw final will, had acted as such legatee's attorney, held not to show undue influence over testatrix, where he was lawyer of high character, known to testatrix for 25 years, was not engaged in any substantial business for such legatee at time, and acted with scrupulous regard to testatrix's wishes, without slightest suggestion touching such legatee's interest.

6. Wills ⇨166(1)—Will joining 76 year old friend and niece's 24 year old son as residuary legatees, with precatory suggestion for distribution of fund, held not void for undue influence by such friend.

Will naming 76 year old man, who had been friend of testatrix and her deceased husband for many years, as joint residuary legatee with 24 year old son of testatrix's niece, subject to precatory suggestions, contained in abbreviated form in prior wills, that residuum be distributed among members of testatrix's family in need of relief at any future time, until exhaustion of fund, held not void for undue influence by such friend.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Frank H. Dunne, Judge.

Petition by Lino Arata to revoke the will of Angiola Bacigalupi, deceased, opposed by Dionisio Canale and others, proponents. From a judgment of nonsuit, petitioner appeals. Affirmed.

Herbert P. Welch, W. H. Morrissey, of San Francisco, and P. B. Lynch, of Vallejo (Brobeck, Phleger & Harrison, of San Francisco, of counsel), for appellant.

W. W. Sanderson, of San Francisco, for respondents.

RICHARDS, J. This is an appeal from a judgment of nonsuit upon the trial of a contest of the last will and testament of Angiola Bacigalupi, deceased. The contest of said will was instituted by Lino Arata, one of the nephews and heirs at law of said decedent, in the form of a petition to revoke the said will of the decedent, which had theretofore been admitted to probate. The contestant in his petition presented five grounds of contest: (1) That the instrument was a forged and pretended will. This ground was abandoned at the trial.

(2) That the testatrix was of unsound mind at the time of the making and execution of her said will. (3) That the will was not legally executed. This ground has been abandoned upon this appeal.

(4) That the will was the result of undue influence exercised over the testatrix by Antonio Nardini and Vittoria Canale, two of the beneficiaries under said will. (5) That the residuary clause in said will was void for certain alleged reasons affecting the precautionary trust provisions thereof. This ground of contest was withdrawn upon demurrer to said petition. The only two remaining grounds of contest urged upon the trial and upon this appeal were those of unsoundness of mind and undue influence.

Angiola Bacigalupi was a native of Italy, but came to California when a girl, and, marrying, lived in this state with her husband, Theodore Bacigalupi, for many years. Her husband died in the year 1915, leaving a considerable amount of community property to his widow, and which constituted her estate at the time of her death, in March, 1924, at the age of 74 years. Her children had died in infancy, and her surviving relatives consisted of an aged sister, since deceased, who lived in Italy; another sister, who was an inmate of the Stockton hospital for the insane; three children of her deceased sister Catharine De Martini; and eight children and grandchildren of her deceased sister Mary Arata. The contestant, her nephew, was one of the sons of the last-named sister of the testatrix. Practically all of the foregoing relatives or the families of them were mentioned by name and remembered in the aforesaid last will of the decedent. Angiola Bacigalupi had made and executed four wills since the death of her husband in 1915; one on April 4, 1916; one on April 10, 1919; one on January 12, 1922; and, lastly, the will under review, on December 10, 1923—all of which wills are embodied in the record upon this appeal. Each of the first three of these wills was prepared under her direction by W. W. Sanderson, Esq., who appears herein as the attorney of record for the respondents, and who also appeared and testified as a witness herein. The last of said wills was drawn by Joseph Cavagnaro, Esq., an Italian attorney of this city, whose standing at the bar and in public repute will hereinafter be adverted to. These four wills of the decedent were before the trial court, and the circumstances under which the first three of the decedent's said wills were drawn and the contents of each of these doubtless influenced in a large measure its conclusion in upholding the fourth and last will. In each of the three former wills of the decedent, drawn under her direction, and when she was unquestionably of sound and disposing mind, and when it is not pretended with any show of reason that she was acting under undue

influence, she displayed the same general purpose to distribute equitably her estate among her relatives which was evinced as the chief object of her last testament. A comparison of these several wills discloses the fact that, while different dispositions are made of portions of the testatrix's property to this or that one of her relatives, the families of these relatives share with quite remarkable equality in the properties or moneys directed to be distributed among them, or to particular members of them, by the terms of these several testaments. After the death of her husband, in the year 1915, and her succession to the common property of each, Mrs. Bacigalupi continued to reside in the family home at Union and Jones streets, in San Francisco. Her household consisted of her niece, Vittoria Canale, and one Antonio Nardini, who was, as it appears, an old friend of her husband and herself, a fellow countryman who had known them both intimately for half a century, and who had come to occupy their home with them in about the year 1906, after the earthquake and fire.

[1, 2] While the evidence discloses the fact that from time to time in the management of her considerable properties after the death of her husband she consulted and advised with Mr. Nardini, there is no evidence in the record that he exercised, or attempted to exercise, any influence whatever, and assuredly no undue influence, over her mind or purposes in the making of the first three of her several wills; nor is there any evidence whatever tending in any degree to show that the niece of Mrs. Bacigalupi, Vittoria Canale, exercised, or attempted to exercise, any such influence affecting the action or purposes of her aunt in the dispositions of her three former wills, except for the single fact that Vittoria Canale and her family were bequeathed a larger share in the estate of Mrs. Bacigalupi than were other members of the several families which were numbered among the latter's relatives, and this may be fully accounted for by the fact, as abundantly shown by the evidence, that it was Vittoria Canale who devoted herself to ministering to the personal needs and growing infirmities of her aunt as she approached the close of her life. During her later years Mrs. Bacigalupi had become much affected with that chronic malady known as Bright's disease, and which was finally the cause of her death. During the year 1923 she had become almost, if not entirely, blind (this being one of the effects of that disorder), and had come to realize that her end was near. It was while thus affected, and within about four months of her death, that the final will was drawn and executed; and it was out of the circumstances coincident with her growing infirmities, and particularly those immediately attending the drafting and execution of her final will, that the contestant herein has evoked the evi-

dence upon which he relies to sustain his contest of that will. His remaining grounds of contest are two; First, that of the testatrix's unsoundness of mind at the time of the execution of her said last will; second, that of the undue influence exerted over her by her niece, Vittoria Canale, and by her lifelong friend, Antonio Nardini. As to the first of these grounds of contest, we do not deem it necessary to review in anything of detail the evidence educed on behalf of the contestant. That this evidence shows that the testatrix was old and feeble and afflicted by her fatal disorder and its growing infirmities may be conceded; but a careful review of the evidence presented on behalf of the contestant shows no more, but, on the contrary, discloses that for a person in her blind and afflicted condition the testatrix exhibited a knowledge, not only of her own properties and affairs, but a familiarity with the affairs and conditions of her numerous relatives, entirely incompatible with any such a degree of mental incapacity as would serve to sustain a contest of her will upon that ground. The fact that her final will showed as to its dispositions a continuity of purpose running through all of her former testaments, and indicating a settled intent to distribute her property among her numerous relations according to the needs and claims of each upon her bounty, is entitled to much weight in determining whether or not the testatrix was in possession of a disposing mind in making her final bequests. *Estate of Perkins*, 195 Cal. 699, 708, 235 P. 45; *Estate of Shay*, 196 Cal. 355, 364, 237 P. 1079. This conclusion has especial significance when the fact is noted that it is against the clauses in said will wherein Vittoria Canale, the niece of the testatrix, is devised a larger and more valuable share of her aunt's estate than is given to others of her relatives of the same degree that this contest is directed. In that regard each of the four wills of the decedent manifest a settled purpose to bestow upon Vittoria Canale or her immediate family the very properties willed to her or them by the decedent's final testament; while as to the residuary clauses in the decedent's final will these only differ from the residuary clauses of the first will of the testatrix executed in the year 1916, in the fact that Antonio Nardini is in the last will joined with the son of Vittoria Canale in the bequests thereof, subject to the precatory suggestions of the giver as to the uses to be made of the properties embraced in said residuary bequest. We dismiss, therefore, without further comment, the charge of mental unsoundness in approving the ruling of the trial court upon this ground of contest.

[3] The second ground of contest, to wit, the ground of the undue influence of Vittoria Canale and Antonio Nardini, we regard as equally without merit. As to Vittoria Can-

ale, it may be stated without recapitulation of the evidence that by the terms of the decedent's last will she is to receive a lesser amount of the testatrix's estate than that accorded her by the provisions of the former wills and it is difficult, therefore, to perceive how her influence over the final purposes of the testatrix producing that result could be held to be either controlling or undue; this without regard to the utter flimsiness and lack of substance of the evidence of the contestant in attributing an evil motive to the ministrations of this faithful attendant upon the testatrix in her last helpless and afflicted years.

[4-6] As to the contestant's evidence touching the alleged undue influence of Antonio Nardini over the mind and purposes of the testatrix in the making of her final will, it should be noted that Antonio Nardini, though an old and trusted friend of both Angiola Bacigalupi and her deceased husband, does not come within the category of those who, by virtue of their relationship to a donor of property by deed or will, are held to occupy such a confidential relation which in and of itself would raise the presumption of undue influence. *Frantz v. Porter*, 132 Cal. 49, 64 P. 92; *Estate of Relph*, 192 Cal. 452, 221 P. 361; *Estate of Hinde* (Cal. Sup.) 254 P. 561. The evidence which the contestant offered in support of his claim of undue influence on the part of Antonio Nardini was almost wholly confined to the acts and conduct of Nardini in procuring the attendance upon Mrs. Bacigalupi of the attorney who prepared her final will. It is the claim of the contestant that in the procurement of the attorney in question to advise the former as to the terms of her will and to draw and bring about the execution thereof, Nardini was providing his attorney, who would act as such, and not as Mrs. Bacigalupi's independent legal advisor in connection with the making and execution of said will. The evidence utterly fails to sustain this contention. Mr. Joseph Cavagnaro was the attorney whose services were thus enlisted. Mr. Cavagnaro was and is an Italian attorney and counsellor at law of many years' practice in the city of San Francisco, and is admittedly a lawyer of high character, and held in much esteem among the people of his own nationality in said city. He had known, and doubtless been known by, Mrs. Bacigalupi for a quarter of a century. He had in other years acted for Mr. Nardini as his attorney, but was not engaged in any substantial business for him at the time his services were sought to draw the final will of Mrs. Bacigalupi; and no inference arises from the fact that he was so sought by Mr. Nardini, that in so acting he was acting as Nardini's attorney. On the contrary, the undisputed evidence in the case shows beyond any serious question that Mr. Cavagnaro acted as

the attorney and consellor of his client, Mrs. Bacigalupi, in the preparation and execution of her final will, and that in so doing he acted with scrupulous regard to the wishes of said client in the performance of his professional duties, and without the slightest suggestion touching the interest of Mr. Nardini in the premises. We therefore acquit Mr. Cavagnaro of any disloyalty to his client, Mrs. Bacigalupi, in the making and execution of her final will, and in so doing also acquit Mr. Nardini of the charge of undue influence in supplying the testatrix with a skillful and faithful legal advisor. But, aside from this contention, the case of the contestant completely breaks down when we come to consider the provisions of the decedent's will relating to the bequest to Mr. Nardini. By the residuary clause of the decedent's last will Antonio Nardini is not for the first time named as a beneficiary of the testatrix's bounty, since by the terms of the decedent's third will, executed in January, 1922, the residuum of her estate was bequeathed to the joint ownership of Nicolas Canale, son of Vittoria Canale, and Antonio Nardini, or to the survivor of them; and the final will of said deceased differs from this former will only in the greater particularity with which the precatory suggestions accompanying the bequest are set forth in the final will.

When the residuary clause in the decedent's final will is considered in the light of her three former wills, the striking fact is disclosed that the decedent's purpose in so disposing of the residuum of her estate was to provide a fund which would be available for distribution among members of her family who might be in need of relief at any future time and until the fund was exhausted. The first will of the decedent in giving the residuum to Vittoria Canale contained this precatory provision in abbreviated form; the second will varied its bequest, but retained its essential purpose; the third will returned to the substantial restatement of the terms of the first will in the foregoing regard, except that Nicolas Canale and Antonio Nardini were substituted for Vittoria Canale as the subjects of its benefit and burden. The fourth and last will further amplified the terms of the bequest, but did not change either its beneficiaries or its essential nature. The amount of property which would fall into this residuum varied under these several wills, and with reasons appearing for such variation which the contestant herein is in no position to criticize; but the substantial value of the residuum did not materially vary, nor did it constitute more than a minor portion of the decedent's estate. The main property which was left in this residuum by

the decedent's final will was a piece of so-called "oil land" in Kern county, of doubtful value, because of the fact that no oil has as yet been sought for or found therein. The claim of the contestant that Antonio Nardini's undue influence over the mind and action of the testatrix in making him a beneficiary of this bequest in the testatrix's final will is reduced to a minimum when it is found to be a substantial repetition of the like bequest in a former will, but it reaches the point of absurdity when two other facts indisputably appear. The first of these is the fact that the bequest is coupled with a precatory suggestion with relation to the disposition of this residuum which, while it does not amount to a trust, lays a moral obligation upon the donees which would, if fulfilled, render it more of a burden than a blessing, and with respect to which there is not a semblance of showing in this case that the donees will not fulfill. The relation of friendship, unbroken through many years, between Antonio Nardini and the testatrix and her predeceased husband, and apparently justified by his character, the relationship of blood existing between the testatrix and the other recipient in a co-ownership with Nardini of this donation, forbid the inference either that Nardini would prove faithless to the moral duty accompanying this residuary bequest or that he would be permitted to do so, even were he so minded, by Nicolas Canale, his co-owner therein, and without whose consent any breach of the precatory obligation would be impossible. Finally, the fact that Nardini was at the time of the making of this will of the age of 76 years or over, while his co-owner in the bequest is or was of about the age of 24, and will in all human probability in a short while at most be his survivor, renders impossible of conception the idea that Antonio Nardini would have engaged himself in the exercise of undue influence over the mind and will of the testatrix with the foregoing results in view. We are impelled from a reading of this entire record to the conclusion that the contestant's case at the close of his showing in support thereof had entirely failed in showing any substantial or even reasonable grounds of contest, and hence that the order of the trial court in granting the motion for a nonsuit was fully justified by the state of the evidence educed by the contestant himself.

The judgment, based upon such order, is therefore affirmed.

We concur: WASTE, C. J.; SEAWELL, J.; SHENK, J.; CURTIS, J.; PRESTON, J.; LANGDON, J.

202 Cal. 445

TASKER v. WARMER, Judge. (L. A. 9995.)

Supreme Court of California. Nov. 15, 1927.

1. Appeal and error ⇨657(1)—Appellate court, during pendency of appeal, may authorize temporary withdrawal of record for correction and amendment.

Appellate court, having jurisdiction of a record regularly on file, may properly authorize temporary withdrawal thereof at any time during pendency of appeal, so that same might be corrected and amended in conformity to direction of appellate court.

2. Appeal and error ⇨657(1)—Trial judge's refusal to permit correction of transcript which appellate court had permitted to be withdrawn for such purpose held erroneous.

Refusal of trial judge to grant motion for correction and certification of transcript, temporary withdrawal of which appellate court had authorized for such purpose, held improper.

3. Appeal and error ⇨607(1)—Insufficiency of request for transcript is not defect jurisdictional to appeal (Code Civ. Proc. §§ 953a-953c).

Insufficiency of application for transcript, in accordance with Code Civ. Proc. §§ 953a-953c, is not a defect which is jurisdictional to the appeal.

4. Appeal and error ⇨657(1)—One seeking amendment and certification of transcript cannot be held guilty of laches, where appellate court authorized withdrawal for such purpose.

Parties seeking amendment and certification of transcript cannot be held guilty of laches, where appellate court, during pendency of appeal, directed withdrawal and amendment of transcript.

5. Mandamus ⇨57(1)—Mandamus held proper to compel trial judge to permit amendment and certification of transcript which appellate court had permitted to be withdrawn for such purpose.

Where appellate court permitted temporary withdrawal of transcript for purpose of amendment and certification, trial judge was without discretion to refuse such certification and amendment on request, and mandamus may be properly issued to compel him to permit such amendment and certification.

In Bank.

Application by Barbara A. Tasker for a writ of mandate prayed to be directed to Benjamin F. Warmer, as Judge of the Superior Court of San Bernardino County, to require respondent to permit amendment of transcript and to further certify same. Writ granted.

Loewenthal, Lissner, Roth & Gunter, of Los Angeles, and Raymond E. Hodge, of San Bernardino, for petitioner.

W. F. Lewis and Swing & Wilson, of San Bernardino, for respondent.

PER CURIAM. This mandamus proceeding arose out of an action entitled *Tasker v. Cochrane*, wherein the petitioner, as plaintiff and assignee of a law firm, sought to recover attorney's fees for services alleged to have been rendered by her assignor. After trial of said action, the jury returned a verdict in favor of petitioner, and judgment was accordingly entered thereon. Upon motion duly made the respondent judge, who presided at the trial of said action, made an order granting to the defendant therein a new trial. From the order granting such new trial the petitioner in this proceeding prosecuted an appeal to this court. In her request for a transcript to be used upon said appeal it was asked "that a transcript of all pleadings in said action, and the testimony offered or taken, exhibits and evidence introduced, offered or received, and all rulings, instructions, acts, or statements of the court, also all objections or exceptions of counsel, and all matters to which the same relate, be made up and prepared in accordance with section 953a et seq. of the Code of Civil Procedure of California." Thereafter the clerk of the lower court prepared a transcript containing certain papers, and the reporter prepared a transcript of the proceedings upon the trial. The clerk's transcript was certified by the clerk, and the reporter's transcript was certified by both the reporter and the trial judge, and the same were thereupon filed in this court. Petitioner, as appellant, seasonably filed her opening brief upon the appeal, and the respondent therein filed her reply brief, wherein for the first time it was contended that certain of the papers included in the clerk's transcript were improperly placed therein, and were not, therefore, properly authenticated. Upon such objection being made, the appellant (petitioner) moved this court for an order allowing the withdrawal of the transcript to permit of its amendment so as to cause the matters erroneously set forth in the clerk's transcript to be inserted in the reporter's transcript and for a proper certification of the same as amended. The motion was granted, and it was ordered that the transcript might be withdrawn from the files of this court and returned to the clerk of the lower court for correction and proper certification. In accordance therewith, the transcript was withdrawn, and petitioner moved the respondent judge for an order directing the transfer of the papers erroneously included in the clerk's transcript to the reporter's transcript, and further moved said judge to certify to the latter transcript as amended. The respondent, upon the appeal, objected to the granting of said motion upon the ground that the original request for a transcript had not complied with the provisions of section 953a of the Code of Civil Procedure,

in that it was not sufficiently specific in its enumeration of the documents to be included therein. After hearing upon the motion, the trial court refused to cause the transfer of said papers to the proper transcript, or to further certify to the same. This proceeding in mandamus was thereupon instituted to compel such action upon the part of the lower court.

In support of the order refusing to cause the amendment and certification, as amended, of the reporter's transcript and in opposition to the issuance of a peremptory writ of mandate herein, the respondent judge urges that the time within which the trial court could have granted relief had expired; it being contended that a trial court is without power to cause the amendment of a record subsequent to the expiration of the six months' period prescribed by section 473 of the Code of Civil Procedure.

[1, 2] We have recently decided in the case of *McMahon v. Hamilton*, 260 P. 793, that an appellate court, having jurisdiction of a record regularly on file, may properly authorize the temporary withdrawal thereof at any time during the pendency of the appeal so that the same might be corrected and amended in conformity to the direction of the appellate court. It is therein pointed out that:

"In such a case we are not confronted with a want of power or jurisdiction in the trial court, assuming the six months' period to have expired, but rather with the inherent power of an appellate court to cause the amendment of a record before it so that the same might speak the truth. The trial court in such a case receives its power to act in the premises from the order of the appellate court."

Further, the opinion indicates that:

"It has repeatedly been held by this court that technical objections are not favored and that a record may and will, when necessary, be corrected unless a right of the adverse party is injuriously affected thereby. * * * Moreover, this court looks with favor upon an amendment the effect of which 'is simply to enable this court to review the decision of the lower court, in view of all the facts which that court had before it when it made such decision.' * * *"

The holding in the case referred to, in our opinion, offers the solution to the question presented in this proceeding, for this court, under the doctrine therein announced, could with propriety authorize and direct the withdrawal and amendment of the transcript here concerned. In view of this court's order, the trial judge, respondent here, should have granted the petitioner's motion for correction and certification of said transcript, and his refusal to do so was improper. To hold otherwise would be to nullify this inherent power of an appellate court to direct the

amendment of a record at any time pending the determination of an appeal prosecuted in good faith.

[3-5] Respondent, in support of his refusal to cause the amendment and certification of the transcript, also urges that petitioner's request therefor was insufficient, and that such defect is jurisdictional to the appeal. We cannot accede to this position. Petitioner's application to the clerk of the lower court for a transcript comprehensively requested that all of the proceedings had before the trial court be included therein. Any defects in this request for transcript cannot be said to be jurisdictional to the appeal. *Smith v. Jaccard*, 20 Cal. App. 287, 128 P. 1023, 1026. In denying a hearing in that case this court declared that the purpose of sections 953a, 953b, and 953c—

"is to provide a method of preparing the record or transcript to be filed in the proper appellate court in support of the appeal. None of the proceedings there prescribed are jurisdictional to the appeal.

"The appeal may be taken either in the manner provided by sections 940 and 941 of the Code of Civil Procedure, or in that provided by sections 941a, 941b and 941c of the Code of Civil Procedure. When properly taken by either method, the appellate court to which it is taken has jurisdiction of the appeal, even if no transcript on appeal is ever filed to support it. It may dismiss such appeal for delay in filing the transcript. But such dismissal will be a dismissal for want of diligence in prosecuting it, and not a dismissal for lack of jurisdiction of the appeal."

This court, having acquired jurisdiction of the appeal in the case of *Tasker v. Cochrane*, could at any time pending determination thereof properly direct the withdrawal and amendment of the transcript on file therein so that the same might present for review "the decision of the lower court in view of all the facts which that court had before it when it made such decision." This conclusion, of necessity, disposes of the respondent's further contention that petitioner herein "has been guilty of laches." Nor can we accept the contention of respondent to the effect "that the discretionary power of the trial court in the matter of the certification of transcripts cannot be controlled by mandamus." Under the circumstances here presented the respondent was without discretion in the premises, for it was incumbent upon him to give effect to the order of this court by causing the amendment and certification of the transcript as requested. Moreover, mandamus is available to require the judge below to certify to the correctness of the reporter's transcript. *Brown v. Superior Court*, 175 Cal. 141, 165 P. 429; *Going v. Guy*, 166 Cal. 279, 135 P. 1128; 2 Cal. Jur. 634, § 352.

Let a peremptory writ of mandate issue as prayed for.

202 Cal. 400

MARTELLO v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al.
(L. A. 9819.)

Supreme Court of California. Nov. 4, 1927.

1. Constitutional law ☞24—Judge pro tempore plan held amended out of Constitution by omitting it therefrom (Const. art. 6, § 8).

The judge pro tempore plan of Const. art. 6, § 8, and legislation in pursuance thereof (St. 1925, p. 1369), providing that parties to a controversy might select an attorney to hear and act upon their controversy, held amended out of the Constitution by *ex industria* omitting it therefrom upon amendment of such section.

2. Constitutional law ☞24—Amending judge pro tempore plan out of Constitution repealed, *eo instante*, statute based thereon, although repeal was not express (Const. art. 1, § 22; art. 6, § 8; art. 22, § 1; Code Civ. Proc. § 72).

Amending out of Const. art. 6, § 8, the judge pro tempore plan, providing for the selection by parties to a controversy of an attorney to hear their controversy as a judge, had the effect of repealing, *eo instante*, Code Civ. Proc. § 72, based upon the former constitutional provision and relative to the same subject, although the repeal was not express, in view of Const. art. 22, § 1, and article 1, § 22.

3. Constitutional law ☞140(1)—Rights of judge pro tempore and litigants held not contractual so as to make abolition of office an unconstitutional impairment of obligation (Const. U. S. art. 1, § 10; Const. Cal. art. 6, § 8).

Rights of a judge pro tempore and the parties to a controversy, who had, in pursuance of Const. Cal. art. 6, § 8, appointed an attorney to act as judge in their controversy, held not contract rights within the meaning of Const. U. S. art. 1, § 10, so as to make the abolition of the office of judge pro tempore by a state constitutional amendment an unconstitutional impairment of the obligation of a contract as to such judge and parties litigant.

4. Judges ☞25(2)—Judge pro tempore lost jurisdiction of cause submitted under parties' agreement when provision establishing office was repealed, and hence could not lawfully proceed to determine controversy (Const. art. 6, § 8; Code Civ. Proc. § 72).

Where the parties to a controversy had, in pursuance of Code Civ. Proc. § 72, enacted as permitted by Const. art. 6, § 8, selected an attorney to act as judge in their controversy, but such judge had not completed his work by serving defendant in such cause with the proposed findings of fact, conclusions of law, and proposed decision of the court prior to the amendment of Const. art. 6, § 8, abolishing judge pro tempore office (St. 1925, p. 1369), held that the instant the provision establishing the office was repealed such judge lost his jurisdiction of the cause, and hence could not lawfully proceed to determine the controversy.

5. Officers ☞4—Sovereign power creating public office may abolish it, although incumbent's tenure is thereby affected, in absence of constitutional restriction.

The sovereign power, which has created a public office, may abolish it, even though the tenure of an incumbent is affected thereby, unless restricted by the Constitution.

In Bank.

Application by Dave Martello for a writ of prohibition prayed to be directed to the Superior Court of the State of California in and for the County of Los Angeles and others. Writ granted.

Superseding opinion of the District Court of Appeal, 254 P. 658.

Faucett & Ring, of Los Angeles, for petitioner.

Max Schleimer, of Los Angeles, for respondent.

Overton, Lyman & Plumb and John De Ferie, all of Los Angeles, amici curiæ.

SEAWELL, J. This proceeding comes to us for decision by reason of an order made by this court granting petitioner a hearing herein after decision rendered by the District Court of Appeal denying petitioner's application for a peremptory writ of prohibition.

Prior to the adoption by the people, at the general election held in this state on November 2, 1926, of the constitutional amendments proposed by the state Legislature at its forty-sixth session relative to the judicial department (chapter 48, Stats. 1925, p. 1369), amending the state Constitution by adding to article 6 a new section, to be numbered 1a (creating a judicial council), and sections 6, 7, and 8, of said article, there was pending in the superior court of the county of Los Angeles an action entitled John A. Ranney, Plaintiff, v. Dave Martello et al., Defendants. By the stipulation of the parties to the action, R. E. Abbott, Esq., a duly and regularly licensed attorney at law, fully qualified to engage in the practice of the law in all the courts of this state, was named and agreed upon by said parties as a judge pro tempore to try said cause, and his action therein was to have the same effect as if he was a judge of said superior court. The stipulation was approved by an order duly made and entered by a judge of said superior court. The trial progressed to a stage whereupon, on October 19, 1926, said judge pro tempore directed respondent clerk of said superior court to make a minute entry in the records of said cause to the effect that judgment go for plaintiff in the sum of \$5,940 and for costs of suit. Nothing further was done than the entry of said minute order until December 4, 1926, on which day the attorneys for petitioner were served with proposed findings of fact, conclusions of law, and the proposed de-

cision of respondent court. It will be noted that the act creating a judicial council and adopting the constitutional amendments, whereby it is claimed all acts providing for the trial of causes by judges pro tempore were repealed, was ratified prior to the day upon which service of the findings of fact, conclusions of law, and proposed judgment was made upon petitioner's attorneys. If, therefore, an irreconcilable conflict arose as between said act and said amendments and any unrepealed statute which would have been sufficient authority for a continuance of the proceedings to a finality by the judge pro tempore but for said conflict, the constitutional amendments must prevail, provided they do not impair the obligation of a contract or deprive either of the parties litigant in the court below of property without due process of law or otherwise infringe upon some right protected by the federal Constitution.

To prevent said judge pro tempore from entering judgment as above indicated, petitioner prayed for the issuance of a peremptory writ of prohibition directed against said court and the judge and clerk of said court, claiming that said amendments, when ratified, eo instante abolished the office of judge pro tempore and withdrew from the judge the judicial authority which the law invested him with prior to the adoption of said amendments to the Constitution.

[1] The adoption of the judicial council plan introduced into our judicial system a new method of disposing of the judicial business of the state, which, in the language of the act creating it, was adopted "in the interest of *uniformity* and the *expedition* of business." (*Italics ours.*) One of its main purposes was to create an administrative judicial council or committee, of which the Chief Justice of the state Supreme Court is at the head, vested with authority to marshal the judicial forces of the state into a unified form in the interest of "improving the administration of justice." The old practice of a judge of the superior court of one county holding court for a judge of the superior court of another county at the request of the former was in practice a matter largely resting in judicial comity, and therefore was lacking in administrative cohesiveness which is essential for the accomplishment of a higher degree of efficiency. As a second and third part of the former plan, section 8, art. 6, before the amendments of 1926, provided that upon the request of the Governor of the state it became the duty of a judge of the superior court of any county to hold a superior court session for and in place of the duly elected judge in and for any other county of the state, and, finally, it was made permissible for parties litigant or their attorneys to stipulate that a cause in the superior court be tried by a judge pro tempore, who must be a

member of the bar, approved by the court. It is very clear that the former plan of judicial assignments, if it can be thus characterized, has been superseded by the judicial council plan. In fact, not a vestige of the old plan is to be found in the new. The former method of selecting judges pro tempore upon stipulation of parties litigant was patently repugnant both to the letter and spirit of the comprehensive plan devised by the Judicial Council Act for the assignment or rotation of judges to the several courts of the state as the judicial business of the state may require. This being so, one or the other must fall, and, under the well-recognized rule of construction, the latest expression of the people upon the subject must prevail. Clearly the provisions of section 72, Code of Civil Procedure, which are but a verbatim repetition of the permissive language of the Constitution as to the selection of judges pro tempore, cannot be harmonized with the evident purpose of the people as shown by the adoption of the more recent elaborate system for the expedition of judicial business. If the intent of the people to abolish the judge pro tempore plan could be said to be in doubt, by reason of a failure to abolish said plan by express language, such doubt is dispelled by the fact that section 8, art. 6, state Constitution, before amendment, contained the judge pro tempore provision, but no reference whatever was made to the trial of causes by a judge pro tempore in said amended section 8, art. 6. In short, the judge pro tempore plan was amended out of the Constitution by *ex industria* omitting it therefrom. The express provisions for trial of causes by a judge pro tempore in section 8 before amendment and its absence in the amendment, taken in connection with the object to be effectuated, leave no room to doubt that it was excluded *ex industria* by the framers of the constitutional amendments. *People v. Ah Chung*, 5 Cal. 103.

[2] It is urged as an argument entitled to grave consideration that, although the amendments to the Constitution omitted to re-establish judges pro tempore as a part of our judicial system, nevertheless the Legislature of 1927 did not repeal section 72, Code of Civil Procedure, which provides for the selection of judges pro tempore precisely as the Constitution did before its amendment, and hence we have a Code section authorizing the continuance of trial of causes by judges pro tempore. We think there is no argumentative force in this circumstance, in view of the rule of construction in case of conflicts that may arise as between statutory and constitutional authority. The supremacy of the Constitution over legislative enactments is expressed in general terms in article 22, § 1 thereof, wherein it is provided that "all laws which are inconsistent with this Constitution shall cease upon the adop-

tion thereof," etc., and of course all amendments made to the Constitution become a part of that instrument. If respondents' construction be the correct one, article 1, § 22, state Constitution, which provides that the provisions of the Constitution are *mandatory* and *prohibitory*, unless by express words they are declared to be otherwise, must be held, contrary to the rule of construction announced in the well-considered case of *People v. Wells*, 2 Cal. 198, and many others that have followed it, to have no application to the creation of our judicial department of government.

As to the application of the rules of express mention and implied exclusion, Mr. Sutherland (Lewis' Sutherland, Statutory Construction [2d Ed.] vol. 1, § 249) said:

"In the grants [of powers] and in the regulation of the mode of exercise, there is an implied negative; an implication that no other than the expressly granted power passes by the grant; that it is to be exercised only in the prescribed mode. Affirmative words may and often do imply a negative, not only of what is not affirmed, but of what has been previously affirmed, and as strongly as if expressed. An affirmative enactment of a new rule implies a negative of whatever is not included, or is different; and, if by the language used, a thing is limited to be done in a particular form or manner, it includes a negative that it shall not be done otherwise. An intention will not be ascribed to the lawmaking power to establish conflicting and hostile systems upon the same subject, or to leave in force provisions of law by which the later will of the Legislature may be thwarted and overthrown."

The circumstance that section 72, Code of Civil Procedure, remains unrepealed by express mention is without persuasive force since the language of the Constitution reforming our judicial system is clear and positive and its object manifest. Three, and only three, distinct methods are provided for the investment of judicial authority, to wit, by *election*, *appointment*, and *assignment*. Authorization by stipulation is not included in any one of the methods or systems above provided. "In construing a Constitution, resort may be had to the well-recognized rule of interpretation contained in the maxim, *Expressio unius, exclusio alterius est*; therefore the expression of one thing in a Constitution may necessarily involve the exclusion of other things not expressed." 5 Cal. Jur. 587. The fact that section 72, Code of Civil Procedure, was not expressly repealed by the Legislature is more consistent with the theory that it escaped the attention of the Legislature rather than that it was supposed to retain legislative life.

[3] We now come to the argument in support of the claim that, if the Judicial Council Act and said amendments of 1926 operated to terminate the powers of the judge pro tempore who had been selected and who had

entered upon the discharge of his duties prior to the adoption of said act and amendments, they are unconstitutional to the extent that they affect the parties litigant and the judge pro tempore as being violative of the Constitution of the United States (art. 1, § 10) which forbids the passage of laws impairing the obligation of contracts. This claim is based upon the proposition that the stipulation, which was but one of the necessary preliminary acts in the process of conferring jurisdiction upon or investing the person selected to try the cause with judicial authority, is a contract in the sense and meaning of contracts which vest property rights in the citizen and which are protected by constitutional guaranties. There is no ground to support the claim that any property right whatsoever inhered or vested in the judge or parties litigant by reason of their mutual participation in the formation of a tribunal which, but for the repealing constitutional provisions, would have had powers equal to those of a regularly constituted court in deciding the case proposed to be submitted to it. As was said in *Deupree v. Payne*, 197 Cal. 529, 241 P. 869, and supported by an ample array of cases decided by this court:

"It is well settled that there is no vested right in an incumbent to an office, nor any property right therein paramount to the public interest."

It must follow that the judge of a court specially created for public convenience holds his office by no firmer tenure nor has he any greater rights than one who is inducted into office by the usual and ordinary methods provided by law. *Graziani v. Denny*, 174 Cal. 176, 162 P. 397. For reasons equally cogent, resting upon considerations of public welfare, a party litigant can have no vested right to have his case tried and determined by any particular judge or court, howsoever constituted. The creation of courts of law is an affair of government, and may not be subordinated to private convenience or interest.

[4] In view of what has been said, section 72, Code of Civil Procedure, was repealed eo instante by necessary implication by the adoption of the Judicial Council Act and said constitutional amendments, and, inasmuch as no final judgment had then been rendered or entered by the judge pro tempore in the cause which he held under submission, he was divested of jurisdiction to thereafter render a judgment. The rule is thus stated in *Ball v. Tolman*, 135 Cal. 375, 67 P. 339, 87 Am. St. Rep. 110:

"It does not follow that jurisdiction once acquired always remains. A court or judge may have authority at one time to proceed, and his authority may afterwards be divested by statute. 'In all cases where a court is rendered incompetent to proceed, its proceedings during such incompetency are as invalid as though it had never possessed jurisdiction' (*Freeman on*

Void Sales, § 7; Freeman on Judgments, § 121); and this incompetency may arise from being deprived of jurisdiction of the subject-matter as well as of the person. * * * As all the proceedings subsequent to the repeal of the statute were without authority, execution was without authority, and all proceedings under it were void. Freeman on Judgments, § 117. * * *

Connolly v. Ashworth, 98 Cal. 205, 33 P. 60, announces a rule of law that has application to the instant case. In that case the trial court gave its written, signed decision, which was not filed with the clerk of the court until after the term of office of the judge had expired. In disposing of the question as to the validity of the judgment this court said:

"* * * It is clear that the trial of a cause by the court is not concluded until the decision is filed with the clerk; and, when the term of office of the judge who tried the case expires before such decision is filed, the fact that it was signed by him and ordered by his successor in office to be filed with the clerk, and was so filed, is not sufficient to sustain the judgment entered thereon. Hastings v. Hastings, 31 Cal. 95; Van Court v. Winterson, 61 Cal. 615; 2 Hayne on New Trial and Appeal, §§ 237, 246; Warring v. Freear, 64 Cal. 56 [28 P. 115]; Comstock Q. M. Co. v. Superior Court, 57 Cal. 625; Polhemus v. Carpenter, 42 Cal. 384; Anglo-Cal. Bank v. Mahoney [Mining Co.], 2 Pac. C. L. J. 128, U. S. Cir. Ct.; Mace v. O'Reilly, 70 Cal. 231 [11 P. 721]."

[5] It is well settled that the sovereign power which creates a public office may abolish it or change the tenure thereof, even though the tenure of an incumbent is affected thereby, unless restricted by the Constitution. Such offices are not held by contract or grant. Miller v. Kister, 68 Cal. 142, 8 P. 813. If the office be a constitutional office, as in the instant case, the constitutional power which created it may likewise, in the exercise of its sovereign power, abolish it. Every person who accepts an office does so with that implied understanding.

The office of judge pro tempore was made available to litigants by conforming to a prescribed procedure as a part of the judicial system of the state. The law was remedial in its operation. Persons who desired to avail themselves of the method of trying cases under the form provided by law were permitted to do so with the understanding that the sovereign power reserved to itself the right to amend or repeal the law at will in the interest of the general welfare.

The hardship and inconvenience which respondent may suffer by the unfortunate intervening circumstance of the instant case, while regrettable, are but incidents to the administration of the law under our system of government.

The office of judge pro tempore in the instant case having been abolished before the completion of the trial of the cause which he

had been authorized to try and determine, he is therefore divested of jurisdiction to further proceed in the trial and determination thereof.

The peremptory writ will therefore issue.

We concur: WASTE, C. J.; SHENK, J.; RICHARDS, J.; CURTIS, J.; PRESTON, J.; LANGDON, J.

88 Cal. App. 617

PEOPLE v. GEE DON YOW. (Cr. 1424.)★

District Court of Appeal, First District, Division 2, California. Nov. 8, 1927.

Hearing Denied by Supreme Court Jan. 5, 1928.

1. Poisons ⇨9—Evidence held to sustain conviction of fruit vendor under Poison Act, § 8.

In prosecution for violation of state Poison Act (Gen. Laws 1923, Act 5994, § 8), regulating sale of poisons, evidence held sufficient to sustain conviction of fruit vendor in lining of whose coat package was found containing can of morphine.

2. Poisons ⇨9—Evidence as to work done by fruit vendor, in whose coat morphine was found, held admissible (Poison Act, § 8).

In prosecution under state Poison Act (Gen. Laws 1923, Act 5994, § 8), regulating sale of poisons, evidence that fruit vendor, in lining of whose coat morphine was found, did manual labor in his store, made deliveries, and carried keys to particular house held admissible.

3. Witnesses ⇨277(4)—Cross-examination of defendant, who testified that he wore same coat on arrest as at trial, as to residence, doing of manual labor, and cleaning of clothes, held not error (Poison Act).

In prosecution under state Poison Act (Gen. Laws 1923, Act 5994) of fruit vendor, in lining of whose coat morphine can was found, cross-examination of defendant as to where he resided, whether he had his clothes cleaned, and did manual labor in his store, and as to number of deliveries made, and his presence at place of arrest, held not error, where defendant testified as to where he was going at time of arrest, and that coat which he wore at time of trial was same coat which he wore on night of arrest and at all times thereafter.

Appeal from Superior Court, City and County of San Francisco; James L. Allen, Judge.

Gee Don Yow was convicted of violation of the Poison Act, § 8, amended by St. 1919, p. 1276, and he appeals. Affirmed.

James M. Hanley, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Emery F. Mitchell, Deputy Atty. Gen., for the People.

STURTEVANT, J. The district attorney filed an information against the defendant, charging him with having violated section 8 of an act entitled "An act to regulate the sale of poisons in the state of California and pro-

viding a penalty for the violation thereof." Deering's Gen. Laws 1923, Act 5994. The defendant pleaded not guilty, and in the trial court a trial was had before the court sitting with a jury. The jury returned a verdict against the defendant, the defendant made a motion for a new trial, the motion was denied, and the defendant appealed from the judgment and order.

In the presentation of its case the prosecution called as witnesses a detective sergeant and two patrolmen, and by their testimony it produced evidence to the effect that in San Francisco, at about 11:30 p. m. on the night of the 28th day of January, 1927, on Jackson street, a short distance below the northeast corner of Trenton and Jackson, the police officers arrested the defendant; that at that place and immediately after the arrest they searched the defendant, and that in searching him they found between the outside and the lining of his coat, at a point near the middle of the back, a new original package containing a can of morphine. The officers retained the can and placed the defendant under arrest. The officers testified that just before the arrest they saw the defendant come out of Trenton and turn down Jackson on the north side.

After the prosecution had rested, the defendant took the stand in his own behalf. He testified that he was one of the partners operating a fruit store at 622 Jackson, that would be approximately three blocks lower down Jackson on the same side of the street on which he was arrested. He claimed that just before the arrest he had taken a package of fruit to deliver to a customer at 1013 Powell street; that on his return he was accompanied by two of his cousins; that as they proceeded along Powell to Pacific the defendant found the can of morphine which he thought to be pepper or mustard, and that he picked it up and put it in the pocket of his sweater and continued on his way; that on Pacific street the friends separated, and the defendant went to call on his friend Wong, who resided on the south line of Pacific, between Powell and Trenton; that he continued his trip by passing through Trenton, and turned down Jackson, when he was arrested.

At the time of his arrest he had in his pocket a bunch of keys. One of the keys fitted the lock at 134A Trenton. The defendant at the time of the trial testified that he never opened up the lining of his coat and afterwards sewed it up, and took off his coat and offered it in evidence and exhibited to the jury. He further testified that it was made to order for him, and exhibited the tag, "Brilliant Tailor Company, San Fran-

cisco, January 14, 1927." He did not, on his direct examination, testify as to where he resided. On cross-examination, over the objection and exception of the defendant, he was asked and required to answer questions: (1) Where did he reside? (2) Did he have keys to a house at 134A Trenton street in San Francisco? (3) Did he ever send a suit of clothes to the cleaners? (4) Did he do manual labor in his store? (5) How many deliveries per day did he make? (6) Why was he on Jackson street on the night of his arrest? (7) What personal property of his, if any, was kept at 134A Trenton street?

[1] The defendant earnestly contends that the prosecution was bound to plead and prove a "conscious possession." He contends that the evidence does not show such a possession. If the evidence given by the police officers was believed by the jury, it is perfectly clear that the jury was entitled to infer that the defendant's possession was quite conscious indeed.

[2] The record does not directly disclose that after his arrest the defendant was admitted to bail. However, it does disclose the fact that on the 10th day of May, several months after his arrest, and two months before the date of the trial, the defendant, two policemen, and Jung Shee were present. The jury might properly infer from that fact that the defendant was out on bail and continuing to transact the business of a fruit vendor. There was no reason to believe that the defendant necessarily wore all his wardrobe at the time of his arrest. It is but natural to believe that one's surplus clothes are at the place where he resides. If one does manual labor about a fruit store, that fact is certainly pertinent, as showing whether clothes have been soiled or otherwise. The number of deliveries which a vendor makes in person is pertinent to the same issue. If one has a key to a certain residence it is some evidence as to where his domicile is.

[3] Finally, all of these matters are pertinent as cross-examination, where a defendant, as did this defendant, testifies that he wore the same coat, which he had on his back at the time of the trial, on the night of his arrest and at all times thereafter until the date of the trial. In other words, all of the questions propounded to him and to which objection is now made were pertinent on the issue tendered by the defendant that he did not open the lining of his coat, and did not carry the can of morphine in the manner testified to by the police officers.

We find no error in the record. The judgment and order appealed from are affirmed.

We concur: KOFORD, P. J.; NOURSE, J.

86 Cal. App. 595

(261 P.)

WRIGHT v. FOREMAN et al. (Civ. 5975.)

District Court of Appeal, First District, Division 2, California. Nov. 5, 1927.

1. Evidence ⚡588—Jury determines truth of conflicting testimony.

Jury may accept evidence as true, though there is other testimony in case in absolute conflict therewith.

2. Municipal corporations ⚡706(5)—Jury's finding of automobile driver's negligence and pedestrian's freedom from contributory negligence held supported by evidence.

In action for injuries to pedestrian crossing at street intersection, evidence held to support jury's findings that automobile driver, driving in center or wrong side of street, was negligent, and that plaintiff was not guilty of contributory negligence.

3. Municipal corporations ⚡705(10)—Pedestrian, looking until reaching center of street, was not guilty of contributory negligence in failing to continue to look for vehicles.

Where pedestrian, immediately before starting to cross congested city street, looked to left to observe approaching vehicles, and continued to do so until she reached center of street, failure to continue to look to left thereafter was not contributory negligence, precluding recovery for injuries sustained when automobile driven from left proceeded along center or wrong side of street.

4. Municipal corporations ⚡705(10)—Pedestrian, crossing at intersection, is not required to anticipate automobile driver will overlap center and proceed on wrong side of street.

Under ordinary circumstances, pedestrian, crossing street at intersection, is not required to anticipate that driver of automobile over congested city street will overlap center of street and proceed upon wrong side of street, but has right to assume that driver under such circumstances will conform to customary traffic laws.

5. Trial ⚡191(7)—Explanation referring to instruction that plaintiff was not contributorily negligent in failing to look to left after reaching center of street held not erroneous as assuming disputed fact.

In automobile accident case, explanation that instruction on pedestrian's duty to protect herself from injury by approaching vehicles should be construed with previous instruction "that it was not contributory negligence not to look to her left after she reached the center of the street," held not erroneous as declaration that plaintiff had in fact reached center of street.

6. Appeal and error ⚡928(1)—Judgment will not be reversed on strained construction of court's charge.

Strained construction of court's charge will not be indulged to reverse judgment.

7. Appeal and error ⚡930(2)—Jury is presumed to have understood and followed instructions as whole.

It must be assumed that the jury understood and followed the instructions as a whole.

8. Trial ⚡285—Explanation reconciling preceding instructions held not to constitute part of court's charge.

In automobile accident case, explanation that instruction with regard to pedestrian's duties should be taken in connection with previous instruction, relieving pedestrian from contributory negligence in failing to look to left after reaching center of street, held not in itself to constitute part of court's charge.

9. Trial ⚡243—Explanation that instruction on pedestrian's duty to keep lookout should be construed with instruction relieving her from duty to look to left after crossing middle of street held not inconsistent with another instruction.

In automobile accident case, court's explanation that instruction relative to pedestrian's duty to protect herself from injuries by approaching vehicles while she was in position which might be perilous should be considered in connection with previous instruction, relieving pedestrian from looking to left after crossing middle of street, if explanation is considered as part of court's charge, held, nevertheless, not inconsistent with preceding instruction.

10. Appeal and error ⚡1033(5)—Appellant may not complain of conflict created by erroneous instruction which is favorable to him.

Where conflict in instructions is created by erroneous instruction favorable to appellant, appellant is not in position to complain of conflict.

11. Municipal corporations ⚡706(8)—Instruction that pedestrian, crossing intersection, must look for approaching vehicles while in position which might be perilous, held proper.

In action for injuries to pedestrian struck by automobile while crossing street intersection, instruction that duty to look for approaching vehicles was incumbent on plaintiff while she was in position which might be one of peril held merely to require that pedestrian look in direction whence peril may reasonably be expected, and therefore instruction was not erroneous.

Appeal from Superior Court, Los Angeles County; Victor R. McLucas, Judge.

Action by Florence Wright against L. O. Foreman and another. Judgment for plaintiff, and defendants appeal. Affirmed.

W. I. Gilbert, of Los Angeles, for appellants.

Black, Hammack & Black, of Los Angeles, for respondent.

THOMPSON, Justice pro tem. This is an appeal from a verdict awarding respondent \$1,500 damages for personal injuries sustained as a result of being struck by an automobile while walking across Eighth street in Los Angeles. Appellants claim that prejudicial error occurred in giving a certain instruction.

Respondent was employed as a saleswoman by the New York Cloak and Suit House at

Seventh street and Grand avenue in Los Angeles. At 5:15 o'clock p. m., August 9, 1922, she left her place of business, walking southerly along the easterly side of Grand avenue until she reached the nearest curb at Eighth street, which crossed Grand avenue at right angles. Here she stopped, looking easterly, to her left, for approaching machines. Double car tracks extend along Eighth street at this point. This street often contained heavy traffic with two or three machines sometimes traveling abreast. At this time, however, the nearest machines which were approaching on her side were half a block distant. She thereupon started directly across Eighth street in the usual pathway reserved for pedestrians. Upon reaching the center of the street she stopped, and looked to her right for approaching machines on the southerly side of the street. Just as she turned to look to her right, appellants' car, which was attempting to pass two other machines traveling westerly in the same direction, struck and knocked her down. She became senseless from the impact, and was carried to the sidewalk. Upon reviving she was taken in appellants' car to the hospital for treatment. Respondent was a heavy woman, weighing 180 pounds, and was greatly injured by her fall. While the car did not pass over her, she received numerous bruises and contusions about the hips, limbs, and body; her leg and back were injured. As a result, she was confined to her bed for several weeks in great pain, and was prevented from attending to her employment for a period of three months. She then returned to her work, and, after a brief service, was again compelled to lose several weeks on account of her injuries.

There was a sharp conflict as to whether appellants' machine struck the respondent at all. Two witnesses testified that it did not strike her, but that she stumbled on the car track and fell. However, respondent and one disinterested witness testified positively that the car did strike and knock her down.

It becomes important, in view of the giving of the challenged instruction, to consider whether the record furnishes evidence as to the exact position in the street which was occupied by the respondent at the time she was struck.

The respondent testified in part:

"I was walking on the east side of Grand avenue. When I got to the intersection, I looked to the east, which was my left. I didn't see any machine so close but that I could go over in safety. But, when I got to the center of the street, I looked to my right. * * * When I got to the center of the street, I was struck on the left side and knocked down. * * * When I was struck, I was in the center between the two car tracks. * * * I don't remember any of the cars. * * * There were cars coming from the east. * * * When I regained consciousness, there was a car partly across the street, on the center between the tracks.

There was an automobile that was across the tracks. * * * I don't say it was clear across on this side; it was half way across the street. I crossed right from the sidewalk, and it was half way across the street when it stopped. I know that the machine did not pass over me. I do not know how it got to that point. It was right in the center when I was struck. I was going south. * * * I know that the ordinary condition of that traffic is always two, and sometimes three, machines abreast. On this particular evening there were machines in sight, but not right close; they were a safe distance away. I couldn't say how far they were away; they were not quite half a block. * * * I stepped off the curbstone and walked right straight across. I saw these machines coming up there. I looked when I got to the center of the track; I looked to my right. I couldn't say how far these machines coming from the west were from me. I was watching them. I saw they were half a block away. * * * I saw two of them abreast, running side by side. * * * When I fell in the street, I was at the center between the car tracks. At the time I was struck, I was in motion. Just as I turned, I was struck. * * * Well, it (the machine) was across the crossing. * * * I was right opposite the sidewalk. * * * The machine was not sitting straight between the car tracks, either; it was sitting cross-ways—not exactly cross-ways, across the track—the front of it was across the tracks. Q. Was any portion of the automobile across this southerly car track? A. It was, at the center; and when I came to it was here (indicating)."

Myron Johnson testified:

"I was standing about 20 feet—when I saw these two cars coming abreast, and this third car whipped around endeavoring to pass the two cars, * * * and it hit her and knocked her down. * * * These two cars I speak of were traveling west on Eighth street. At the time I first saw Foreman's car strike Mrs. Wright, it was right here (indicating); the left wheel being in the center of the south car track. I mean the left front wheel was in the center of the south car track, passing over half of the intersection of the street. It stopped about five feet after they hit her. The car stayed here until they placed Mrs. Wright in the car to get her to a doctor. * * * The car hit her on the left side. She spun around and fell to the pavement. She did not stumble in any way. I did have a conversation with Mrs. Foreman; she said, 'This is a bad accident,' I said, 'Yes; if you had not tried to whip around on the south side of the track it would not have happened; you should not have been in such a hurry.' * * * I saw those two cars abreast. When she was struck, they were about eight or ten feet away from her. * * * The cars were traveling two abreast; the third car whipped around out to pass them."

[1, 2] The jury was entitled to accept this evidence as true, although there was testimony in absolute conflict therewith. This evidence therefore furnishes substantial proof to the effect that, after due precaution on the part of respondent, she crossed to the center of the street where she looked to her right for approaching cars on the opposite

side over which she was about to pass; and that, while appellants were endeavoring to pass upon the left of two other machines which were traveling abreast in the same direction, the left front wheel of their automobile crossed the center line of the street upon the wrong side, and was traveling about the center of the south car track, when respondent was struck and injured. In other words, there is substantial evidence that a portion of appellants' car was on the wrong side of the street at the time of the accident. Appellants denied negligence on their part, and relied upon alleged contributory negligence as a defense. Both of these issues were determined adversely to them by the jury. The evidence is ample to support these findings of the jury on both issues.

Among other instructions the court gave the following, which for the purpose of reference will be designated as (a), (b), and (c), the last of which is challenged by the appellants as erroneous:

(a) "You are further instructed that, if you should find from the evidence that the plaintiff, immediately before she started to cross the street, looked to her left to observe whether there were approaching vehicles, and continued looking to her left until she reached the center of the street, and if you further find that she had reached a place on the street where, if the defendant operated his machine in accordance with the provisions of the law, she would have been out of the danger zone, then the failure of plaintiff to continue to look to the left would not preclude a recovery, because of her right to rely upon the use of the street by the defendant Naron in a lawful manner, and of her right to expect the automobile to be at a place where under the law it had a right to be."

(b) "You are instructed that the duty of a pedestrian to look both ways upon a street does not necessarily cease when he or she steps from the curb to the street, but such duty was incumbent upon her in this case at all times while she was in a position which might be one of peril from vehicles approaching from either side, and this duty continued upon her until she was completely across the street. Therefore you are instructed that, if the plaintiff in this case entered upon the public street in question, and walked across said street from north to south thereof, it was her duty, while thus walking, to protect herself by maintaining a lookout to her right and to her left, to ascertain whether or not vehicles were approaching from either direction."

"This was a continual duty on her part to protect herself from injury by approaching vehicles, and, if she failed to exercise such care as above outlined, such failure on her part would be negligence, and, if this negligence contributed directly or proximately to the happening of the accident in any degree however slight, the plaintiff cannot recover, and your verdict will be for the defendants, notwithstanding the fact you may believe the defendants themselves were guilty of negligence."

(c) "This instruction is to be taken in connection with the one heretofore given, that the plaintiff, after she reached the center of the street, might assume, without contributory neg-

ligence on her part, that the defendant would not be approaching on the wrong side of the street; that is, that it was not contributory negligence on her part not to look to her left after she reached the center of the street. That instruction, I say, is to be taken in connection with this one."

Appellants contend that this final paragraph, designated (c), is erroneous, because (1) it is contradictory of the preceding instruction, and (2) that it invades the province of the jury by assuming that the respondent was struck by the automobile of the defendants while it was traveling on the wrong side of the street.

[3,4] The first instruction above quoted is a correct statement of the law under the facts of this case. Substantially the same instruction was approved in the case of *Mosso v. Stanton Co.*, 85 Wash. 499, 148 P. 594. Under ordinary circumstances, it is not contributory negligence for one to fail to anticipate that the driver of an automobile over a congested city street will overlap the center and proceed upon the wrong side of the street. In the exercise of ordinary care, under such circumstances as this case presents, a pedestrian has the right to expect the driver of an automobile to conform to the customary traffic laws. *Harris v. Johnson*, 174 Cal. 55, 161 P. 1155, L. R. A. 1917C, 477, Ann. Cas. 1918E, 560; *Averdieck v. Barris*, 63 Cal. App. 495, 218 P. 786; *Gornstein v. Priver*, 64 Cal. App. 249, 259, 221 P. 396.

[5-8] The appellants do not complain of any of the instructions given, except the explanatory paragraph above designated as (c). This does not purport to charge the jury as to the law, but the sole purpose of this explanation was to identify the former instruction (a), which, the court declared, must be read in connection with the instruction (b). In order to identify this instruction, the court said:

"This instruction is to be taken in connection with the one heretofore given, that the plaintiff, after she reached the center of the street, might assume," etc.

This is not a declaration that the plaintiff had in fact reached the center of the street. It may be reasonably construed to charge the jury that, if they should find that she had reached the center of the street, then plaintiff might assume "that the defendant would not be approaching on the wrong side of the street." A strained construction of the court's charge will not be indulged to upset a judgment. It must be assumed that the jury understood and followed the instructions as a whole. They had been previously directed that "the court cannot determine the facts, nor aid you in arriving at them. * * * You are the sole judges of the effect and value of the evidence." They were also specifically instructed as to the application of the traffic laws and the burden of proof. This explanatory paragraph should not be con-

strued as a part of the court's charge. Nor can it reasonably be said to infer that the respondent had in fact passed the center of the street at the time she was struck by appellants' automobile.

[9-11] Even though paragraph (c) be considered a part of the court's instructions, it is not inconsistent with the preceding instruction. In paragraph (b) the court had charged the jury that in crossing a street it was "the duty of a pedestrian to look both ways. * * * This (duty) does not necessarily cease when she steps from the curb to the street, but such duty was incumbent upon her in this case at all times while she was in a position which might be one of peril from vehicles approaching from either side, and this duty continued upon her until she was completely across the street. * * *" This was a mere declaration of the principle that in crossing a street a pedestrian must use due vigilance, even to the extent of looking both ways while she is in a position of peril. If this instruction is construed to mean that, regardless of the state of traffic, or the circumstances and conditions under which a pedestrian attempts to cross a street, she will be guilty of contributory negligence unless she constantly looks both right and left to anticipate the approach of vehicles traveling on the wrong side of the street, then it is not the law. Appellants may not complain of a conflict created by an erroneous instruction which is favorable to them. Strictly construed, however, this instruction means that a pedestrian must be vigilant and watchful, continuing to look in the direction whence peril may reasonably be expected. This is precisely what is said in the case of *Moss v. Boynton Co.*, 44 Cal. App. 474, 186 P. 631, upon which appellants rely. It was there said:

"It was a duty devolving upon plaintiff, as the act of an ordinarily prudent man, immediately before placing himself in a position of danger, to look in the direction from which danger was to be anticipated. This was a continuing duty, and was not met by looking once and then looking away again."

Nor is there anything in conflict with this declaration in the opinion of the court in the case of *Mayer v. Anderson*, 36 Cal. App. 740, 173 P. 174, which is cited by appellants. It is there said:

"When traffic upon the intersection above described was heavy (plaintiff), walked out upon the crossing looking straight ahead, without glancing to either side, and was absolutely oblivious to the proximity of the automobile right up to the moment of the impact, at which time he had traversed about three-quarters of the distance across the street. Plaintiff was bound to do more than to ascertain whether or not there was any obstruction in his immediate path. He was required to be alert and watchful, and to look up and down the street

in order to know whether approaching vehicles were likely to intercept his line of travel."

It does not appear from the facts in the *Mayer Case*, supra, that the plaintiff was struck by an automobile which was traveling in violation of the traffic laws on the wrong side of the street. Nor is it there asserted that a pedestrian must constantly look up and down a street regardless of conditions or location upon the thoroughfare, nor that he will be guilty of contributory negligence if he fails to anticipate the approach of machines on the wrong side of the street.

In the instant case, it appears that the respondent stopped before she attempted to cross Eighth street looking for approaching machines, when she observed that the nearest ones were half a block distant, she crossed to the center, looking to her left. Upon reaching the center of the street, she looked to her right for vehicles. This appears to have been a reasonable exercise of prudence on her part. Under full and fair instructions the jury so found.

The judgment is therefore affirmed.

We concur: KOFORD, P. J.; STURTEVANT, J.

86 Cal. App. 623

SYRETT v. STRICKLAND et ux.
(Civ. 5968.)

District Court of Appeal, First District, Division 2, California. Nov. 9, 1927.

1. Landlord and tenant $\S$ 195(1)—Where lessees, having paid rent to certain date, abandoned lease and premises, lessor had no further claim until that date.

Lessor's rights under lease for total of \$4,500 for five years, of which first month and last month were paid in advance, were measured by his contract, and, where lessees, having paid rent in advance up to November 15, 1924, repudiated and abandoned lease and premises, lessor had no further claim against lessees until November 15, 1924, and could not maintain action under complaint filed October 25, 1924, alleging that \$2,625 of total rent was yet unpaid.

2. Arrest $\S$ 35—Attachment $\S$ 119—Where complaint for damages for breach of lease was not good, writ of attachment and order for arrest fell with complaint.

Where complaint for damages for breach of lease contract alleging that defendants had abandoned lease and premises and were about to leave state was not good, writ of attachment and order for arrest fell with complaint.

Appeal from Superior Court, Los Angeles County; Guy R. Crump, Judge.

Action by Frank R. Syrett against J. C. Strickland and wife for damages for breach of lease contract. From a judgment dismissing plaintiff's action and from an order vacating an order of arrest of defendants and

an order dissolving an attachment, plaintiff appeals. Affirmed.

Fred C. Bigby, of Los Angeles, for appellant.

A. J. Getz, of Los Angeles, for respondents.

KING, Presiding Justice pro tem. This is an appeal by plaintiff from:

(1) A judgment sustaining a demurrer to plaintiff's amended complaint without leave to amend and dismissing the action.

(2) An order of the court, made as a special order after final judgment, vacating an order of arrest of the defendant J. C. Strickland.

(3) An order of the court dissolving an attachment.

The amended complaint states: That plaintiff and defendant entered into an agreement in writing whereby plaintiff leased to defendants certain premises under which defendants entered into possession. The lease is set out in full. That plaintiff made expensive alterations to the property which were suited to the purposes of the lease, but otherwise valueless. That prior to its termination defendants repudiated and abandoned the lease and premises, declaring they would not be bound by the lease, and that they would not pay the unpaid balance to become due nor keep possession of the premises, but avowed their intention of leaving the state and abandoning the lease and premises. That defendants had disposed of and concealed their property and were about to leave the state with intent to defraud the plaintiff out of his claim against them. That by reason of the breach of said lease plaintiff had been damaged.

The prayer is for damages in the amount yet unpaid on the lease and that defendant J. C. Strickland be adjudged guilty of fraud and held for bail for satisfaction of the judgment.

The lease is for a total of \$4,500 for 5 years, of which the first month and the last month were paid in advance. The complaint, filed October 25, 1924, alleges that \$2,625 of the total rental was yet unpaid, being payable at \$75 per month on the 15th of each month. It is apparent then that 25 months' rental had been paid, including the last month paid in advance, so that the rent was paid up to November 15, 1924.

[1] To this amended complaint the defendants demurred generally, and also on the ground of uncertainty, "in that it cannot be ascertained therefrom whether or not there is any rent now due and unpaid, and also that it cannot be ascertained therefrom whether or not defendants are now in the possession of the premises or in what manner they abandoned the same, or who is now in possession of said premises." The complaint is also charged to be ambiguous and unintelligible for the same reasons.

The demurrer was sustained without leave

to amend, and judgment of dismissal given. The court also rendered its orders vacating the arrest of the defendant J. C. Strickland and discharging certain property which had been attached.

Plaintiff's rights are measured by his contract with defendants. After receiving the last payment of \$75 which paid the rent up to November 15, 1924, he had no further claim against them till this date.

In the case of *Respini v. Porta*, 89 Cal. at page 466, 26 P. 967 (23 Am. St. Rep. 488), the court uses this language:

"We cannot support him (the plaintiff) in his contention that, because the defendant, against his (plaintiff's) wishes and without right, abandoned the property, he is entitled to recover the full amount provided for by the terms of the lease to defendant."

The decision then quotes section 3300, Civil Code, and continues:

"We think plaintiff's rights are measured by the provisions of this section, and not by section 3302 of the Civil Code."

In that case the conditions were quite similar to the case here. When plaintiff demanded payment of rent for an ensuing quarter as provided by the lease, "defendant replied that he had no more money, could not pay the rent, and was going to leave the place and give up everything."

Our Supreme Court says, in *Welcome v. Hess*, 90 Cal. at page 513, 27 P. 371 (25 Am. St. Rep. 145):

"The term is an estate in lands. The tenant, subject to the covenants of his lease, is the owner for the term. If he leaves the demised premises vacant, and avows his intention not to be bound by his lease, his title still continues, unless the landlord has accepted the offer of surrender. The landlord has no more right to the possession or to lease than a stranger. * * * The tenant cannot abandon his title; and, notwithstanding he has gone out, unless the surrender is accepted, that continues. It is his right to resume possession at any time during his term."

In the case of *Bradbury v. Higginson*, 162 Cal. 602, 123 P. 797, the court defines the rights of a landlord under similar conditions, saying:

"Where a lease is repudiated and the premises abandoned, the landlord may pursue one of two courses: He may rest upon his contract and sue his tenant as each installment of rent, or the whole thereof, becomes due; or he may take possession of the premises and recover damages, which damages will be the difference between what he may be able to rent the premises for and the price agreed to be paid under the lease. Where he sues for damages, he cannot in advance recover the full price to be paid for the unexpired term, but the amount of his recovery is limited as just indicated"—citing cases.

The affidavit for attachment which is before the court illustrates plaintiff's claim more fully. It recites:

"That the defendants herein are indebted to the plaintiff in the sum of \$2,625 * * * upon a written contract for the direct payment of money, to wit, rentals for leased lands under written lease," etc.

Similarly the affidavit for the arrest of one of the defendants states:

"The said defendant is indebted to plaintiff in the sum of \$2,625, * * * an unpaid balance on a written lease for premises of the plaintiff."

[2] Neither statement is true. The superior court correctly sustained the general demurrer and dismissed the action. The writ of attachment and the order for arrest fell with the complaint.

The judgment and accompanying orders are affirmed.

We concur: NOURSE, J.; STURTEVANT, J.

88 Cal. App. 671

PIGG v. INTERNATIONAL INDEMNITY CO.
(Civ. 5966.)★

District Court of Appeal, First District, Division 2, California. Nov. 14, 1927.

Hearing Denied by Supreme Court Jan. 12, 1928.

1. Insurance ⚡591½—Under statutory provision that injured person's personal representatives might sue Indemnity company after judgment against insured, insolvency of insured held unnecessary, notwithstanding policy read "insolvent" instead of "insured" (St. 1919, p. 776).

Under provision of indemnity insurance policy, required by St. 1919, p. 776, that the personal representatives of a person injured by a motor vehicle might bring action against the indemnity insurer after obtaining judgment against the insured, proof of insolvency of insured held unnecessary, notwithstanding policy read, "in case judgment shall be secured against such insolvent," instead of "against the insured," as statute required, since statutory provision was part of policy, and another policy provision incorporated any statutory provision at variance with any condition of the policy.

2. Insurance ⚡52(3)—Statute, requiring provision in indemnity policy enabling injured person's personal representatives to sue insurer after judgment against insured, held part of policy (St. 1919, p. 776).

St. 1919, p. 776, requiring provision in indemnity insurance policy enabling personal representatives of persons injured by motor vehicles to bring action against insurer after obtaining judgment against insured, held part of indemnity policy, and hence uncertainty in policy provision was resolved in favor of statutory requirements.

3. Executors and administrators ⚡49—Right to sue indemnity insurer after obtaining judgment against insured held property, which passed to injured person's executrix (St. 1919, p. 776).

Right of person injured by motor vehicle to bring action against indemnity insurer under St. 1919, p. 776, after obtaining judgment against the insured, held a property right, which passed to his executrix as an incident to the judgment.

4. Insurance ⚡665(3)—In action by injured person's executrix against indemnity insurer, evidence supported finding insured had not violated policy provisions requiring aid in defending suits (St. 1919, p. 776).

In action under St. 1919, p. 776, by executrix of person injured by motor vehicle against indemnity insurer, evidence held to support trial court's finding that the insured had not violated provision in the policy requiring that the insured should aid in securing information, evidence, and attendance of witnesses and co-operate in defending any claim or suit whenever required by the company.

5. Insurance ⚡530—Under Indemnity policy providing that Insurance company would pay \$5,000, costs, and interest, liability held not limited to \$5,000.

Under indemnity insurance policy providing that the company's liability should not exceed \$5,000 for damages for injuries to any one person, but also providing that company would pay all taxed costs and all interest accruing upon such part of such damages awarded by judgment as should not be in excess of \$5,000, company's liability held not limited to \$5,000, and judgment not exceeding \$5,000, plus costs plus interest, was authorized.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by Josephine C. Pigg, executrix of the estate of William R. Pigg, deceased, against International Indemnity Company. Judgment for plaintiff, and defendant appeals. Affirmed.

W. I. Gilbert, of Los Angeles, and Lasher B. Gallagher, of San Francisco, for appellant.

E. B. Drake, of Los Angeles, for respondent.

KOFORD, P. J. [1, 2] The deceased, William R. Pigg, was injured by a motor vehicle driven by T. Kunitake. The latter was insured against liability by the defendant and appellant. William R. Pigg recovered judgment against Kunitake for his injuries, and, the judgment remaining unpaid after the death of said Pigg, his executrix brought this action against the appellant under one of the provisions of the liability insurance policy sold to Kunitake. This provision was made in pursuance of an act of the Legislature. Stats. 1919, c. 367, p. 776. This statute requires such a liability policy to state that insolvency of the insured shall not release the

insurance carrier, and to state that, "in case judgment shall be secured against the insured * * * then an action may be brought against the company. * * *" In *Marple v. American Automobile Insurance Co.* (Cal. App.) 255 P. 260, we held that insolvency of the insured was not a condition to such action against the company, but that it was only necessary to obtain a judgment against the insured. In view of this authority, it is unnecessary for us to consider the appellant's claim that the evidence did not support the trial court's finding of the insolvency of the insured, based upon the return of an execution nulla bona.

The statute requires said policy to state, "in case judgment shall be secured against the insured * * * an action may be brought. * * *" The policy here used the expression, "in case judgment shall be secured against such insolvent" instead of against the insured. Whatever uncertainty this gives rise to must be resolved in favor of the statutory requirement because: First, another provision of the policy (section 14) expressly incorporates into the policy any specific statutory provision at variance with any condition of the policy; and, second, the statutory provision is a part of the policy. *Malmgren v. Southwestern Automobile Ins. Co.* (Cal. Sup.) 255 P. 512.

[3] Appellant also contends that, conceding an action might have been maintained by the injured person himself against the company upon the judgment, the language of the statute and policy upon this subject is such that an action could not be brought by his executrix—that this cause of action given by the policy and the statute is confined to those specifically named therein. The statute requires a provision "stating that in case judgment shall be secured against the insured in an action brought by the injured person or his heirs or personal representatives, in case death resulted from the accident, then an action may be brought against the company, on the policy and subject to its terms and limitations, by such injured person, his heirs or personal representatives as the case may be, to recover on said judgment." Appellant's argument seeks to confine this right of action to those directly injured; i. e., the one personally injured, or, in case of his death (caused by the injury insured against), then by his heirs or representatives as in an action for wrongful death. William Pigg's cause of action for personal injuries abated upon his death, but before his death he had obtained a judgment. At the time he obtained this judgment he also acquired, by the force of the statute and the policy, the right to bring an action against the insurance carrier. This right of action was an action upon a judgment—a contract, and not such a cause of action as abated upon his death. This cause of action was property. This

property passed to his personal representative like any other property or final judgment. The right to sue the insurance carrier upon the judgment was an incident to the judgment and passed along with that judgment to his estate as an asset thereof.

[4] Now this cause of action by the policy and the statute is said to be "subject to its (the policy's) terms and limitations." Appellant claimed and pleaded as a defense that the assured Kunitake violated section 6 of the policy. That section reads:

"Whenever required by the company, the insured shall aid in securing information and evidence and the attendance of witnesses, and shall co-operate with the company (except in a pecuniary way) in all matters which the company may deem necessary in the defense of any claim or suit or in the prosecution of any appeal."

The trial court, in finding No. 9, found this defense to be untrue. Appellant claims this finding to be unsupported by the evidence. This defense was based upon the information that the assured had gone to Japan and was not available at the time of the trial. He made a statement of the accident, however, to the insurance company's attorneys, delivered to them the summons and complaint, and verified the answer in the action. His statement included the statement that there were no witnesses. On March 24, 1921, the cause was set for trial for June 28, 1921. Appellant's attorneys made no effort to get in touch with the assured (defendant) until June 24, 1921; at that time and subsequently they mailed letters and notices to him which he did not receive. On the date set for trial, June 28, 1921, defendant's counsel (counsel for appellant here) appeared in court. He did not move for a continuance, but stated that he wished to withdraw from the case. This request was apparently allowed without notice to the defendant. The cause was then continued and transferred to another department of the court for a later hearing as upon default. Plaintiff's counsel served notice on defendant by leaving notice with the county clerk of the withdrawal of his attorney and the resetting of the cause for trial. All the intendments of the evidence are in favor of the finding of fact made by the trial court against this defense. We may not say that under this evidence the court was not justified in concluding that the assured was not sufficiently advised by those whom the insurance carrier had employed to make his defense; that his going to Japan was in ignorance of any necessity for his remaining here until the trial, or in ignorance of the date set for the trial, or due to failure of counsel to advise him that it was necessary to keep in touch with the attorneys.

[5] Appellant claims the judgment appealed from could in no event under the terms

of the policy exceed \$5,000. The judgment against Kunitake was filed July 14, 1921, and was for \$6,592.50 and \$32.90 costs. The judgment in this action was filed December 18, 1924, and was for \$6,229.20 and \$23.70 costs. This does not exceed \$5,000 of the original judgment, plus \$32.90 costs, plus interest on \$5,000 at 7 per cent. We think this is the correct amount under the terms of the policy. The company agreed to indemnify the insured up to an amount not exceeding \$10,000 for one accident—

"provided, however, that the company's liability shall in no event exceed \$5,000 for damages for such injuries to any one person. *And will in addition* (1) defend (certain suits); (2) pay (certain expenses)—(b) pay all taxed costs; (c) pay all interest accruing upon such part of such damages awarded by judgment as is not in excess of the company's limit of indemnity as above defined."

It is apparent from reading the foregoing excerpt from the policy that the company assumed a greater liability than \$5,000, for it is said that in addition to paying \$5,000 for damages for injuries it would pay costs and also interest on so much of the judgment for damages as did not exceed \$5,000.

The judgment is affirmed.

We concur: STURTEVANT, J.;
NOURSE, J.

86 Cal. App. 668

PENILLA et al. v. GERSTENKORN
(Civ. 3362.)

District Court of Appeal, Third District, California. Nov. 12, 1927.

1. Specific performance ⇨97(1)—Tenant was excused from formal tender of rent as condition precedent to specific performance, where it would have been refused.

Where facts showed that, if tenant had made tender of first six months to be paid at commencement of renewal term of lease, landlords would have refused it, tenant was excused from making a formal tender as condition precedent to an action for specific performance of renewal agreement of lease.

2. Specific performance ⇨28(2)—General covenant giving tenants right to renew lease held sufficiently certain to be enforceable.

Although covenant in lease for four years gave lessee right of renewing lease was general, it was sufficiently certain to be enforceable.

3. Landlord and tenant ⇨88(2)—General covenant to extend or renew implies additional term equal to first term on same terms except as to renewal.

A general covenant to extend or renew a lease implies additional term equal to first term and on same terms, including that of rent, except a covenant to renew.

4. Landlord and tenant ⇨85—Right of renewal constitutes part of tenant's interest, and, in absence of contrary covenant, may be assigned and enforced by assignee.

Right of renewing a lease by tenant constitutes part of his interest in land, and, in absence of covenant to contrary, may be sold and assigned by him, and benefit of such right may be enforced by his assignee.

5. Landlord and tenant ⇨86(1)—Where tenant had right to renew lease, fact that rental value of property had increased since time of first lease was immaterial.

Where covenant of lease for four years gave tenant right to renew lease, fact that rental value of premises had increased since time lease was executed was immaterial, since sufficiency of consideration for contract was determinable from facts existing when contract was made.

Appeal from Superior Court, Los Angeles County; Walton J. Wood, Judge.

Action by Constance M. Goytino Penilla and another against H. A. Gerstenkorn, for restitution of premises, in which defendant filed a cross-complaint for specific performance of lease contract. From a judgment for defendant, plaintiffs appeal. Affirmed.

R. C. Noleman, of Los Angeles, and A. C. McCall, of Alhambra, for appellants.

Griffith Jones and John J. Craig, both of Los Angeles, for respondent.

FINCH, P. J. February 20, 1919, the plaintiffs leased to M. A. Laffey and F. P. Casey, for the term of four years from that date, two vacant lots in the city of Los Angeles on which to maintain and operate an oil and gasoline service station. The lease, which contained no covenant against assignment, gave the lessees "the right of renewing this lease" at the end of the four years. During the year 1922 the defendant acquired the interests of the lessees under the lease and thereafter held possession of the property and conducted a service station thereon up to the time of the trial of this action. The plaintiffs, however, at all times refused to recognize the defendant as a tenant, and they accepted no rent from him. On their refusal to accept payment of rent from him, the defendant regularly, on the 20th of each month as provided in the lease, deposited the monthly rental in a Los Angeles bank to the credit of the plaintiffs. February 14, 1923, the defendant made demand upon the plaintiffs for a renewal of the lease for an additional term of four years. The plaintiffs refused to renew the lease, and on March 1, 1923, they commenced this action to recover possession of the premises. The defendant answered, setting up the foregoing facts as a defense, and, by way of cross-complaint for specific performance, he alleged the same facts and also that at

the time the lease was executed the reasonable rental value of the premises was not in excess of \$2.50 per month, and that the consideration for the lease was "fair and adequate" and "as to said plaintiffs just and reasonable." The court found the allegations of the answer and cross-complaint to be true, and entered judgment thereon requiring the plaintiffs to "make, execute, and deliver to the defendant * * * a lease of the property" for a term of four years from February 20, 1923, and containing the same terms as the original lease, except the provision for renewal, and that for the payment of the rent for the first six months at the time of the execution of the lease.

[1] The original lease provided for payment of rent at the rate of \$15 a month, that for the first six months to be paid at the commencement of the term. At the time the defendant demanded a renewal of the lease, he did not tender payment of rent in advance for the first six months of the new term. Appellants contend that, because of failure to make such tender, the defendant was not entitled to judgment for specific performance. It is apparent from the facts stated that such a tender would have been refused by the plaintiffs. For more than five months prior to the defendant's demand for a renewal of the lease they had refused to recognize him as a tenant or to accept payment of rent from him. This conduct excused him from making a formal tender as a condition precedent to an action for specific performance. *Buckmaster v. Bertram*, 186 Cal. 673, 678, 200 P. 610. The defendant continued to deposit the monthly installments of rent, as they became due, to the plaintiffs' credit up to the time judgment was entered, more than fifteen months after the end of the original term. The judgment requires that the amount of these deposits be applied in payment of the accrued rent. It thus appears that any tender of rent to the plaintiffs at the time of the demand for a renewal would have been an idle act, and that no different judgment could have been given if the rent in advance for the first six months of the new term had been tendered.

[2-5] While the covenant to renew is general, it is sufficiently certain to be enforceable. It does not, as appellants contend, purport to create a perpetuity, and the right of renewal, vested in the original lessees, was assignable. "A general covenant to extend or renew implies an additional term equal to the first, and upon the same terms, including that of rent, except the covenant to renew; to include which would make the lease perpetual." *Taylor's Landlord and Tenant*, § 332; 16 R. C. L. 887. "The right of renewal constitutes a part of the tenant's interest in the land, and, in the absence of a covenant to the contrary, may be sold and assigned by him, and the benefits of this right may be

enforced by the assignee." *Taylor's Landlord and Tenant*, § 332; *Standard Oil Co. v. Slye*, 164 Cal. 435, 442, 129 P. 589. There is testimony to the effect that at the time the lease was executed the reasonable rental value of the premises for a term of four years, with the privilege of a renewal for an additional term of four years, was \$15 a month, and the court so found. The rental value of the property has greatly increased since that time, but that fact is immaterial. "The sufficiency of consideration for a contract must be determined from the facts as they existed when the contract was made rather than by subsequent developments." 23 Cal. Jur. 444.

The judgment is affirmed.

We concur: HART, J.; PLUMMER, J.

FERGUSON v. KOCH. (Civ. 3253.)*

District Court of Appeal, Third District, California. Nov. 15, 1927.

Hearing Granted by Supreme Court Jan. 12, 1928.

1. Sales ⇨262—Trial court may consider circumstances, parties' relative position and knowledge, and whether buyer examining truck was misled, in determining whether he may claim breach of warranty.

In determining whether buyer, examining and accepting delivery of truck, is precluded from claiming breach of warranty, trial court has right to judge of circumstances attending sale, relative position and knowledge of parties, and whether buyer was in fact misled.

2. Appeal and error ⇨842(3)—Whether buyer was misled by false statements, notwithstanding independent investigation, held fact question for trial court, whose decision will not be disturbed.

Whether buyer was misled by seller's false statements as to nature and capacity of, and kind of motor in, truck purchased, notwithstanding fact that buyer made independent investigation, held a question of fact for trial court, whose decision will not be disturbed on appeal.

3. Sales ⇨266—Warranties of secondhand automobile made into truck must be held express.

Any warranties accompanying sale of secondhand automobile, made over into truck, must be held express, not implied, warranties.

4. Sales ⇨267—Buyer of used chassis "as is" held to have accepted it, as matter of law, without guaranties of kind, capacity, and motor model.

Purchaser of secondhand "chassis, year model 1916, as is," held to have accepted it, as matter of law, without guaranties that it was a "speed wagon" of 2½-ton capacity with same motor being put in new cars for 1925; "as is" meaning that buyer takes article with all its faults.

⇨For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Superseded by opinion of Supreme Court 268 P. 342.

5. Sales $\Rightarrow$ 38(4)—Contract deliberately reduced to writing, stating character of article sold without mistake or fraud, cannot be avoided for false representation of quality (Civ. Code, § 1625).

Contract, deliberately reduced to writing, stating character of article sold without mistake or fraud, cannot be avoided for false representation as to quality, completely ignored by vendee in written instrument, in view of Civ. Code, § 1625, though defrauded party cannot be deprived of right to prove fraud by simple device of written instrument.

Appeal from Superior Court, Yolo County;
W. A. Anderson, Judge.

Action on a conditional sales agreement by E. A. Ferguson against Fred Koch. Judgment for defendant, and plaintiff appeals. Reversed.

W. E. Davies, of Marysville, for appellant.
A. G. Bailey, of Woodland, for respondent.

WEYAND, Justice pro tem. The plaintiff, appellant herein, by written contract, sold to the defendant, respondent here, a Reo auto truck. The machine had been "made over" from an old Reo automobile of the touring car type. In the contract, however, the machine was not denominated a truck, but was referred to as a "Reo chassis." Before making the agreement of sale and purchase, the defendant made two examinations of the truck. One was made at plaintiff's place of business, and while the machine was stored there, and one examination was made after the car had been towed to defendant's place of business, some 40 miles distant. Upon the second examination, some parts of the engine were removed and the cylinders were examined. Thereupon a written agreement of sale and purchase was made out by the seller, and the same was signed by both parties to this action. This written agreement was in the following language:

"Robbins, Sutter Co., Dec. 14, 1925. This is to certify that E. A. Ferguson agrees to sell to Fred Koch, the following described property: One Reo chassis, year model 1916, as is. E. A. Ferguson, the sole legal owner of said Reo for several years past, agrees to give a clear title to said Reo, to Fred Koch, the buyer. The Reo chassis is sold as is, due to the fact that certain parts belonging to chassis are not attached thereto. E. A. Ferguson guarantees that a license for said Reo can be obtained. E. A. Ferguson, to the best of his knowledge, states that the motor of said Reo is in very good condition. [Here follow terms of sale, which are immaterial to this discussion.]

"[Signed] E. A. Ferguson.

"Fred Koch.

"Witness: J. Ponne."

The defendant failed to make the payments required by the agreement, and this suit followed.

Defendant by his answer alleged that the plaintiff made certain false and fraudulent representations to defendant, as to certain qualities of the truck. It is averred that the following representations were made: First, that the truck was a "Reo speed wagon"; second, that it was a 2½-ton truck, and would carry that weight; and, third, that it had the same motor in it that the Reo Company was then putting in the new cars for the year 1925.

Defendant further alleged that these represented qualities were the inducements that caused him to enter into the agreement of purchase; that soon thereafter defendant found that the said representations so made to him by plaintiff were false and untrue, and thereupon he immediately offered to return the truck to the plaintiff. Plaintiff denied these allegations of fraud.

Upon a trial of the issues thus presented, the court found the allegations of defendant's answer to be true, and gave judgment for the defendant.

Appellant contends that the decision of the lower court was erroneous for several reasons.

First. It is claimed that if the defendant, a man admittedly familiar with trucks generally, was given full and free opportunity to make an independent examination of the truck, and that if he did in fact make a full examination, and thereafter accepted the machine, he did so under the caveat emptor doctrine.

Secondly. Appellant contends that, as the machine was a "made-over" truck, reconstructed from an already used or secondhand car, it would have no warranties or warranties by implication, and that, if the contract of sale did express certain warranties, these warranties must be taken as the only warranties attending the sale. In this connection it is further claimed that, as the written agreement had therein the words "as is," referring to the condition of the car when sold, it must be interpreted as meaning that the buyer takes the truck with all its faults and imperfections.

The questions presented on this appeal are not easy of solution, owing to the fact that, as stated in many decisions and text-books, the decided cases are not easily harmonized.

[1, 2] Taking the question as to whether the defendant, having made an examination and thereupon accepting delivery of the car, is now precluded from claiming that the machine was wanting in some particular as warranted, we believe that, if we are to harmonize the decisions, we must do so upon the theory that the trial court has a right to judge of the circumstances attending the sale and of the relative position and knowledge of the two parties to the agreement and as to whether the buyer was in fact misled. It is plain that an expert on secondhand auto-

mobiles cannot be misled into accepting delivery of an automobile from one who knows nothing about a car. In such case it can make no difference what the seller says as to qualities possessed by the machine. On the other hand, a purchaser without mechanical knowledge has a right to rely upon what a skilled mechanic tells him. The trial court in the case at bar having heard all the testimony on this point, found that the defendant herein was misled by plaintiff's statements, notwithstanding the fact that defendant did make an independent investigation of the car. We cannot hold as a matter of law that, because defendant did make an independent investigation, he was not in some substantial measure misled by plaintiff's false statements. We think the evidence is sufficient, if believed by the trial court, to indicate that he might have relied much more on the statements of plaintiff, as to the qualities of the automobile, than he did on his own examination.

In the late case of *Mooney v. Cyriacks*, 185 Cal. 70, 195 P. 922, it was held that a purchaser is not estopped from claiming that false representations were made, because such purchaser made an independent investigation. However, in that particular case it appeared that the plaintiff was a woman, knowing almost nothing of the general qualities of automobiles, and it further appeared that particular representations, as to qualities very important to her, were so presented to her that even had she been quite an expert as to such machines, she might have been easily misled. The automobile in the *Mooney* Case had been run at least 10,000 miles. The speedometer thereon was by the seller fraudulently set back so as to indicate that the machine had been driven only some 900 miles, which last-named distance was the mileage the seller represented the machine had been driven. In addition to this, it appeared that the top of the automobile had been skillfully patched by the seller in a manner as to make it appear that the top was new.

It is therefore plain that in the *Mooney* Case the purchaser was, by fraud, prevented from making a fair inspection. *Williston on Sales*, § 208, says:

"There is no reason in the nature of things why a buyer should not rely both on the seller's statements and his own judgment."

The trial court, in the instant case, having determined that defendant was in fact misled, we will not disturb the decision because defendant did make his own examination of the automobile before the purchase.

We then come to the question as to whether or not the defendant herein should have been permitted to introduce any evidence as to fraudulent representations, under the circumstances attending the sale and as the same are affected by the written contract now before the court.

[3] The automobile was not only what is termed a secondhand car, but, to use the language of some of the witnesses, it was "made over" into a truck from an old 1916 Reo touring car. We cannot hold that it had any implied warranties under the circumstances. If warranties accompanied its transfer, they must be held to be express warranties of the seller. Of express warranties only does defendant complain.

[4] The written contract did not attempt to name it as a "truck"; it was described as a "Reo chassis, year model 1916, as is." There were certain express warranties in the sale and purchase agreement. That plaintiff would give a clear title, and would guarantee that a license could be obtained, were warranties clearly expressed. As to the quality of the motor the agreement says: The seller "to the best of his knowledge states that the motor of said Reo is in very good condition." No other warranties are expressed.

The agreement, however, does say that the truck is sold "as is." Just what these words imply has not been fully treated in the reports. We can find but one use of the expression in the reported cases. In *Schwartz v. Kohn* (Sup.) 155 N. Y. S. 547, it is used, but, as used there, no light is thrown on the real meaning of the expression. According to the use of the word, particularly in catalogues of secondhand books, furniture, or such like articles, its use implies that the buyer takes a chance in making the purchase. It seems to imply the thought that the buyer is taking delivery of goods in some way defective, and upon the express condition that he must trust to his own examination. The very words "as is," taking this contract as a whole, would cause a person to know that the seller meant to say to the buyer, "You look the article over, and, if you buy it, you do so at your risk." It means much the same as saying, "If you buy you take the article with all its faults." We believe that, as a matter of law, under the facts as this record shows them to be, the defendant must be held to have accepted this truck, without the guaranties of which he complains accompanying the transfer.

[5] He in no way pretends that he was misled into signing the agreement, except as to the prior fraudulent statements. His signature to the agreement was not obtained by fraud or artifice. All previous negotiations are presumed embodied in the writings. Section 1625, Civ. Code.

We believe the language used by the court in *Yuba Manufacturing Co. v. Stone*, 39 Cal. App., at page 447, 179 P. 421, clearly expresses the true rule that should be our guide. The decision just cited says:

"Manifestly the court, as far as possible, should protect an innocent party against the fraud of one seeking to take an unconscionable advantage, but in this class of cases, when the

parties have deliberately reduced their contract to writing, and have undertaken to set forth the character of the contrivance which is sold, and there is no mistake or fraud connected with the execution of said instrument, it is reasonable and in accordance with the law to hold that the contract shall not be avoided by reason of some false representation as to the quality of the machine, which representation the vendee has seen fit to completely ignore in the written instrument. It is true, of course, that a defrauded party cannot by the simple 'device of a written instrument' be deprived of the right to prove the fraud, but it is equally true that he cannot be permitted to nullify the rule in relation to written instruments by the specious claim that he was deceived by certain oral representations."

The judgment of the lower court is reversed.

We concur: HART, Acting P. J.; PLUMMER, J.

86 Cal. App. 700

SHUPE v. EVANS. (Civ. 4482.)

District Court of Appeal, Second District, Division 2, California. Nov. 15, 1927.

1. Judgment $\S$ 18(2)—Failure of complaint to state cause of action does not render judgment void.

Defect in failure of complaint to state facts sufficient to constitute cause of action was not one going to jurisdiction of court, and hence judgment was not void, and remedy of defendant was by appeal.

2. Judgment $\S$ 135—Relief from default judgment in unlawful detainer action may be had under either of two sections of Code of Civil Procedure (Code Civ. Proc. $\S\S$ 473, 1179).

Relief from default judgment in unlawful detainer action may be had either under Code Civ. Proc. $\S$ 473, or under section 1179, since relief granted by section 473 is in addition to, or cumulative of, that given by section 1179.

3. Judgment $\S$ 138(1)—Trial upon merits is to be had whenever possible.

A trial upon the merits is to be had whenever possible.

4. Appeal and error $\S$ 957(1)—Order setting aside default judgment will be affirmed, where sufficiency of showing was passed upon and no abuse of discretion is shown.

Order vacating default judgment will be affirmed, where trial court passed upon sufficiency of showing made by defendant and no abuse of discretion is either claimed or shown.

Appeal from Superior Court, Riverside County; G. R. Freeman, Judge.

Action in unlawful detainer by N. J. Shupe against Donald L. Evans. From an order setting aside default judgment, plaintiff appeals. Affirmed.

Hahn, Hahn & Landreth, of Pasadena, for appellant.

Sarau & Thompson, of Riverside, for respondent.

COLLIER, Justice pro tem. This is an unlawful detainer action. The chronology of the case is as follows: February 23, 1923, complaint in unlawful detainer filed and summons issued. February 24, 1923, complaint and summons served on defendant. February 28, 1923, default of defendant entered. March 3, 1923, trial had. March 3, 1923, findings and conclusions of law filed. March 5, 1923, judgment filed and entered. March 5, 1923, writ of possession issued. March 6, 1923, writ of possession served and satisfied. March 6, 1923, demurrer filed. March 12, 1923, demurrer dropped from calendar. March 18, 1923, notice of motion to set aside the judgment entered herein under section 473 of the Code of Civil Procedure. May 18, 1923, affidavits of Thompson and the defendant filed. May 18, 1923, proposed answer filed. June 11, 1923, order setting aside judgment entered. June 19, 1923, notice of appeal filed.

It will be noticed that the judgment was entered March 5, 1923; that the notice to set aside said judgment was not served or filed until May 18, 1923, or almost 2½ months after the entry of judgment; that the order setting aside said judgment was not entered until June 11, 1923, or over 3 months after default. The appeal is taken from the order setting aside said judgment of March 5, 1923. Appellant claims that section 473 of the Code of Civil Procedure does not apply to an unlawful detainer action, while section 1179 of the same code does govern.

Respondent controverts this position, and alleges, furthermore, that the complaint fails to state a cause of action in this: (1) That the lease provides that said defendant shall "keep all of said grounds in first-class condition, including the proper attention and irrigation of grapes, shrubs, grass, vines and any other plants or trees growing thereon, all in accordance with the directions of the" plaintiff; (2) that the alternative notice provided for in subdivision 3 of section 1161 of the Code of Civil Procedure was not served, and that service of such notice was jurisdictional.

We will not discuss the sufficiency of the complaint.

[1] The defect, if any there was, was not one going to the jurisdiction of the court, and hence the judgment was not void, and the remedy of the defendant was by appeal.

"But this was not a defect going to the jurisdiction of the superior court, and the judgment in respect thereto was not void. The complaint sought this very relief, and the court erroneously concluded that the plaintiff in that action was entitled to this relief as against petitioner. It is thoroughly settled in this state that the failure of a complaint to state facts

sufficient to constitute a cause of action does not render a judgment void. The court had full jurisdiction of the subject-matter of the action, and, by reason of personal service on petitioner, full jurisdiction of the person of the defendant as to all the matters tendered by the complaint. (See *Crouch v. H. L. Miller & Co.*, 169 Cal. 341 [146 P. 880], and cases therein cited.) The remedy of the petitioner, who must be held to have been perfectly advised of the claim of the plaintiff in that action, as stated in his complaint, was to contest that claim in the trial court, or on appeal from that judgment." *Gillespie v. Fender*, 180 Cal. 202, 203, 180 P. 332.

[2] We will now discuss and consider the order of the court vacating the judgment of March 5, 1923. It is not claimed by appellant that the trial judge abused his discretion in making said order, but the sole point raised is that section 1179 of the Code of Civil Procedure governs, and is the only remedy of respondent, and that section 473 has no application to cases in unlawful detainer.

No cases have been cited by either counsel, and we know of none, where section 473 has been applied to unlawful detainer cases; but it has been used in various special proceedings, such as claim and delivery (*Bonestell v. Western Auto-Motive Finance Corp.*, 69 Cal. App. 719, 323 P. 734); mandamus (*Lapique v. Superior Court*, 40 Cal. App. 582, 181 P. 227, where the court indulges in some obiter dicta at page 584 [181 P. 228]); *Torrens* title proceedings (*Beggs v. Riordan*, 44 Cal. App. 230, 186 P. 187); quiet title proceedings (*Schaefer v. Dinwiddie*, 44 Cal. App. 405, 186 P. 617); red light abatement (*People v. Gifford*, 54 Cal. App. 182, 201 P. 469); quiet title, under *McEnerney Act* (St. 1906 [Ex. Sess.] p. 78) (*Cresta v. Ocean Shore Railroad Co.*, 56 Cal. App. 687, 206 P. 460); criminal cases (*People v. Mahach*, 60 Cal. App. 635, 213 P. 539); partition proceedings (*Chavez v. Scully*, 69 Cal. App. 633, 232 P. 165), and adoption proceedings (In re *De Leon*, 70 Cal. App. 1, 232 P. 738).

It is thus seen that section 473 is of very wide application.

Furthermore, a consideration of the two sections leads us to disagree with appellant's contention. Section 1179 of the Code of Civil Procedure provides that: "The court may relieve a tenant against a forfeiture of a lease, * * * in case of hardship, where application for such relief is made within thirty days," etc. It will be observed that no mention is made of "mistake, inadvertence, surprise or excusable neglect." If appellant's contention were correct neither party would be entitled to relief in case of mistake, inadvertence, surprise, or excusable neglect, no matter how meritorious the application might be. Again, section 473 is purely procedural, while section 1179 deals more with substantive law mixed with procedure.

Again, section 1179 deals with an entirely different situation than section 473. Under section 1179 the application may be made by the defendant (the tenant), and also by either "a * * * subtenant, * * * mortgagee, * * * or any person interested in the continuance of the term," whether parties to the action or not, while section 473 is limited to the parties themselves or their legal representatives.

Hence, we are of opinion that the relief granted by section 473 is in addition to, or cumulative of, that given by section 1179.

[3] The appellate courts of the state have decided so many times that a trial upon the merits is to be had wherever possible that no citation of authorities is necessary.

[4] The trial court having passed upon the sufficiency of the showing made by the defendant to be relieved from the default judgment and no abuse of discretion being either claimed or shown by the record, the order vacating the judgment of March 5, 1923, is affirmed.

We concur: CRAIG, Acting P. J.; THOMPSON, J.

GROENEVELD v. DELOZIER et al.
(Civ. 5970.)

86 Cal. App. 640

District Court of Appeal, First District, Division 2, California. Nov. 10, 1927.

1. Sales $\S$ 411—Complaint alleging defendants' agreement to sell cattle and dairy equipment, performance by plaintiff, and defendant's breach, held to state cause of action.

Complaint alleging contract under which defendants agreed to sell cattle and dairy equipment to plaintiff, price therefor being payable in installments, payment of part of price by plaintiff, and entry into possession, and breach of agreement by defendants, held to state cause of action.

2. Trover and conversion $\S$ 32(1)—Complaint alleging defendants converted cattle and dairy equipment sold to plaintiff held to state cause of action.

Complaint alleging purchase by plaintiff of cattle and dairy equipment, payment of part of price therefor, and entry into possession, and that defendants breached contract and unlawfully converted cattle and chattels to their own use, held to state cause of action for conversion.

3. Sales $\S$ 417—Finding that buyer of cattle and dairy equipment was damaged in sum paid to apply on contract price held sustained by evidence.

Where contract for sale of cattle and dairy equipment for named price was breached by defendant, finding that plaintiff was damaged in sum of first installment paid was sustained by evidence that he took possession of personal property and during his absence thereafter, before second payment became due, defendants contracted to sell property to third person,

whom plaintiff found in possession when he returned.

4. Evidence $\Rightarrow$ 258(1) — Excluding testimony that woman accompanying buyer notified defendants cattle purchased were abandoned and asking them to take charge held proper, where her agency for buyer was not shown.

In action for breach of contract to sell cattle and dairy equipment and for conversion of cattle by sellers thereof after breach, excluding sellers' offer of testimony to show that woman present with buyer when sale was made had notified defendants that cattle were abandoned and had asked them to take charge held proper, where her agency for plaintiff was not shown.

5. Sales $\Rightarrow$ 417—Evidence held not to show buyer of cattle and dairy equipment breached contract to care for cattle and keep feed bills paid.

Evidence that buyer of cattle and dairy equipment employed same dairyman employed by sellers and had sufficient feed on hand to feed stock held not to show he breached contract requiring him to care for stock in dairymanlike manner and keep feed and expense bills paid.

6. Sales $\Rightarrow$ 185—Seller having breached contract to sell cattle and dairy equipment before date installment became due, buyer was not required to tender payment.

Where seller of cattle and dairy equipment breached contract for sale of cattle before second installment became due, buyer was not required to tender such payment.

Appeal from Superior Court, Los Angeles County; Walter Guerin, Judge.

Action by M. Groeneveld against J. G. Delozier and another. From a judgment for plaintiff, defendants appeal. Affirmed.

J. E. Hannon, of Los Angeles, for appellants.

Claude A. Shutt, of Los Angeles, for respondent.

KING, Presiding Justice pro tem. Appeal from judgment for plaintiff for \$1,000. The verified complaint alleges:

I. A written contract dated July 30, 1923, by which defendants agreed to sell plaintiff certain cattle and dairy equipment for \$5,000, payable \$100 down, \$900 July 31, 1923, \$1,000 on or before 90 days, \$75 August 16, 1923, and other later payments, with interest on deferred payments payable monthly. The contract recites that, "as there is a mortgage now against the cows, these payments are to be applied on it" until the defendants "take same up." It is contracted that the stock and increase are to remain on the ranch "where now located" until paid for. Plaintiff was "granted the use of the corrals and barns," etc. Appellants agreed to erect a three-room cottage for the milkers and make other specified improvements. It was also

provided that, if plaintiff "fails to meet his payments as they become due, then he forfeits all money paid and his interest in said cattle reverts," etc., "at their option." The agreement provides that plaintiff was to care for said stock "in a dairymanlike manner" and to keep feed and expense bills paid.

II. That plaintiff entered into possession of the property July 31, 1923, and on August 9, 1923, defendants dispossessed him.

III. That defendants did not apply the payments to the mortgage nor build the cottage.

IV. That plaintiff has performed all obligations, etc., "except those he was prevented from performing by defendants."

V. That plaintiff has paid \$1,000, that \$1,500 is the reasonable increase in value of said cattle—and plaintiff is damaged \$2,500.

A second cause of action along similar lines alleges that "defendants unlawfully took, converted, and disposed of said cattle and chattels to their own use to the damage of plaintiff in the sum of \$2,500." He prays for \$2,500.

A general and special demurrer was overruled.

The answer denies "that defendants, or either of them, dispossessed plaintiff of any cattle or chattels contrary to the terms of their agreement or otherwise." It alleges that defendants were at all times ready, able, and willing to apply all payments to erect a cottage, but "plaintiff violated his said contract and terminated the same without having requested or desired the making of any said payment or the erection of any said house."

As to the second cause of action, defendants "deny that on the 9th day of August, 1923, or at any other time when any act was done by either of the defendants with relation to any of said cattle or chattels, the plaintiff was lawfully possessed or possessed of any of said cattle or chattels, his property, or that any of said cattle and chattels was at said time or ever the property of plaintiff"; and "deny that the defendants or either of them, ever unlawfully took or converted or disposed of any of said cattle or chattels to their own use or otherwise as alleged in said amended complaint or otherwise."

The court found:

- (1) That the contract was made as alleged.
- (2) That plaintiff paid the \$100 and the \$900 due July 31, 1923.
- (3) That plaintiff entered into possession July 31, 1923, and on August 9, 1923, defendants dispossessed him.
- (4) That plaintiff performed all conditions and obligations, etc., as set forth in the contract up to and including August 9, 1923.
- (5) "By reason of the failure of defendants to perform its conditions and obligations agreed by them to be performed, plaintiff has

been damaged in the sum of" \$1,000 and interest from July 31, 1923.

A motion for new trial was denied.

Plaintiff testified that defendant Colvin took him to the premises and introduced him to Hardy, a milker then in the employ of defendants, and whom plaintiff then hired and placed in charge. Plaintiff then left. He came back August 7th; Hardy being still in charge. He returned August 16th with one Vanderveen, described as "really the prospective buyer" to "turn the keys over to him." He found S. B. Jones in possession. Jones had moved in with his wife, son, and daughter. He saw defendants August 18th, and they admitted they had sold to Jones. He demanded the cattle or his money, but never got either. He testified that he was ready August 16th when he went to the place to pay the money then due.

Under cross-examination of plaintiff, a written rescission, dated September 5, 1923, and served September 12th, was introduced demanding his money, \$1,000 and damages of \$1,500, "because of the breach by you of said contract in transferring same to one S. B. Jones."

September 21, 1923, a return notice was served on plaintiff, tendering all property described in the complaint, and stating, "This offer will terminate September 24th." This was served two days after the original complaint was filed. Defendant Colvin testified that plaintiff did not care for the stock in "a dairymanlike manner." He also testified that they offered to turn the cattle back to plaintiff if he would pay up what was due and for the feed. This was on August 18th. This last statement is corroborated by the other defendant.

Defendants first argued:

(1) That the complaint states no cause of action.

(2) That evidence is insufficient to sustain the findings.

(3) Decision is against law.

(4) Errors of law committed at trial.

(5) It affirmatively appears that plaintiff failed to perform the contract.

Taking up these objections in their order:

[1, 2] 1. The amended complaint certainly states a cause of action in each count.

[3] 2. The plaintiff produced evidence of the execution of the written contract sued on; that under the contract he took possession of the personal property mentioned therein "on the ranch where now located," he "being granted the use of the corrals and barns" as provided in the contract; that he made the payment of \$100 on execution of the contract and of \$900 due July 31, 1923; and

that during his absence, and before another payment became due, on August 9, 1923, defendants contracted to sell the property to one Jones, whom plaintiff found in possession when he came back on August 16th when his third payment was due. The court evidently accepted this testimony as true, and found that plaintiff was damaged in the sum of \$1,000, which he had paid. The court might very readily, under the evidence, have given judgment for the additional \$1,500 which Jones contracted to pay for the same property nine days after plaintiff made his contract. The findings are fully sustained.

3. We are unable to follow appellants' argument on this point.

[4] The errors of law complained of are (a) the overruling of defendants' demurrer; and (b) the denial of the motion for a nonsuit, which are covered above. Appellants then discuss the action of the court in sustaining objections to their offer of testimony "to show the connection with this transaction of the woman who was present when the transaction was had, and of the refusal of the court to receive in evidence the fact that she had notified the defendants that the cattle were abandoned and had asked them to take charge of the same." As to this offered testimony, the learned trial judge pertinently stated in sustaining the objections:

"You have not gone far enough to show that he (plaintiff) should take orders from her in the future. She was incapable of giving consent. The fact that she was present and even furnished some of the money is no proof whatever to my mind that she was cointerested, other than being interested in the plaintiff."

The rulings sustaining the objection to this testimony were correct.

[5] 5. In support of this objection appellants urge that the "uncontradicted testimony of defendant Colvin, page 17 et seq. of this brief, is to the effect that the dairy herd was at no time cared for in a dairymanlike manner." Counsel has overlooked the testimony of plaintiff that he employed the same dairyman who had been in the employ of appellants and that there was sufficient feed on hand to feed the stock.

[6] As to the argument that "it was not even contended that the plaintiff ever tendered to defendants the payment that became due on the 16th day of August, 1923," a complete answer is that a week before this payment became due appellants had breached the contract—while no payment was due.

The judgment is affirmed.

We concur: NOURSE, J.; STURTEVANT, J.

88 Cal. App. 697

BURNSTEIN et al. v. SIMMONDS et al.
(Civ. 5949.)

District Court of Appeal, First District, Division 2, California. Nov. 15, 1927.

Bills and notes  370—**Failure to surrender to makers note for which note sued on was executed, held not to defeat recovery by good-faith purchaser** (Civ. Code, § 3138).

In action on negotiable note by purchaser for value in good faith, before maturity without knowledge of any equities of defendants, defense that note for which note sued on was executed was to be returned to makers on payment of interest on note sued on, but that prior note was never returned, and hence there was no consideration for note sued on, could not be maintained under Civ. Code, § 3138, and could not defeat recovery on note.

Appeal from Superior Court, Los Angeles County; K. S. Mahon, Judge.

Action by Sarah M. Burnstein and others against Frank Simmonds and others. Judgment for plaintiffs, and defendants appeal. Affirmed.

D. Joseph Coyne, of Los Angeles, for appellants.

Hahn & Hahn, of Pasadena, for respondents.

STURTEVANT, J. The plaintiffs commenced an action against the defendants to recover on a promissory note. The defendants appeared and answered, and also filed a cross-complaint. The cross-complaint was answered, and a trial was had in the trial court before the court sitting without a jury. The trial court made findings responsive to each and all of the issues, and ordered judgment for the plaintiffs. From a judgment entered thereon the defendants have appealed, and have brought up a bill of exceptions.

The defendants contend that on the findings as made the judgment should have been in their favor. That contention is based on facts which we will proceed to recite.

On the 28th day of November, 1917, Vernon Cruikshank delivered to John W. Sharpe his promissory note in the sum of \$6,000, due 90 days thereafter, with interest at 8 per cent., and pledged as security for the payment thereof 5,000 shares of the capital stock of the Tungsten Mines Company. Said note was indorsed on the reverse side by John W. Sharpe, Frank Simmonds, E. J. Genereux, and Elmer Cole, and thereafter it was delivered to D. W. Glenn, together with the collateral security. On December 6, 1920, that note had not been paid, and the parties interested entered into such agreements that on said date a promissory note was signed which was as follows:

"No. ——. Corona, Cal., December 6, 1920.

"On or before 3 years after date for value received, I, we or either of us promise to pay

to D. W. Glenn or order, at the First National Bank of Corona, California, six thousand and no/100 dollars, with interest, payable quarterly, at the rate of seven per cent. per annum from date until paid, and attorney's fees of ten per cent. on the amount then unpaid, if suit be commenced or other proceedings taken to enforce the payment of this note.

"\$6,000.00 balance prin.

"Should the interest not be paid when due, it shall be compounded monthly thereafter, and bear the same rate of interest as the principal, and thereafter the whole sum of principal and interest shall become immediately due and payable at the option of the holder of this note. Principal and interest payable in gold coin of the United States of America of the present standard. The makers and endorsers of this note hereby waive diligence, demand, protest and notice.

"[Signed] Frank Simmonds.

"Elmer E. Cole.

"Ethel I. Genereaux.

"E. J. Genereux."

That note was delivered to the payee, and there was a collateral agreement that, if the interest for the ensuing six months was duly paid according to the terms of the note, then and in that event the note dated November 28, 1917, would be surrendered to the makers. The interest was so paid. However, the note dated November 28, 1917, was not, after the interest had been so paid, returned to the makers thereof. The indorsers have not received it, and the payee is not in possession of it, and does not know where it is, and he has not refused to deliver it to the indorsers or either of them. D. W. Glenn assigned, indorsed, and transferred the note dated December 6, 1920, to C. F. Baldauf and Annie Baldauf, and prior to the beginning of this action they assigned unto Sarah M. Burnstein all of their interest. The plaintiff Citizens' Trust & Savings Bank had an interest in said note as pledgee, but prior to the trial of this action said interest ceased, and at the time the judgment was rendered it had no interest therein.

The plaintiff Sarah M. Burnstein purchased said note in good faith, prior to its maturity, and without notice of defendants' claims, and paid therefor property of the reasonable value of \$6,000. Neither plaintiff Sarah M. Burnstein nor her assignors, C. M. Baldauf and Annie Baldauf, nor either of them, had any knowledge of the claims, demands, or equities of defendants against the note in suit prior to the time that plaintiffs acquired their interest therein.

The defendants point to the collateral agreement that the note dated November 28, 1917, was to be returned to the makers when the interest on the note in suit had been paid for the ensuing six months, etc., and thereupon they strenuously maintain that they have never become liable on the note in suit. They contend in this behalf that this action

was premature; that the novation must be complete; that there was no consideration for the note upon which this action was brought; that there is no evidence to sustain the judgment; and that the note dated November 28, 1917, being lost, must be legally accounted for and defendants protected before action brought. The plaintiffs reply that, as the note in suit was a negotiable instrument, and as the plaintiffs had no knowledge whatever of the collateral agreement above mentioned until long after Sarah M. Burnstein purchased the note, and, as Sarah M. Burnstein bought the note in good faith before maturity, and for full value, to wit, property of the reasonable value of \$6,000, that under these circumstances the defendants may not assert, as against these plaintiffs, the defense above delineated. In making this reply they are sustained by the statute. Civ. Code § 3138. They also argue that under the facts the defendants have not been damaged or inconvenienced by the failure of the payee to deliver the Cruikshank note for several different reasons which they proceed to state. In their reply brief the defendants do not attempt to cite any authorities showing that they may interpose in this action, as against these plaintiffs, the defense which they claim. However, they content themselves by citing authorities that have to deal with the rights of the original parties to negotiable instruments, or which involved contracts which were not negotiable instruments.

Under the findings as made by the trial court the judgment was clearly correct. Except as we have noted, there is no contention that the findings are not supported by the evidence.

It follows that the judgment should be affirmed. It is so ordered.

We concur: KOFORD, P. J.; NOURSE, J.

86 Cal. App. 664

SNODGRASS v. BELL et al. (Civ. 5962.)

District Court of Appeal, First District, Division 2, California. Nov. 12, 1927.

1. Taxation ⚡734(7)—Tax title held void for failure to state amount of penalties in published notice of delinquent tax list (Pol. Code, § 3764).

Tax title held void for failure of published notice of delinquent tax list to set forth amount due for penalties, as well as taxes, in compliance with Pol. Code, § 3764.

2. Judgment ⚡707—Judgment quieting title under tax deed is no defense in action by adverse claimant not party to prior suit.

Judgment quieting title in holder of tax deed in action wherein one claiming by adverse possession was not a party is of no avail to former in latter's action to quiet title.

3. Adverse possession ⚡70—Failure to show how predecessor of plaintiff in possession over 34 years obtained title, held not fatal to action to quiet title.

Failure to show how one, from whom plaintiff and her predecessor obtained paper title and possession over 34 years before commencing action to quiet title, obtained title to or right to grant disputed strip, held not fatal to action, where she occupied and cultivated it as then fenced and as described in her title deeds ever since.

4. Adverse possession ⚡89—Adverse claimant's nonpayment of taxes on part of strip for part of period of possession would not warrant judgment for one claiming under void tax deed.

Failure of plaintiff, claiming title by adverse possession, to pay taxes on every part of disputed strip for 5 of 34 years of continuous possession relied on, would not warrant judgment for defendant, claiming under void tax deed, in action to quiet title.

5. Adverse possession ⚡114(3)—Plaintiff's possession for over 34 years under deeds from previous possessor made prima facie case of ownership in action to quiet title.

Plaintiff's possession of disputed strip of land under deeds from previous possessor for over 34 years made at least a prima facie case of ownership in action to quiet title.

Appeal from Superior Court, Los Angeles County; Ernest Weyand, Judge.

Action to quiet title by Helen D. Snodgrass against Chester A. Bell, William J. Errengy, and others. Judgment for plaintiff, and defendant Errengy appeals. Affirmed.

Emmet H. Wilson and G. C. De Garmo, both of Los Angeles, for appellant.

Maurice C. Sparling, of Los Angeles, for respondent.

KOFORD, P. J. Respondent, as plaintiff in the court below, obtained judgment against defendants, including appellant herein, quieting her title to an acreage of land in Los Angeles county. Appellant's answer denied respondent's title and asserted title to a strip of land along respondent's southern boundary. This strip is about 36 feet wide and contains about 1.10 acres. Appellant's claim of title is based upon a tax deed. Respondent claims title by adverse possession.

The original source of respondent's title, as well as of the title of whoever owned the property immediately to the south of her land, was a decree of partition of the Rancho Tajauta, by which respondent's land was allotted to Ascencion Valenzuela, and the land to the south of her was allotted to Felipe Valenzuela. The deeds of respondent's predecessors up until the years 1882-1885 contain descriptions which fix the southern boundary as the northern boundary of the Felipe Valenzuela allotment. At that time

George Reed and wife acquired the land. Reed and wife, by deeds in 1888, 1890 and 1891, conveyed to C. Snodgrass, the immediate predecessor of respondent, all the land described in the complaint, using descriptions which did not tie to the Felipe Valenzuela northern boundary, but included the strip of land now in dispute here. Respondent's testimony established that for 34 years she and C. Snodgrass were in possession cultivating the same and that the southern boundary of the land possessed by them was marked by a fence the posts of which, at the time of the trial, were still standing in their original position; that the land was fenced at the time they took possession; that she had paid all taxes assessed in her name for many years down to date of trial. Her tax receipts since 1911 were received in evidence and the description contained in the assessment rolls of the land assessed to her is a subject of controversy between the parties. The description used called for 30.51 acres exclusive of roads. This was the correct amount of land in plaintiff's inclosure. A metes and bounds description followed, which, if laid out on the ground, would include only 30 acres and would omit one-half of the disputed 1.10-acre strip. According to the testimony of a civil engineer and surveyor, Hopkins, the southern boundary line of respondent's property was so described by this metes and bounds description in the assessment roll that it bisected the disputed strip from its northwest corner thereof to the southeast corner, leaving out a triangular shaped one-half of the disputed 1.10-acre strip.

From 1890 to 1897 the land to the south of respondent was assessed by a description which gave the northern boundary as the land of Snodgrass or of Reed and Snodgrass and variously referred to the acreage as 14, 14.91, and 15 acres. From 1897 to 1914, inclusive, this property was assessed as the 15.91-acre allotment of Felipe Valenzuela. In 1914 a portion of this land was assessed to Maria de Jesus Reyes de Valenzuela, successor to Felipe Valenzuela, by a metes and bounds description which did not include any of the land claimed by respondent. In 1915 and thereafter, the disputed strip besides being in this way at least partly assessed to respondent was also assessed to "Unknown owner." It was described as the north 1.10 acres of Felipe Valenzuela 15.91-acre allotment. The taxes being unpaid, this property was sold for taxes in 1923 to Chester A. Bell, the immediate grantor of appellant. This apparently escaped the actual notice of respondent, who continued as before to pay the taxes assessed in her name.

The result of this tax record is, first, that

during the time this strip was assessed to "Unknown owner" and sold for taxes, respondent was paying taxes regularly on at least the one-half part of the same strip according to the metes and bounds description; second, the acreage description on her tax assessment description upon which she was paying taxes taken by itself would include all the disputed strip.

[1] Respondent claims the appellant's tax title is void because at least one-half and perhaps all the tax upon the disputed strip was paid by her at the very time it was assessed to "Unknown owner." She cites authority holding that if part of the tax is illegal the whole sale and tax deed is void. *Bucknall v. Story*, 36 Cal. 67; *Wills v. Austin*, 53 Cal. 152. Respondent also claims the tax title is void because the published notice of the delinquent tax list failed to set forth the amount due for penalties as well as for taxes. The notice is the same notice which was held to be illegal in *Bussenius v. Warden*, 71 Cal. App. 717, 236 P. 371, for failure to comply with Political Code, § 3764, for the same reason assigned by respondent here. Under this authority the appellant's tax title is void.

[2] The appellant's judgment quieting title based upon the tax deed was obtained in an action in which respondent was not a party and is therefore, of course, of no avail to him in this action.

[3] The break in the chain of respondent's paper title is by no means fatal to her action. Although the record does not show how Reed obtained title to or the right to grant the disputed strip, nevertheless respondent and her predecessor obtained paper title and possession from Reed more than 34 years before this action was commenced, and she has occupied and cultivated it as then fenced and as described in her title deeds ever since that time. Her possession was under color of title. Cal. Jur. vol. 1, p. 571.

[4, 5] Appellant's tax title being void, he has no claim upon the property. We need not consider his claim that respondent has not paid taxes for five years on every part of the disputed strip. Even if respondent had not so paid her taxes that would not warrant a judgment in favor of defendant, who has only a void tax deed and is therefore a stranger to the title and not in possession. Respondent's long possession under deeds from the previous possessor made at least a prima facie case of ownership. *Scott v. Beck* (Cal. Sup.) 259 P. 933, and cases cited.

The judgment is affirmed.

We concur: STURTEVANT, J.; NOURSE, J.

83 Cal. App. 703

G. S. DONALDSON INV. CO. v. SHAY et al.
(Civ. 5728.)

District Court of Appeal, Second District, Division 2, California. Nov. 16, 1927.

Appeal and error ⇨356—Appeal not being taken in time limited by statute, appellate court has no jurisdiction (Code Civ. Proc. § 939).

Appeal from judgment not being taken in the 60 days limited by Code Civ. Proc. § 939, appellate court has no jurisdiction, and appeal will be dismissed.

Appeal from Superior Court, San Bernardino County; Benjamin F. Warmer, Judge.

Action by the G. S. Donaldson Investment Company against W. A. Shay and others. From an adverse judgment, plaintiff appeals. On motion to dismiss appeal. Appeal dismissed.

Arthur Wm. Green, of Los Angeles, for appellant.

Duckworth & Harrison, of San Bernardino, for respondents.

THOMPSON, J. This is a motion to dismiss the appeal on the ground that the notice of appeal was filed too late. It is submitted to us upon the motion and brief of respondent only, the appellant having failed to file any reply.

From the certificate of the county clerk it appears that the judgment appealed from was entered on July 15, 1926, and that the notice of appeal was filed on April 9, 1927, and more than 60 days after the entry of judgment. No proceedings for a new trial were begun. Section 939 of the Code of Civil Procedure provides that:

"An appeal may be taken from any judgment * * * within sixty days from the entry of said judgment."

It has been uniformly held that the appeal must be taken within the time prescribed by law, otherwise the appellate court is without jurisdiction to entertain it. *Lancel v. Postlethwaite*, 172 Cal. 326, 156 P. 486.

Appeal dismissed.

We concur: **WORKS, P. J.; CRAIG, J.**

87 Cal. App. 23

HARLOW v. AMERICAN EQUITABLE ASSUR. CO. OF NEW YORK. ★
(Civ. 3366.)

District Court of Appeal, Third District, California. Nov. 18, 1927.

Rehearing Denied Dec. 17, 1927. Hearing Denied by Supreme Court Jan. 16, 1928.

1. Insurance ⇨131(1)—Insurance contract may be oral.

Parol contract of insurance may be made, and is enforceable.

2. Insurance ⇨152(3)—Parties to insurance contract are presumed to have entered it with reference to statutory form (St. 1909, p. 404).

Both parties to insurance contract must be presumed to have entered it with reference to statutory form prescribed by St. 1909, p. 404.

3. Insurance ⇨622(1)—Action on fire insurance contract, begun more than 15 months after fire, cannot be maintained (St. 1909, p. 404).

Action against insurance company, begun more than two years after fire, cannot be sustained as action on contract of insurance, in view of provision of standard policy prescribed by St. 1909, p. 404, that action must be commenced within 15 months after commencement of fire.

4. Fraud ⇨25—Damages cannot be recovered for fraud in execution of contract, unless such fraud causes pecuniary damage (Civ. Code, § 1572).

One claiming fraud, under Civ. Code, § 1572, in execution of contract, may recover when he shows he has sustained pecuniary damage or injury by reason of having been put in position worse than he would have occupied if there had been no fraud, but he cannot recover, unless such damage or injury is shown.

5. Insurance ⇨622(1)—After expiration of statutory period for bringing action on fire policy, insured cannot bring action on ground of fraud in executing contract.

Insured cannot recover on fire insurance contract after expiration of statutory period for bringing action on ground of fraud in execution of such contract, since such fraud could have caused no damage; insurer being bound by contract as fully as if it had been made in good faith.

Appeal from Superior Court, Los Angeles County; Albert Lee Stephens, Judge.

Action by C. Fred Harlow against the American Equitable Assurance Company of New York. Judgment for defendant, and plaintiff appeals. Affirmed.

Milton M. Cohen, of Los Angeles, for appellant.

W. W. Hindman, of Los Angeles, for respondent.

FINCH, P. J. This action was commenced June 30, 1924. The defendant's demurrer to the complaint was sustained, and thereafter the plaintiff filed an amended complaint reading as follows:

"Amended Complaint for Damages.

"The plaintiff herein, by leave of court first had and obtained, files this amended complaint herein and as and for such amended complaint and for cause of action against said defendant, avers as follows:

"I. That the said defendant, at all the times herein mentioned, was, and now is, a corporation organized and existing under and by virtue of the laws of the state of New York, and having a place of business in the city of Los An-

geles, county of Los Angeles, state of California.

"II. That the plaintiff herein, on or about the 14th day of April, 1922, and for some time prior thereto, was the owner in fee of a certain piece of real property, together with all the improvements thereon, situate at Washington Boulevard and Huron road, three-quarters of a mile west of Palms, in the county of Los Angeles, state of California.

"III. That on or about the 8th day of November, 1921, in the city of Los Angeles, county of Los Angeles, state of California, the said defendant falsely and fraudulently represented to this plaintiff that, in consideration of the sum of \$150, the said defendant, in the event of destruction of said property by fire within a period of 3 years from said 8th day of November, 1921, would, within 90 days after such fire, pay to this plaintiff all the damages and losses sustained by said plaintiff by reason of such fire, not to exceed the sum of \$10,000; that, at the time the said defendant made said representations to this plaintiff, the said defendant had no intention to perform the same, nor any part thereof; that the said representations were made by said defendant with the intent to deceive and defraud this plaintiff, and to induce this plaintiff to pay the said defendant the said sum of \$150; that this plaintiff, fully believing that said representations were true, and relying upon said representations as protecting this plaintiff against loss by fire in the sum of \$10,000 for the period of 3 years from said 8th day of November, 1921, was induced thereby to pay to the defendant on the said 8th day of November, 1921, in the city and county of Los Angeles, state of California, the said sum of \$150.

"IV. That thereafter, to wit, on or about the 14th day of April, 1922, the said improvements situated upon the said property and contained therein were wholly destroyed by fire, and that said property at the time of said destruction of same by fire was of the value of over \$10,000.

"V. That the said defendant has not paid to this plaintiff the said sum of \$10,000, or any part thereof, although this plaintiff has repeatedly demanded of said defendant the payment of said sum, and by reason thereof this plaintiff has been damaged in the sum of \$10,000.

"Wherefore plaintiff prays judgment against the defendant in the sum of \$10,000, with interest thereon from the 14th day of July, 1922, and for costs of suit."

The defendant demurred to the amended complaint on the grounds that it "does not state facts sufficient to constitute a cause of action"; that the action was not commenced "within 15 months" after the alleged fire; and that the action was barred "by subdivision 1 of section 339 of the Code of Civil Procedure, * * * as the same was not commenced within two years after the alleged cause of action mentioned in plaintiff's amended complaint accrued." The demurrer was sustained with 10 days' leave to amend. Plaintiff failed to amend within the time allowed by the court, and judgment was thereupon entered dismissing the action. The plaintiff has appealed from the judgment.

[1-3] The complaint alleges a contract of insurance; whether oral or written being im-

material. "A parol contract of insurance may be made and is enforceable." *American C. Co. v. Agricultural I. Co.*, 12 Cal. App. 133, 135, 106 P. 720; *Ferrar v. Western Assurance Co.*, 30 Cal. App. 489, 491, 159 P. 609, 611; *Smith v. Massachusetts Bonding, etc., Co.*, 71 Cal. App. 661, 666, 236 P. 176; *Law v. Northern Assurance Co.*, 165 Cal. 394, 400, 132 P. 590. A standard form of insurance policy is prescribed by statute, and the use of any other form is prohibited, except as permitted by the terms of the statute. *Stats. 1909, p. 404.* Both parties must be presumed to have entered into the contract of insurance with reference to the statutory form. *Kavanaugh v. Franklin Fire Ins. Co.*, 185 Cal. 307, 315, 197 P. 99; *General Acc., etc., Corp. v. Indus. Acc. Com.*, 196 Cal. 179, 187, 237 P. 33; *Northern Ins. Co. v. National U. F. I. Co.*, 35 Cal. App. 481, 484, 170 P. 434; *Hicks v. British American Assurance Co.*, 162 N. Y. 284, 56 N. E. 744, 48 L. R. A. 424. The complaint does not allege that the plaintiff gave notice or made proof of loss as required by such standard policy, or at all. Such policy provides that no action thereon "shall be sustained * * * unless begun within 15 months after the commencement of the fire." This action was begun more than 2 years after the alleged fire. From the foregoing facts it clearly appears that the suit cannot be sustained as an action on the contract of insurance, and appellant does not contend that it can be so maintained. In his reply brief it is said:

"Respondents, in their argument, proceed upon the premises that this is an action for breach of contract. It is manifest, however, from the amended complaint, that the action is based solely upon fraud."

[4, 5] As stated, the complaint alleges an enforceable contract of insurance, under which the plaintiff, by proceeding in accordance with the terms thereof, as supplied by the statute, could have recovered against the defendant for the amount of his loss. The question is whether, having failed to assert his rights under a valid contract which was binding upon the defendant, the plaintiff may now sue for damages on the ground that, at the time of the execution of the contract, the defendant did not intend to perform its promise, even though such want of intention in no manner affected its liability. Section 1572 of the Civil Code provides that "a promise made without any intention of performing it" constitutes actual fraud within the meaning of the chapter in which that section appears. That chapter has to do with the freedom of consent of the parties to a contract. While, in a proper case, a defrauded party may rescind a contract or defend against its enforcement on the ground of the other party's fraud in its procurement without proving damage, it is axiomatic that damages cannot be recovered for a fraud which has caused no damage. "Generally speaking, plaintiff

may recover when he shows that he has sustained some pecuniary damage or injury by reason of having been put in a position worse than he would have occupied if there had been no fraud, but he cannot recover where he does not show that he has sustained such damage or injury." 26 C. J. 1169. Notwithstanding the alleged fraudulent character of the promise, the defendant was legally bound thereby as fully as if it had been made in good faith, and the alleged fraud did not put the plaintiff "in a position worse than he would have occupied if there had been no fraud." If the plaintiff has suffered damage, it has been due to his failure to pursue the remedies open to him under the contract of insurance, and not to the alleged fraud of the defendant, which had no possible effect upon those remedies.

The judgment is affirmed.

We concur: PLUMMER, J.; HART, J.

87 Cal. App. 792

C. FRED HARLOW, Plaintiff and Appellant, v. FEDERAL INSURANCE COMPANY OF NEW JERSEY, a Corporation, Defendant and Respondent. (Civ. 3367.)*

District Court of Appeal, Third District, California. Nov. 18, 1927.

Rehearing Denied Dec. 17, 1927. Hearing Denied by Supreme Court Jan. 16, 1928.

Appeal by plaintiff from a judgment of the Superior Court of Los Angeles County, Albert Lee Stephens, Judge, in an action upon an agreement of reimbursement of damages sustained by reason of fire. Affirmed.

Milton M. Cohen, of Los Angeles, for appellant.

W. W. Hindman, of Los Angeles, for respondent.

PER CURIAM. The facts of this case are in all respects, except as to names of the defendants, identical with those in *Harlow v. American Equitable Assurance Co. of New York*, 261 P. 499, this day decided by this court. On the grounds stated in the opinion in that case, the judgment herein is affirmed.

87 Cal. App. 17

DEE v. DEE. (Civ. 3370.)

District Court of Appeal, Third District, California. Nov. 17, 1927.

1. Divorce ⚭69—Unreasonable delay in commencing divorce action for desertion and neglect cannot be predicated on mere lapse of time, however long continued; "continuing offenses" (Civ. Code, § 125, and § 124, subd. 3).

Under Civ. Code, § 125, defining unreasonable delay in commencing divorce action, trial court erred in denying divorce for "willful desertion and willful neglect" on ground that there was unreasonable delay under section 124, subd. 3, in commencing action more than 20 years

after desertion, since both willful desertion and willful neglect constitute "continuing offenses."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Continuing Offense.]

2. Divorce ⚭69—Wife's lack of funds held sufficient excuse for 20 years' delay in suing for divorce (Civ. Code, § 125).

Wife's being without funds with which to prosecute divorce action held, under facts and circumstances, to be sufficient excuse for 20 years' delay in prosecuting action, within Civ. Code, § 125.

3. Divorce ⚭154—Trial court cannot deny divorce, where corroborated evidence establishes willful desertion and willful neglect.

Trial court is not authorized to deny divorce, where evidence of plaintiff, adequately corroborated, establishes, beyond question, allegations of willful desertion and willful neglect.

Appeal from Superior Court, Santa Barbara County; S. E. Crow, Judge.

Action by Gertrude Dee against Thomas R. Dee. Judgment for defendant, and plaintiff appeals. Reversed, with directions.

W. P. Butcher, Jr., of Santa Barbara, for appellant.

PRESTON, Justice pro tem. This is an appeal by plaintiff, Gertrude Dee, from a judgment denying her an interlocutory decree of divorce from her husband Thomas R. Dee. These parties intermarried in the city of Chicago on the 8th day of June, 1897, and separated in Denver, Colo., on or about the 15th day of May, 1902, and there is no issue of said marriage and no community property. Mrs. Gertrude Dee commenced this action for divorce in the superior court of the county of Santa Barbara on the 8th day of February, 1924.

Three separate and distinct causes of action for divorce are alleged in the complaint, to wit, willful desertion, willful neglect, and habitual intemperance.

Personal service could not be had upon the defendant, Thomas R. Dee, and he was served by publication, for the time, and in the manner, prescribed by law, and made no appearance whatever in the action.

Under plaintiff's first cause of action the complaint alleges:

"That on or about the 15th day of May, 1902, the said defendant, Thomas R. Dee, willfully and without cause, deserted and abandoned plaintiff, and ever since has, and still continues, to willfully and without cause, desert and abandon said plaintiff, and to live separate and apart from her, without any just cause or any reason, and against her will."

In support of this cause of action the plaintiff testified that prior to the 15th day of May, 1902, she and her husband lived in Illinois, and her husband became addicted to the

⚭For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

★Rehearing denied. Hearing denied by Supreme Court.

overindulgence in intoxicating liquors, to such an extent that he was unable to secure employment in said state, and they moved to Iowa. His intoxication continued, and then they moved to her people in Denver, Colo., and her husband still continued his overindulgence in intoxicating liquors, and on or about the 15th of May, 1902, left their home in Denver, without her knowledge, and she has not seen him since, and did not hear from him until about the time the present action was instituted (February 8, 1924), and that he has never offered to return to her. This testimony is fully corroborated by the testimony of plaintiff's mother.

Under the second cause of action for divorce the plaintiff alleges:

"That said defendant, from the 8th day of June, 1897, up to and including the present date, has willfully neglected to provide the plaintiff with the common necessities of life, he having at all times the ability so to do," etc.

In support of this cause of action plaintiff testified that by reason of the drunkenness and idleness of her husband he failed and neglected to provide her with the common necessities of life; that she was supported by her father and mother until she came to California, which was about eight years before the commencement of this action, and since that time she has supported herself, and that defendant has not contributed anything at all towards her support since his disappearance from Denver about the 15th of May, 1902, down to the time of the trial of this action in the court below. All of this testimony is also amply corroborated by the testimony of the mother of Mrs. Dee.

The trial court, after hearing all this evidence, found:

"That all of the allegations of the complaint are true, but that there was an unreasonable lapse of time before the commencement of the action, and therefore the plaintiff is not entitled to an interlocutory decree of divorce, * * * and that the prayer of plaintiff's complaint for said interlocutory decree of divorce be, and the same is, hereby denied."

[1] We are of the opinion that the court erred in denying a divorce to plaintiff. The evidence is amply sufficient, if believed by the trial court, to support a decree of divorce upon the ground of both willful neglect and willful desertion, and the court, having found "all of the allegations of the complaint to be true," should have granted the plaintiff an interlocu-

tory decree of divorce.

Subdivision 3 of section 124, Civil Code, provides that a divorce must be denied in actions on the grounds of willful neglect and willful desertion (among others), when there is an unreasonable lapse of time before the commencement of the action.

Section 125 of the same Code defines unreasonable lapse of time to be such a delay in commencing the action as establishing the presumption that there is connivance, collusion or condonation of the offense, or full acquiescence in the same, with intent to continue the marriage relation, notwithstanding the commission of such offense.

[2] None of these matters could exist in view of the facts alleged and proved by plaintiff against the defendant. Both willful desertion and willful neglect are continuing offenses. *McMullin v. McMullin*, 140 Cal. 112, 73 P. 808; *Locke v. Locke*, 153 Cal. 56, 94 P. 244. The testimony shows that defendant has never, after willfully deserting plaintiff in 1902, offered to return, and since that time and long prior thereto, and up to the time of the trial, had not provided anything towards her support. Therefore the status of the parties, at least from 1902 to the commencement of this action, has not changed. Furthermore, plaintiff testified that the reason she had not commenced this action sooner was because she was without funds with which to prosecute the action, which in itself would appear, under the facts and circumstances of this case, to be a sufficient excuse for the delay.

[3] The trial court is not authorized to deny a divorce where the evidence of plaintiff, adequately corroborated, as in the case at bar, establishes beyond question the truth of the allegations of the complaint. *Lewis v. Lewis*, 167 Cal. 732, 141 P. 367, 52 L. R. A. (N. S.) 675; *Kirkpatrick v. Kirkpatrick*, 152 Cal. 316, 92 P. 853; *Benkert v. Benkert*, 32 Cal. 467.

It is wholly unnecessary for us to decide whether there has been an unreasonable lapse of time in commencing the action for divorce upon the ground of habitual intemperance, for, as we have seen, the other two grounds have been fully established.

The judgment is reversed, and the trial court is directed to enter an interlocutory decree of divorce in favor of the plaintiff, Gertrude Dee, and against the defendant, Thomas R. Dee, as prayed for in the complaint.

We concur: FINCH, P. J.; PLUMMER, J.

86 Cal. App. 744

HANSEN v. HANSEN. (Civ. 3372.)

District Court of Appeal, Third District, California. Nov. 15, 1927.

1. Divorce $\hookrightarrow$ 184(6)—Question whether in given case grievous bodily injury or mental suffering has been inflicted on spouse seeking divorce is for trial court's determination.

Question whether in given case grievous bodily injury or mental suffering has been inflicted on spouse seeking divorce is question of fact for decision of trial court.

2. Divorce $\hookrightarrow$ 184(6)—Infliction of mental or physical suffering on wife by husband's alleged indulgence in filthy habits held question for trial court (Civ. Code, § 94).

In wife's action for divorce for cruel and inhuman conduct of husband, question whether acts and conduct of husband, alleged to have expectorated at table, walked about house in nude condition, indulged in filthy habits, and to have discouraged children's patriotism, occasioned wife grievous mental or physical pain or injury constituting cruel treatment, under Civ. Code, § 94, was for trial court.

3. Divorce $\hookrightarrow$ 108—Allegations of husband's filthy habits in home over long period, rendering wife's life intolerable, held to warrant introduction of testimony of acts complained of (Civ. Code, § 94).

Allegations in wife's divorce action that husband for long period rendered wife's life intolerable by filthy habits, in expectorating at table, walking about in nude condition, and discouraging children's patriotism, held to permit testimony as to alleged acts of cruelty, under Civ. Code, § 94.

4. Divorce $\hookrightarrow$ 127(4)—Corroboration of plaintiff seeking divorce for cruelty is sufficient if there is other testimony as to considerable number of material facts or evidence tending to confirm plaintiff's statements.

Where divorce is sought for cruel treatment, corroboration of plaintiff's testimony is sufficient if considerable number of important facts are testified to by other witnesses, or if other evidence tends to strengthen and confirm plaintiff's statements.

5. Divorce $\hookrightarrow$ 49(2)—Wife's submission to husband's ill treatment for four-year period held not "condonation" or acquiescence preventing divorce (Civ. Code, § 124, subd. 3, and §§ 125, 130).

That wife withstood husband's alleged ill treatment for over four years before bringing divorce suit held not to constitute "condonation" or acquiescence in husband's conduct, so as to forfeit rights of wife under Civ. Code, § 124, subd. 3, and sections 125, 130.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Condone—Condonation.]

6. Divorce $\hookrightarrow$ 69—Question whether lapse of time before commencement of suit is reasonable is for trial court (Civ. Code, § 124, subd. 3, and §§ 125, 130).

Question whether any lapse of time between acts constituting grounds for divorce and com-

mencement of divorce suit is reasonable under Civ. Code, § 124, subd. 3, and sections 125, 130, is question for trial court.

7. Divorce $\hookrightarrow$ 184(10)—Findings in divorce suit supported by evidence are conclusive on appeal.

Findings of trial court in divorce suit where supported by evidence are conclusive on appeal.

8. Divorce $\hookrightarrow$ 27(7)—Alleged acts of husband in using sink and yard for toilet and expectorating at dinner table held not justifiable as mere personal habits preventing wife's divorce for cruel treatment (Civ. Code, § 94).

Alleged acts of husband in using yard and sink for toilet, expectorating at dinner table, and walking about house in nude condition, for which wife sought divorce for cruel treatment under Civ. Code, § 94, held not justifiable as mere traits of character and personal habits preventing divorce.

9. Divorce $\hookrightarrow$ 130—Wife's right to divorce for willful neglect held immaterial, where evidence supported finding of husband's extreme cruelty (Civ. Code, § 94).

Where evidence was sufficient in divorce action to support decree of divorce for extreme cruelty under Civ. Code, § 94, it was immaterial whether wife was also entitled to divorce for willful neglect.

Appeal from Superior Court, Los Angeles County; Elliot Craig, Judge.

Action by Lillias Jane Hansen against Peter Hansen for divorce. Judgment for plaintiff, and defendant appeals. Affirmed.

T. J. K. MacGowen, of Los Angeles, for appellant.

Oscar E. Winburn, of Watts, for respondent.

PRESTON, Justice pro tem. This is an appeal by defendant, Peter Hansen, from a judgment granting an interlocutory decree of divorce to plaintiff, Lillias Jane Hansen, upon the grounds of willful neglect and extreme cruelty.

These parties intermarried in Australia on September 24, 1913, and separated in California on September 25, 1923. Three children were born as the issue of said marriage, the custody of whom were awarded to the plaintiff.

Appellant contends that the acts alleged in the complaint are insufficient to constitute extreme cruelty.

The complaint, among other things, alleges:

"Plaintiff alleges that defendant, disregarding his marriage vow and his duty to and toward the plaintiff as his wife, has been for a period of several years last past guilty of extremely cruel and inhuman conduct to and toward the plaintiff, and in particulars as follows:

"That during a long period of time heretofore defendant has been so coarse, disgusting, and degrading in all personal, domestic, and sexual habits as to cause this plaintiff great mental

suffering, physical pain, and much humiliation, and to such an extent as to render the life of plaintiff burdensome and her life with him intolerable.

"That defendant is coarse, filthy, and vulgar in his personal habits in that he has on several occasions and at many times expectorated at the dining table while eating his meals in company with plaintiff and members of the family, said defendant at such times and occasions using empty egg shells or dishes upon the table as receptacles for his expectorations, all of which were sickening, disgusting, and humiliating to plaintiff, and which caused her to become disgusted, sick, and humiliated.

"That defendant has a violent, harsh, and ungovernable temper, and constantly exercises a domineering and unreasonable attitude to and toward plaintiff, causing her to become nervous, sick, and humiliated.

"That on or about the 6th day of October, 1920, defendant, without any cause or reason and without the consent or knowledge of plaintiff, took the two oldest of said minor children and left them at a Chinaman's house at Prescott, Ariz., and refused to tell plaintiff where said children were or to allow or permit her to see said children, until plaintiff agreed to dismiss a certain action which she had theretofore filed against the defendant in the superior court of Los Angeles county, asking for a divorce from defendant upon the ground of extreme cruelty. Defendant at said time told plaintiff that unless she dismissed said divorce action she would never see said minor children again; whereupon and acting in fear of said threat plaintiff did cause said action to be dismissed. Said conduct and words of defendant caused plaintiff great mental suffering and to become nervous and sick.

"That almost daily defendant walks around the family home of the parties herein in a nude condition in the presence and in view of plaintiff and all of the minor children of said parties, thereby causing plaintiff to become disgusted, sick, nervous, and humiliated.

"That defendant constantly teaches the said minor children to be unpatriotic, and has on three occasions within the past year burned and destroyed American flags which had come into the possession of said minor children, thereby causing plaintiff to become disgusted and humiliated and to suffer great mental anguish."

Section 94 of the Civil Code defines extreme cruelty to be "the wrongful infliction of grievous bodily injury, or grievous mental suffering, upon the other by one party to the marriage."

[1, 2] No arbitrary rule of law can be laid down as to what particular facts must be alleged and proven in order to justify a finding that the complaining party has suffered grievous bodily injury, or has undergone grievous mental suffering. A correct decision must always depend upon the sound sense and judgment of the trial court. "Whether in any given case there has been inflicted * * * 'grievous mental suffering' or grievous bodily injury, is a * * * question of fact, to be deduced from all the circumstances of each particular case, keeping always in view the intelligence, apparent

refinement, and delicacy of sentiment of the complaining party." *Barnes v. Barnes*, 95 Cal. 171, 30 P. 298, 16 L. R. A. 660; *Fleming v. Fleming*, 95 Cal. 430, 30 P. 566, 29 Am. St. Rep. 124; *Andrews v. Andrews*, 120 Cal. 184, 52 P. 298; *MacDonald v. MacDonald*, 155 Cal. 665, 102 P. 927, 25 L. R. A. (N. S.) 45; *Donnelly v. Donnelly*, 26 Cal. App. 577, 147 P. 582; *Perkins v. Perkins*, 29 Cal. App. 68, 154 P. 483; *Maloolf v. Maloolf*, 175 Cal. 571, 166 P. 330; *McCahan v. McCahan*, 47 Cal. App. 176, 190 P. 460; *Crum v. Crum*, 57 Cal. App. 539, 207 P. 506.

[3] Therefore, in the case at bar, whether or not the acts and conduct of appellant inflicted grievous mental suffering, or grievous bodily injury, or both, upon the respondent, was a question of fact for the determination of the trial court from all the facts and circumstances in the case. No demurrer was interposed to the complaint, and no objection to the introduction of evidence thereunder was made by appellant, upon the ground that the complaint did not state facts sufficient to constitute a cause of action. The allegations and specifications of cruelty set forth in the complaint are sufficient as a basis for the introduction of testimony of the alleged acts of cruelty. 8 Cal. Jur. 705, and cases cited.

Appellant also contends that the evidence is insufficient to sustain the judgment for divorce on the ground of extreme cruelty. There is no merit whatever in this contention. The testimony of the plaintiff and respondent follows very closely the allegations of the complaint and reveals a course of conduct on the part of the appellant so immoral, degrading and reprehensible and habits so filthy as to shock the sensibilities of any decent man or woman, much less a lady of modesty and refinement, as the record shows respondent to be.

It will serve no useful purpose to recite all the evidence in detail; suffice it to state some of the acts and conduct of appellant, embraced within and forming part of his course of conduct towards respondent, which continued regularly and continuously for more than four years immediately preceding their separation, viz.: It was the practice of the defendant, while eating his meals, in company with his wife and children, to expectorate in egg shells and dishes; he would take his false teeth out of his mouth and lick them while he was still eating; he would use the sink for a toilet, and also use the back yard for a toilet in daylight in the view and presence of his children and neighbors; he would go around the house in the presence of his children, guests, and wife in a nude condition; he would sleep at night with his wife, absolutely naked, refusing to wear any night clothes of any kind, and would keep his wife awake at nights and pinch her from the thighs down, making her black and blue, because she insisted on wearing a nightgown. This prac-

tice of pinching his wife was a common occurrence, and from which she suffered considerable pain. All these acts continued for about four years, growing more intolerable as time went on. Mrs. Hansen further testified that appellant's treatment of her at night became so unbearable that she was compelled to get out of bed a number of times and lie on the floor to try to get rest and sleep.

The proof also shows that the appellant would go out in the yard in a nude condition in the middle of the day and take a bath at a pump in plain view of the children and neighbors, in South Pasadena.

The evidence also shows that the appellant was unpatriotic in the extreme. His three children were given three American flags; he took one of the flags and burned it up and the others were taken from the children, and he went to the lady who gave his children the flags and told her "not to give the children American flags—that he was not an American and did not want his children to have American flags." He would stop the children from singing patriotic songs they had learned at school, and refused to let them salute the American flag. Many other details were given of the conduct and actions of the appellant, equally revolting and disgusting. The appellant complained that his wife would not go with him where he could get work, but the proof shows that they moved 14 times within two years and five months.

[4] Complaint is also made by appellant that the alleged acts of cruelty testified to by respondent are not sufficiently corroborated. The fact is that practically all of the acts and conduct of cruelty are fully corroborated by other witnesses, or by facts and circumstances. Indeed, the corroboration is more complete than is usually possible in this kind of action. It is, however, wholly unnecessary that all of the acts of cruelty be corroborated, for the law is well settled that where a divorce is sought on the ground of extreme cruelty, consisting of successive acts of ill treatment, as is the case here, it is not necessary that there should be direct testimony of other witnesses to every act sworn to by the plaintiff, but it is sufficient corroboration if a considerable number of important and material facts are testified to by other witnesses, or if there is other evidence, circumstantial or direct, which strongly tends to strengthen and confirm the statements of plaintiff. *Andrews v. Andrews*, supra; *Crum v. Crum*, supra; *Perkins v. Perkins*, supra; *Avery v. Avery*, 148 Cal. 242, 82 P. 967.

The trial judge had the parties before him, and thus having the opportunity of judging of the degree of intelligence, refinement, and delicacy of sentiment possessed by respondent, concluded that the acts and course of conduct of appellant willfully inflicted upon her grievous mental suffering, as well as grievous bodily injury, to the extent that it constituted

extreme cruelty. A careful examination of the rather voluminous record convinces us that the trial court was fully warranted in so concluding; in fact, there is no other reasonable deduction that could be drawn from all of the evidence in the case.

[5] Appellant also contends that an unreasonable lapse of time has intervened between the commission of the acts of cruelty and the commencement of this action, and for this reason alone insists that the judgment should be reversed. This contention is devoid of any merit whatever. The testimony shows that appellant has been guilty of serious reprehensible conduct towards the respondent continuously for more than four years immediately preceding their separation and the filing of the complaint in this action. In fact, the respondent testified that appellant pinched her legs from the thighs down, to such an extent that her limbs were black and blue, on the very last night that she lived with him. Appellant would have us hold that because his wife had been physically able to, and did withstand his ill treatment for more than four years, she has thereby condoned or acquiesced in it, and has forfeited her right to obtain a divorce upon that ground. Certainly, such is not the law. Mrs. Hansen explained why she had endured this cruel treatment for so long, and said it was on account of the children, and in the hope that conditions would be better, but instead of getting better they continued to get worse, until she could endure his unjustifiable treatment and conduct no longer and left him, and immediately instituted this action for divorce.

[6, 7] One of the main objects of the provisions of section 124, subd. 3, and sections 125 and 130 of the Civil Code, is to prevent collusion and fraud, but a reading of the testimony in this case certainly dispels any intimation that there has been any collusion, or any condonation of, or acquiescence in, the conduct of appellant on the part of Mrs. Hansen. Furthermore, the question whether any lapse of time is reasonable or not is one which the trial court must determine, and the trial court in this case determined there was no unreasonable lapse of time, and, there being ample evidence to support such a conclusion, it is conclusive on appeal. 9 Cal. Jur. 692.

[8] Counsel for appellant, while apparently admitting the truth of the charges made against his client, attempts to justify them upon the ground that such acts should be termed "mere traits of character" and "personal habits," and, not being directed towards respondent with a malevolent motive, are therefore insufficient to constitute cruelty. Appellant lays great stress upon the case of *Dahnke v. Dahnke*, 55 Cal. App. 13, 202 P. 894, as supporting the above contention. A mere casual reading of that case will show that it lends no support whatever to the con-

tention of counsel. In that case Henry Dahnke was at the time of his marriage inflicted with a loathsome, incurable skin disease, of which he did not acquaint his wife before their marriage. Mrs. Dahnke, after obtaining this knowledge, lived and cohabited with Dahnke for seven years, and the court found that the disease was not contagious and did not affect Mrs. Dahnke in any way, and that there was no intention on the part of Dahnke to wrongfully inflict any suffering upon his wife. On the contrary, in the case at bar, the evidence shows, and the court found, that the acts and conduct of Peter Hansen were willful and deliberate and wrongfully caused respondent great mental suffering and physical pain and humiliation, etc. It could hardly be seriously contended that appellant's filthy habits in using the yard and sink for a toilet, expectorating at the dinner table, etc., were "mere traits of character" or "mere personal habits" of a normal person. Such conduct and such habits show a lack of character and a lack of common decency.

[9] It is further contended by appellant that there is no sufficient corroboration of the testimony of Mrs. Hansen that appellant was guilty of willful neglect. We need not dwell at length upon this cause of action. As we have already stated, respondent sought a divorce upon two grounds, willful neglect and extreme cruelty, and, as we have seen, the evidence is ample to support a decree of divorce upon the ground of extreme cruelty, it therefore becomes immaterial in this case whether or not she has also proven a sufficient cause for divorce upon the ground of willful neglect. We might add, however, that we have examined the testimony offered in corroboration of the testimony of Mrs. Hansen on the ground of willful neglect, and, while such testimony is not as strong and complete as it is in support of the cause of action on extreme cruelty, it is, nevertheless, in our opinion, sufficient.

We find no reason for disturbing the judgment of the trial court. The judgment is therefore affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

86 Cal. App. 785

McCONNELL v. REDD. (Civ. 5784.)

District Court of Appeal, First District, Division 1, California. Nov. 17, 1927.

1. Sales $\S$ 454—Contract held one of "conditional sale," not reserving title merely as security, though authorizing seller to apply proceeds of resale toward payment of balance due.

Contract retaining title to property sold until fully paid for held one of "conditional sale," not of absolute sale with reservation of title

merely as security, though providing that seller might apply proceeds of resale on buyer's default toward payment of balance due, in view of other provisions authorizing seller to retake property and terminate contract or to bring action for price.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Conditional Sale.]

2. Sales $\S$ 450—Outstanding characteristic of "conditional sale" is reservation of title, which authorizes seller to retake possession on default, notwithstanding alternative remedy provided.

The outstanding characteristic of a "conditional sale" is reservation of title by seller, who is entitled under such provision to retake or recover possession, if buyer fails to pay price or installment thereof, though contract provides for alternative remedy of resale and application of proceeds toward payment of balance due.

3. Sales $\S$ 464—Law favors conditional sales, and courts should afford every protection to upholding their conditions.

The law of California favors conditional sales, and it should be the policy of the court to afford every protection to upholding their conditions.

4. Sales $\S$ 477(1)—Buyer suggesting and accepting substitution, and making required payments until default, cannot set up abandonment of written contract and making of oral one.

Buyer of ice machine, who suggested installation of different cooler than that contracted for, accepted substituted cooler, and made payments provided for until default, cannot raise objection, in claim and delivery, that written contract was abandoned by parties and oral one increasing price entered into at time of substitution.

5. Sales $\S$ 479(9)—Seller reserving title until full payment held entitled to relief in claim and delivery without fixing time for buyer to avoid foreclosure; "forfeiture."

Seller held entitled to specific relief in claim and delivery, on buyer's default in payment of installment on price of ice machine, without fixing time in which buyer might avoid foreclosure; rules as to "forfeiture," which involves both idea of losing property by delinquent party and transfer thereof to another without delinquent's consent, being inapplicable to question of right to possession on buyer's default under contract reserving title in seller until full payment.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Forfeiture.]

6. Sales $\S$ 479(6)—Buyer refusing to pay balance, frequently demanded, cannot complain of delay in bringing claim and delivery.

Buyer refusing to pay balance due under conditional contract, though frequently demanded, cannot be heard to complain of seller's delay in bringing action in claim and delivery for property sold.

7. Sales  477(6)—Accepting payments on installments does not waive provision making time of essence, nor invalidate any part, of conditional sale contract.

Accepting payments on account of installments on conditional sale contract does not waive provision making time of essence, nor invalidate any part, of contract.

Appeal from Superior Court, Alameda County; James G. Quinn, Judge.

Action in claim and delivery by George McConnell against Joseph Redd. Judgment for plaintiff, and defendant appeals. Affirmed.

Daniel Rygel, of Oakland (George M. Naus, of Oakland, of counsel), for appellant.

L. L. Steele, of Oakland, for respondent.

TYLER, P. J. Action in claim and delivery. The complaint, in substance, alleges ownership in plaintiff of a certain ice machine, cooler, and equipment, of the value of \$400, wrongful possession and detention by defendant, and a demand for delivery. The prayer is for possession of the property, or, in case delivery cannot be had, for its value together with damages. The answer denies ownership in plaintiff; alleges the value of the property to be \$875; admits possession; alleges ownership in defendant; and denies wrongful detention. Briefly stated, the facts show that plaintiff was engaged in the business of selling and installing ice machines, coolers, and equipment. Defendant conducted a dairy farm at Newark, Cal. He was desirous of obtaining an ice machine for the cooling of his product. Accordingly he entered into a written contract with plaintiff, wherein and whereby plaintiff agreed to install at defendant's ranch a certain character of ice machine, cooler, and necessary equipment, for which defendant agreed to pay the sum of \$875, according to the terms and conditions expressed in such contract. Among the conditions was one which provided that title to the property should remain in plaintiff until fully paid for. In this connection the contract further provided that the institution of an action for the price should not be considered a waiver of the reservation of title. Upon default in payment of any part of the purchase price the parties agreed that the entire balance should forthwith become due and payable, plaintiff, in that event, being given the right to retake possession of the property, either with or without resort to legal process, and to retain all amounts theretofore paid on account thereof, and either terminate the contract, or at his option resell the property as a whole or in parts, either at public or private sale. The net amounts so realized were to be applied toward the unpaid portion of the purchase price, defendant to be liable for any deficiency, or upon such default plaintiff was giv-

en the option to recover from defendant the entire unpaid portion of the purchase price. Time was made of the essence of the contract.

Plaintiff, in accordance with the contract so entered into, proceeded on May 9, 1924, to install the machinery as agreed, but during the course of the installation defendant informed plaintiff he did not desire the particular cooler the contract provided for, but one of a different make. Plaintiff agreed to provide the desired cooler upon condition that defendant pay plaintiff the sum of \$70 in addition to the sum specified in the contract, which defendant agreed to do. The substituted cooler, together with the other machinery, was installed, this item being the only deviation from the written contract above referred to. The additional cost of the cooler brought the contract price to the sum of \$945, and of this sum plaintiff received of defendant, through one E. S. Babue, of the Producer's Milk Company, to which firm defendant sold his milk, the sum of \$728.25, thus leaving a balance of \$216.75, with interest, as provided in the contract. Payments were made regularly by Babue on behalf of defendant up to the time when the amount indicated was paid, at which time defendant instructed Babue not to make any further payments on account of the contract, giving as a reason that he would take care of the balance himself. Although frequent demands were made upon defendant for the balance due, he refused to pay the same. On December 8, 1925, plaintiff commenced this action, claiming the property. It was taken possession of by the sheriff of Alameda county under the provisions of sections 509, 511, of the Code of Civil Procedure, and later delivered to plaintiff, who still holds possession of the same. Under these facts the trial court found plaintiff to be the owner of the property, and judgment was rendered accordingly, from which judgment this appeal is taken. As grounds for reversal it is urged that the trial court erred in finding plaintiff to be the owner, and likewise erred in making the judgment absolute, instead of fixing a day within which appellant should pay the balance found to be due upon an accounting, or be foreclosed of his interest in the property.

[1] In support of this claim it is contended that the contract was not one of conditional sale, but, on the contrary, was absolute with reservation of title merely by way of security. In support of this claim it is argued that the contract, containing as it does a provision that, in the event of default on the part of the buyer, the seller may apply the proceeds of any resale toward the payment of the unpaid portion of the purchase price, the buyer then to be liable for any balance still remaining to be paid, prevents the reservation of title from being an absolute one and

turns the retention of title into a retention by way of security merely. That this being so, the sale was not a conditional one, and the buyer became the owner, and the seller was in the position of a mere mortgagee, for which reason the court erred in finding and adjudging ownership in the plaintiff, and further erred in not giving the buyer a definite time in which to perform. We are cited to the case of *Atkinson v. Japink*, 186 Mich. 335, 152 N. W. 1079, as supporting this contention. Even conceding this case to be authority for the construction claimed, we do not think that the provision in any manner changed the character of the contract. As was said in *Studebaker v. Witcher*, 44 Nev. 376, 204 P. 502, the case relied on is against the weight of authority from other jurisdictions (see cases there cited). As above indicated, there were other provisions in the contract relating to the security of the seller. He had the right thereunder, in the event of default, to (1) retake the property and terminate the contract; (2) to retake possession, resell the same, and apply the proceeds received toward the payment of any balance due; or (3) to bring an action for the recovery of the purchase price. The case does not present the situation where a seller has exercised an option given him to declare the whole of the purchase price due and sue for the amount rather than for the recovery of the property itself. In such a case he may be said to have confirmed the title in the purchaser. Here plaintiff seeks to recover property, the title to which he has never divested himself. The mere right given to plaintiff under the contract to conclude all sums to be due, when considered with the provision relating to the retention of title until payment was made, does not in any manner affect the character of the instrument which is one of conditional sale. The clause is in complete harmony with the condition reserving title in plaintiff.

[2] The outstanding characteristic of a conditional sale is the reservation of title by the seller. Under such a provision the seller is entitled to retake or recover possession of the property if the buyer fails to pay the purchase price or an installment thereof. Having defaulted, whatever rights the buyer may have are terminated, and, by virtue of the title which the seller has retained, he is entitled to recover possession, and the mere fact that the contract provides for an alternative remedy in no manner qualifies or affects that right. Nor does it change or alter the character of the instrument as here claimed. *Bice v. Arnold*, 75 Cal. App. 629-635, and cases cited, 243 P. 468; *Silverstin v. Kohler & Chase*, 181 Cal. 51, 183 P. 451, 9 A. L. R. 1177.

[3] The law of California favors conditional sales, and it should be the policy of the courts to afford every protection to upholding their conditions. *Marker v. Williams*, 39 Cal. App. 674, 179 P. 735. In clear and unambiguous language the contract here involved provides that the title to the property shall remain in the conditional vendor until the purchase price shall have been paid. This plain and definite provision is controlling. Defendant agreed to the terms and should be made to abide them. The contract amounts to nothing more than a conditional sales contract, and it is not altered or changed by reason of the alternative remedy name. Practically the same provisions were contained in the contract under consideration in *Bice v. Arnold*, supra, where the contract was held to be one of conditional sale.

[4] Nor is there any merit in the further claim that the written contract was abandoned by the parties and an oral one entered into at the time there was a substitution of the cooler. No such contention was made under the pleadings or at the trial nor at any other time. The change of this portion of the plant was made at defendant's own suggestion; he accepted the same and made the payments provided for under the contract up to the time he defaulted. Under these circumstances, he is in no position to raise such objection at this time. The objection is without merit.

[5] The same may be said of the claim that plaintiff had no right to specific relief without fixing a time in which defendant might avoid foreclosure. The rules as to forfeiture have no application to the question of the right to the possession of property. Forfeiture involves both the idea of losing property by a delinquent party and the transfer of it to another without the consent of the delinquent. Here no ownership was transferred, for plaintiff had never parted with his title. *Hegler v. Eddy*, 53 Cal. 598; *Van Allen v. Francis*, 123 Cal. 476, 56 P. 339.

[6, 7] To the suggestion that delay in the bringing of the action has affected plaintiff's rights, it is sufficient to say that this is a matter defendant should not be heard to complain of. Accepting payments upon account of installments upon conditional sales contracts does not waive the provision making time of the essence of the contract, nor does it invalidate any part of the contract. *Pacific Finance Co. v. Pierce*, 48 Cal. App. 601, 191 P. 1115; *Los Angeles Furniture Co. v. Hansen*, 46 Cal. App. 5, 188 P. 292.

The judgment is affirmed.

We concur: KNIGHT, J.; CASHIN, J.

86 Cal. App. 764

In re BARREIRO'S ESTATE. (Civ. 5834.)★

District Court of Appeal, Second District, Division 2, California. Nov. 16, 1927.

Hearing Denied by Supreme Court Jan. 12, 1928.

1. Husband and wife ⚡255—Whether corporate stock is separate or community property held to depend on character of realty with which husband purchased it.

Whether corporate stock, purchased by deceased husband, is community property or separate property, held determinable by separate or community character of realty with which stock was purchased.

2. Husband and wife ⚡262(1)—Buildings erected on husband's separate realty during marriage held not presumptively community property.

Improvements, consisting of buildings erected during marriage, on land owned by husband at time of marriage, and continuously thereafter, until transferred to corporation for capital stock, held not presumptively community property, value of which should be included in that of widow's portion of such stock.

Appeal from Superior Court, San Diego County; C. B. Andrews, Judge.

Petition by the divorced wife of Benigno Barreiro, deceased, for a partial distribution of the estate. From a decree of partial distribution, the executor and children of deceased appeal. Modified, and affirmed as modified.

Wright & McKee and Lewis J. Utt, all of San Diego, for appellants.

Herman Freese and Stephen Connell, both of San Diego, for respondent.

THOMPSON, J. This appeal is from a decree of partial distribution by the three minor children of the deceased, and by the executor of the last will and testament of Benigno Barreiro, deceased. The respondent is the mother of the children and the divorced wife of decedent. She petitioned the court for a partial distribution of the estate, which the court ordered. By the will of decedent all of his estate was devised and bequeathed to the three children. The respondent asserted her right to take one-half of the estate, claiming that the property was the community property of herself and deceased. By stipulation of all the parties all the property of the estate, other than 1,000 shares of the capital stock of a Mexican corporation known as the Compania de Inversiones de la Baja California, S. A., appraised at \$500,000, was expressly excluded from the scope of the application and the hearing. The court found that, of the 1,000 shares, one-fifth, or \$100,000 worth, was separate property, and that the remainder was community property. In arriving at this result, the court found that two parcels of real property which had been owned by the de-

ceased at the time of his marriage, and continuously thereafter until transferred to the company, in exchange for a portion of the capital stock, had, during the marriage relation, been improved with buildings, and that, due to the fact that "no evidence or proof" was "adduced establishing or showing that said improvements were made or paid for with the separate funds of said decedent," the improvements were presumptively community property. The improvements so found to partake of the character of community were valued at the sum of \$55,000.

Appellant contend that the improvements as a matter of law constitute a part of the separate estate of decedent, and that this court should either modify the decree by adding to the sum of \$100,000 the sum of \$55,000 or instruct the trial court to amend the conclusions of law and the decree to the same effect.

[1, 2] Inasmuch as appellants assert that fixtures attached to the separate real property take on the character of the land, and become separate estate also, the respondent argues that they are not seeking to recover any part of the realty, but only seeking to have distributed to the widow one-half of the portion of the capital stock of the company found to be community; that this proportion should be fixed in accordance with the value of the separate and community estate turned over to the company for the capital stock. This argument of respondent is unsound, for the reason that the character of the capital stock, whether separate or community, is determined by the character of the property which purchased the stock. We do not mean to say that a fund might not be traced through this medium to its destination, and the character of the property finally acquired be determined according to the facts, because such is not the case before us, but only that in the instant case no character is given to the property by proof other than that the land was separate property. We therefore have but one question to settle: Were the improvements presumptively community property? In McKay's Community Property, § 347, we read:

"Such improvements are incorporated into it" (the land) "and follow the title to it. They are not a thing apart, nor does the making of them create any form of title or interest in the land. This is the rule of both the civil and the common law. The character of the land as separate or common determines the ownership of the improvements."

The claim of respondent is effectually concluded by the language of the Supreme Court in the case of Shaw v. Bernal, 163 Cal. 262, 267, 124 P. 1012, 1013:

"If we assume that all the money expended in constructing the house on this land was community property, it still remains that both the

land and the building constructed thereon constituted separate property of the wife. A similar question was early decided by this court. The conveyance of land purchased with community funds had been by express direction of the husband, made to the wife, with the intent on his part to make to her a gift of the property. Subsequently the husband from community funds constructed a dwelling house thereon. The court said: "The question is, who was the owner of the house when it was built under those circumstances?" It admits of only one answer—the owner of the lot was also the owner of the house. It formed a part of the real estate, and the title to the home is necessarily included in the title to the lot on which it is erected, in the absence of an agreement sufficient to pass the title to the house alone. *Peck v. Brummagin*, 31 Cal. 440, 448 (89 Am. Dec. 195). This holding is in accord with the general rule stated in 21 Cyc. 1648, as follows: "Improvements made during marriage on the separate property of either husband or wife, although with community funds, will as a general rule belong to the spouse owning the separate property." An agreement between the parties may produce a different result as is implied in the above quotation from *Peck v. Brummagin*; creditors of the husband may perhaps establish a claim to improvements so constructed where they can show that the expenditure thereof was a fraud upon them (see *Maddox v. Summerlin*, 92 Tex. 483 [49 S. W. 1033, 50 S. W. 567]); the wife might reach as community property a building erected by the husband from community funds on his separate property, for the very purpose of fraudulently depriving her of her interest therein (see *Smith v. Smith*, 12 Cal. 216 [73 Am. Dec. 533]); but it is clearly the rule that where a husband deliberately constructs from community funds a building upon the separate property of his wife, in the absence of any sufficient agreement or undertaking to the contrary, as between him and her the title to the building follows the title to the land and is separate property of the wife, and neither he nor the marital partnership has any title to any portion of the property, either land or building. *The authorities hold that the most that the marital partnership may acquire under such circumstances, if anything, is a right to reimbursement to the extent of the value added to the property by the improvements.* Whether the right to reimbursement exists in such cases is a question not at all involved in this proceeding and we express no opinion thereon. In support of the views we have expressed are the following authorities, in addition to those already cited: *McKay on Community Property*, § 249; *Ballinger on Community Property*, note to section 19; 6 *American and English Encyclopedia of Law* (2d Ed.) 324; *Rice v. Rice*, 21 Tex. 58; *Maddox v. Summerlin*, 92 Tex. 483 [49 S. W. 1033, 50 S. W. 567]; *Humphreys v. Newman*, 51 Me. 40." (Italics ours.)

To the same effect see *Carlson v. Carlson*, 10 Cal. App. 300, 101 P. 923, and *Smith v. Smith*, 47 Cal. App. 650, 653, 191 P. 60.

It follows, since there is no question of fact to be determined, that the decree should be modified by adding to the separate property

the sum of \$55,000, and subtracting a like amount from the community property, and the trial court is instructed to modify its decree accordingly, and, as so modified, it is affirmed.

We concur: WORKS, P. J.; COLLIER, Justice pro tem.

FRANTZ v. MALLIN. (Civ. 5972.)★

District Court of Appeal, First District, Division 2, California. Nov. 16, 1927.

Hearing Granted by Supreme Court Jan. 12, 1928.

1. Limitation of actions ⇨66(6)—Cause of action against seller agreeing to repurchase stock and pay cash therefor, on or before date specified, accrued at date mentioned without necessity of demand (Code Civ. Proc. § 337, subd. 1).

Under contract by which seller of shares of stock agreed to repurchase the stock and pay \$2,500 "in cash therefor on or before August 4, A. D. 1920," no demand or notice on seller was necessary, and statute of limitations commenced to run against buyer under Code Civ. Proc. § 337, subd. 1, from date mentioned in contract, as cause of action accrued at that date.

2. Limitation of actions ⇨2(1)—Law of forum controls in determining whether cause of action is barred.

When statute of limitations is pleaded, law of forum governs as to limitation as against law of place where contract is made or performable.

3. Limitation of actions ⇨177(2)—Where complaint shows on its face that period of statute has expired, plaintiff must allege such other facts as will prevent running of statute (Code Civ. Proc. § 337, subd. 1).

Under complaint for recovery on contract showing on its face that more than four years have elapsed, plaintiff must allege such other facts as will prevent running of statute of limitations under Code Civ. Proc. § 337, subd. 1.

4. Limitation of actions ⇨84(2)—Statute suspending limitation against defendant out of state applies only in case of physical absence, irrespective of residence (Code Civ. Proc. § 351).

Code Civ. Proc. § 351, providing that action may be brought within statutory period after defendant's return, if he is out of state at time cause of action accrues, relates only to physical absence from, or presence in, state, and involves no question of residence.

5. Limitation of actions ⇨179(1)—Complaint alleging that defendant was at all times resident of another state held demurrable for failure to avoid statute (Code Civ. Proc. § 337, subd. 1; § 351).

In action for breach of contract to repurchase stock, complaint alleging defendant's agreement to pay "in cash therefor on or before August 4, A. D. 1920," and "that defend-

ant is a resident of Los Angeles county, Cal., and during all the time herein mentioned said defendant was a resident of the state of Colorado," held demurrable under Code Civ. Proc. § 337, subd. 1, as showing on its face expiration of four-year limitation period, without alleging facts sufficient to suspend statute for defendant's absence from state under section 351.

6. Limitation of actions — 191—Proposed amendment to complaint alleging defendant had not been continuous resident of state for four years held demurrable for failure to avoid statute (Code Civ. Proc. § 337, subd. 1; § 351).

In action for breach of defendant's contract to repurchase stock at date over four years previous, proposed amendment to complaint alleging that defendant had not been continuous resident of California for period of four years, and "did not take up his residence in California until long after the first of the year 1921," held subject to demurrer for failure to avoid bar of statute (Code Civ. Proc. § 337, subd. 1), as defendant must have been absent from state in order to suspend running of statute under section 351.

Appeal from Superior Court, Los Angeles County; Hugh J. Crawford, Judge.

Action by J. H. Frantz against H. J. MalLEN. From a judgment of dismissal, plaintiff appeals. Affirmed.

C. A. Ballreich, of Los Angeles, for appellant.

J. Marion Wright, of Los Angeles (B. L. Herlihy, of Los Angeles, of counsel), for respondent.

KING, Presiding Justice pro tem. Appeal from judgment of dismissal upon sustaining defendant's demurrer to the complaint without leave to amend.

The complaint filed December 17, 1924, alleges that "defendant is a resident of Los Angeles county, Cal., and that during all the time herein mentioned said defendant was a resident of the state of Colorado, and during said time the plaintiff was, and still is, a resident of said state of Colorado."

It then goes on to allege that plaintiff and defendant entered into a written agreement in Colorado, set out in full in the complaint, by which in consideration for the purchase of certain shares of stock by plaintiff from defendant for \$2,000, defendant agreed to purchase said stock from plaintiff, "and pay him \$2,500 in cash therefor on or before August 4, A. D. 1920." If on or before August 4, 1920, defendant offered to pay plaintiff \$2,500, and plaintiff refused, defendant not to be under any obligation to buy it. Plaintiff bought and paid for the stock.

The complaint then alleges that a week or two prior to August 4, 1920, desiring to turn the stock back and receive the \$2,500, plaintiff inquired as to defendant's whereabouts,

and learned he was in Europe; that defendant never offered to buy back the stock; that in the fall of 1920, upon defendant's return from Europe, plaintiff demanded the buying back of the stock by defendant, who refused, and still refuses. Soon after this demand defendant left Colorado, and plaintiff "knew not of his residence until some few months since, when he learned that he was in Los Angeles county, Cal." Judgment is prayed for \$2,500, with interest at 8 per cent.

A demurrer was interposed upon the general ground of insufficiency, lack of jurisdiction of the subject-matter, and setting up subdivision 1 of section 337, Code of Civil Procedure, as a bar. The demurrer was argued January 22, 1925, and January 23d it was sustained without leave to amend.

February 16, 1925, plaintiff filed a notice of motion for leave to amend, to be heard February 20th, specifying that he would move to strike out of the court's order the words "without leave to amend," and accompanying the notice with a copy of the proposed amendment, which alleged, upon information and belief, that defendant had not been a continuous resident of California for a period of four years, and "did not take up his residence in California till long after the first of the year 1921"; that the contract sued on was not at the commencement of the action, or now, barred by the statute of Colorado, which provides a six-year limitation period.

This motion was denied March 16, 1925, and March 20, 1925, an order was made dismissing the action. Plaintiff appeals.

Appellant attacks the ruling on the demurrer, which was doubtless based on the plea of the statute of limitations. He contends that no cause of action arose until demand was made; that defendant having become a resident of California, even if the California four-year period prevails, yet, the complaint not showing on its face that defendant has been a resident of California for four years, this period has not yet run.

[1] The contract plainly provides that defendant will purchase the stock from the plaintiff and pay him "in cash therefor on or before August 4, A. D. 1920." It does not call for a demand or a notice, and none was necessary. The defendant's agreement was to be performed on or before a definite date, and on that date the statute began to run.

The complaint in no place states that defendant is, or ever was, within the state of California, except possibly by inference from the allegation on information and belief "that the defendant is a resident of Los Angeles county, state of California," and even this is negated by the allegation in the same paragraph—also on information and belief—"that during all the time herein men-

tioned said defendant was a resident of the state of Colorado."

The complaint also contains a statement that "some few months since he (plaintiff) learned that he (defendant) was in Los Angeles county, Cal."

The only other statement as to the whereabouts of defendant at any time from August 4, 1920, to date of the commencement of the action is an allegation that defendant was not in Colorado "on said date and for many weeks prior and subsequent thereto," and a further allegation that during the fall of 1920 defendant returned from Europe, presumably to Colorado, where plaintiff demanded payment, which was refused, and "soon after the demand above set out the defendant again left the state of Colorado."

[2] Manifestly *lex fori* governs when the statute of limitations is pleaded, and, unless something is pleaded in the complaint to toll the running of the statute, his demand was barred four years from August 4, 1920, or under appellant's contention, four years from "the fall of 1920," when demand was made, for four years had elapsed before December 17, 1924, when the complaint was filed.

A very clear discussion of the law of the forum is contained in a note in 6 L. R. A. (N. S.) 658, where this language is used:

"In the absence of a local statute of the forum changing the rule, it is established by the overwhelming weight of authority that the limitation of time for bringing the action upon a contract depends upon the law of the forum, and not upon the law of the place where the contract was made or where it is performable.

"In other words, the question of limitation is governed by the law of the forum rather than by the law of the place to which the contract is properly subject, so far as matters of substance are concerned. * * * An action upon a foreign contract cannot be maintained if it would be barred by the statute of limitations of the forum, although not yet barred by the foreign law."

[3] Appellant very earnestly contends "that the four-year statute of California was not available to the defendant, unless it appeared on the face of the complaint that he had been a continuous resident of this state for the full period of four years."

[4] In this he is in error. The face of the complaint showing, as it does, that the four-year period has elapsed, plaintiff must allege such other facts as will prevent the running of the statute. Section 351, Code of Civil Procedure, relied on by appellant, provides that the action may be brought within the statutory period after defendant's return, if he is out of the state at the time the cause of action accrues, and that his departure from the state after a cause of action accrues prevents the statute from running during his absence.

[5] It will be noted that this section refers solely to the physical absence from, or presence in, the state by the defendant. No question of residence is involved. Hence the allegation of the complaint that defendant is a resident of Colorado, or that he is a resident of Los Angeles, does not in any way tend to show that he is or has been, in the words of our statute, "out of," or departed from, the state.

The case of *Dougall v. Schulenberg*, 101 Cal. 156, 35 P. 635, cited by appellant, clearly states as quoted in his brief: "The statute only commenced to run in their favor when they came to this state," and again: "Deducting the period during which the defendant was absent, he had not been in this state two years," etc. These quotations do not justify counsel's deduction that the full term of two years' residence was the question.

So in the case of *McKee v. Dodd*, 152 Cal. 637, 93 P. 854, 14 L. R. A. (N. S.) 780, 125 Am. St. Rep. 82, cited, the court referred to the fact that "the total length of his stay in this state aggregated less than two years"—not "lived in California" as argued by counsel.

There is nothing in the complaint whatever to show that the defendant had not been physically within the state of California the full statutory period of four years, and, the complaint plainly showing that this period had elapsed, the demurrer was correctly sustained.

[6] Even if appellant's motion to amend had been granted, the complaint would still have been vulnerable to the same attack, and the motion was properly denied.

The judgment is affirmed.

We concur: STURTEVANT, J.;
NOURSE, J.

86 Cal. App. 768
PEOPLE v. LOOMIS. (Cr. 991.)

District Court of Appeal, Third District, California. Nov. 16, 1927.

1. Homicide $\S$ 244(1)—Evidence that defendant shot victim while pursuing him held to sustain conviction for manslaughter.

In murder prosecution, evidence that defendant pursued deceased, and inflicted fatal wound at end of pursuit, and at no time after beginning of pursuit was victim in position menacing defendant, held to sustain conviction for manslaughter.

2. Criminal law $\S$ 823(9)—Instruction on presumption of innocence, obtaining until overcome by satisfactory evidence, held not error, when construed with charge on reasonable doubt.

In murder prosecution, instruction that defendant in criminal charge is by law presumed to be innocent until contrary is satisfactorily

proven by competent evidence *held* not error, when viewed with remainder of charge that guilt must be established beyond reasonable doubt, and to moral certainty, and burden of proof thereof is on the people.

3. Criminal law ☞811(5)—Instruction that jury weighing testimony could consider witnesses' demeanor, interest, consistency, and recollection of facts held not error as singling out testimony.

In murder prosecution, instruction that jury, in weighing testimony of witnesses, could consider their demeanor, their interest in result of trial, how far their testimony appeared consistent or was contradicted by other testimony, and whether witnesses' recollection was clear and distinct, *held* not error as singling out testimony.

4. Homicide ☞287—Instruction as to defendant taking law in hands to avenge grievance held not error.

In murder prosecution, evidence of defendant and his wife that defendant killed deceased, after learning of his illicit relations with defendant's wife, *held* proper foundation for instruction as to defendant's taking law in his own hands to avenge real or fancied grievance.

5. Criminal law ☞1173(2)—Refusal to instruct, if juror was not convinced of guilt, to adhere until convinced beyond doubt, held not to require reversal.

In murder prosecution, it was not reversible error to refuse defendant's instruction that, if any juror, after deliberating on evidence, was of opinion defendant was not proved guilty by evidence to moral certainty and beyond reasonable doubt, he should vote for acquittal, and adhere thereto until convinced beyond reasonable doubt he was wrong.

6. Criminal law ☞1186(4)—Misconduct of district attorney in asking objectionable questions held not reversible error, in view of evidence of guilt and verdict of manslaughter (Const. art. 6, § 4½).

In murder prosecution, where, under evidence, jury was not warranted in returning verdict of acquittal, and in returning conviction of manslaughter utmost leniency was extended defendant, misconduct of district attorney in asking objectionable questions to defendant and his wife as witnesses as to her operations, venereal disease, and parentage of her child *held* not ground for reversal, and, under Const. art. 6, § 4½, the appellate court cannot interfere.

7. Homicide ☞116(4)—To justify taking life, circumstances must create reasonable cause for belief of actual peril.

It is not enough that defendant may believe in existence of peril in order to justify taking of human life, but circumstances must be such as to give reasonable cause for belief.

Appeal from Superior Court, San Joaquin County; George F. Buck, Judge.

Frank Loomis was convicted of manslaughter, and he appeals. Affirmed.

Foltz, Rendon & Wallace, of Stockton, for appellant.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

PLUMMER, J. The appellant was convicted of manslaughter upon an indictment charging him with the crime of murder, in that he did, on or about the 14th day of April, 1927, in the county of San Joaquin, willfully, unlawfully, feloniously, and of his malice aforethought, kill and murder one E. J. Wilson. This appeal is prosecuted by the appellant from the order of the court denying his motion for a new trial and the judgment of conviction entered upon the verdict of the jury finding him guilty of manslaughter, as herein stated.

The transcript shows that the appellant Loomis and the deceased E. J. Wilson were ranchers living some three or four miles apart in the agricultural section of San Joaquin county lying northeast of the town of Ripon; that Loomis and Wilson had resided in that neighborhood at least seven years previous to the 14th day of April, 1927; that the appellant and the deceased had been acquainted for that period of time, and had exchanged a limited number of calls or visits; that some two years previous to the 14th day of April, 1927, the wife of the deceased had died, and that thereafter Wilson made more frequent visits at the home of the appellant. The evidence shows that the deceased, for a period covering about six months prior to April 14, 1927, had several times come to the home of the appellant and taken the wife of the appellant out to card parties and other places of amusement. The evidence does not show just how many times the deceased had taken Mrs. Loomis out to different places of amusement, but it does show that the appellant consented to Wilson taking Mrs. Loomis out to the different places. The family of the appellant consisted of himself, his wife, and a minor daughter of the age of about eight years. It further appears from the testimony that some time previous to the 2d day of April, 1927, and on or about the 27th day of February, 1927, the deceased took Mrs. Loomis for an automobile ride on a road leading from Escalon to Farmington, and during the ride violated the person of Mrs. Loomis. Some conversation thereafter which took place between the deceased and Mrs. Loomis is set forth in the transcript to the effect that the deceased insisted that Mrs. Loomis should not make known to the appellant the wrongful acts of the deceased; it appearing that the deceased apologized for his unwarranted conduct, and promised never again to repeat such conduct. Thereafter Mrs. Loomis, not mentioning to her husband the conduct of the deceased just referred to, upon the invitation of the deceased and the urging of her husband, accompanied the deceased to one or two places of amusement, and on the 2d day of

April, 1927, without having said anything to her husband about the acts of the deceased, again accompanied the deceased to a card party. Upon returning home from the card party, the deceased took Mrs. Loomis to his own residence, and there, according to the testimony of Mrs. Loomis, against her wish and consent, again violated her person. After this occurrence the deceased once more became penitent and apologized, and, on the 11th day of April, 1927, invited Mrs. Loomis to accompany him to some party or place of amusement. Mrs. Loomis refused this invitation, and, after the departure of the deceased, upon being pressed by her husband as to her reason for declining to go out with the deceased, as he (Loomis) could not go, related to her husband the acts of the deceased herein mentioned. On the following day the appellant, with his wife, drove over to the residence of the deceased in an automobile, and there, in the presence of one or two witnesses, had a conversation with the deceased in relation to the conduct of the deceased toward the wife of the appellant. In this conversation the deceased manifested no disposition to discontinue his acts toward the wife of the appellant. Thereafter the appellant and his wife drove over to the town of Modesto, where a physician was consulted to ascertain if any infectious disease had been communicated to Mrs. Loomis by reason of the conduct of the deceased. The appellant and his wife then returned to their home and continued working on their farm until about 11 o'clock on the 14th day of April, 1927, when the appellant and his wife again drove over to the home of the deceased. Before leaving on this second visit, the appellant took with him an automatic revolver, placing the same in his right-hand hip pocket. Upon reaching the residence of the deceased, and inquiring of an electrician, who chanced to be there, of the whereabouts of the deceased, the appellant ascertained that the deceased was at work out in the fields mowing alfalfa. Thereupon the appellant, together with his wife, drove over in their automobile to where the deceased was mowing alfalfa, and waited for the deceased to come around to that portion of the field nearest to the course over which the appellant had driven his automobile.

According to the testimony of Mrs. Loomis, the deceased stopped his mowing machine right by the automobile just mentioned; that the appellant and Mrs. Loomis remained in the automobile; that the right front wheel of the automobile was about opposite the left side wheel of the mowing machine; that the deceased, after stopping his mowing machine, came up to the right side of the automobile; that the appellant asked the deceased what he had to say about the occurrences, and the deceased remarked that he had nothing to say; that at the time of this conversation the deceased was standing by the right side of the automobile, with one of his hands against the

door thereof; that at this juncture the appellant got out of the automobile, and went around the rear thereof, and leaned up by the hind wheel against the fender. At this instant of time the appellant addressed the deceased as follows: "Earle, I just want to know if you acknowledge that you forcibly assaulted my wife;" to which the deceased replied, "Yes, and, what is more, I will do it again; I will get rid of you, and then I will get her." After saying this, the deceased made a lunge at the appellant, and hit him. The witness did not see the blow, but says she heard it; that she saw the deceased pass by her as he moved toward the appellant; that she heard a thud as of something falling; that she immediately looked around, and the appellant was getting up; that, after the appellant got up, deceased again started toward him with his hands raised; that at this time the appellant had his right hand raised, holding therein the gun to which we have referred; and that, as the deceased started toward the appellant the second time, the appellant fired one shot. The deceased hesitated a moment, ran over toward the mowing machine, and hesitated there a moment as the appellant fired a second shot; that the deceased then ran in an easterly direction over the checks in which the alfalfa field was divided; that the appellant followed the deceased some little distance, during which period of time several shots were fired; that, after the deceased had reached a point which is shown by the testimony of other witnesses to be at a distance of 203 feet from where the shooting began, the deceased turned and faced the appellant, and the appellant, according to his testimony, at a distance of some 15 feet, again fired at the deceased, whereupon the deceased, after taking a step or two, fell to the ground, and was later taken up dead. The testimony of the appellant shows that he followed the deceased from the time he began firing at him when they were standing alongside the automobile until the deceased fell to the ground at a point, as we have stated, 203 feet distant, and that he fired at the deceased until his revolver was empty. The testimony of other witnesses who measured the grounds was to the effect that the distance from the automobile to the place where the body of the deceased lay was 203 feet, and that, along the course which was taken by the parties from the time the shooting began until its termination, five cartridge shells were found corresponding to the kind and size suited for use in the automatic pistol belonging to the appellant; that two of the shells were found within close proximity of the body of the deceased, one being about 12 feet therefrom, and the second at a few feet greater distance. The other shells were along the course over which the parties traveled.

The testimony of the appellant is to the effect that he was afraid that the deceased was about to do him some great bodily harm; that

the deceased was a larger man than he, and that the appellant was afflicted with defective eyesight, and could not distinguish objects, without the aid of his glasses, more than a few feet distant, and that he was afraid the deceased would break his glasses and render him helpless; that he pursued the deceased, thinking that the deceased was going to the mowing machine for the purpose of getting a rifle or revolver. The testimony, however, shows that the deceased did not obtain any revolver, rifle, or any instrument whatever by which he might defend himself against being shot by the appellant, and that the appellant fired several shots at the deceased after the deceased had left the vicinity of the mowing machine.

The testimony of Dr. Johnson, who performed the autopsy, shows that several wounds were inflicted upon the body of the deceased, and that the wound which caused the death of the deceased entered the front left side of his body, pierced the aorta or large blood vessel leading to the heart, passed through other organs of the body, and shattered one of the vertebra of the spinal column; that death necessarily followed very quickly after the infliction of this wound; that, after receiving a wound of this kind shattering the vertebra, the person so wounded would immediately drop to the earth and remain there until death; that it would only be a few seconds—the language of the physician being, “Death would follow probably in a few seconds, if it ran into minutes at all”—that none of the other wounds which he had described were necessarily fatal. Dr. Johnson also testified that the autopsy revealed that one of the bullets entered the body from the rear, inflicting a severe, though not necessarily fatal, injury. There is no testimony in the transcript contradicting that of Dr. Johnson which we have just stated in relation to the wounds received by the deceased, and of the fact that the wound which pierced the aorta and other organs of the body between the aorta and the spinal column, and shattered one of the vertebra of the deceased, was such as necessarily to cause the deceased to fall to the ground and to expire within a few seconds, and therefore the jury could only conclude that the fatal shot was the one which brought the deceased to the ground at a distance of 203 feet from where the shooting began, and that this shot was fired after the deceased had retreated for the distance mentioned, and was facing the appellant without anything in his hands whatever indicating that the deceased possessed either the power, or entertained the intent, to inflict upon the appellant any grievous bodily injury.

[1] Before the testimony of the appellant and Mrs. Loomis had been introduced, the physical facts introduced in evidence, as we have herein summarized them, establish conclusively that the appellant had pursued the deceased and fired at him at least five dif-

ferent times, inflicting the fatal wound at the end of the pursuit; that the deceased not only retreated to his mowing machine, which was only a few feet away, and to a point much farther distant, in his attempt to escape death, and at no time after the first shot was fired was in a position menacing the appellant. The testimony of the appellant and of the appellant's wife coincide exactly with what the physical facts surrounding the affray disclose, and show that the appellant pursued the deceased, as we have stated, and that the deceased at no time had any weapon or instrument of any kind with which he could inflict grievous bodily injury upon the appellant. The only difference between what the physical facts of the encounter disclose and the testimony of the appellant is that the appellant testified that he was afraid the deceased was going to get a gun or revolver at the mowing machine, and that thereafter he was still afraid of the deceased. The testimony of the appellant, after the first shot, fully discloses the character of the pursuit. Answering a question as to what the deceased did after the first shot was fired, the appellant testified:

“Then he (referring to the deceased) started to run southeast, and when he got to the mowing machine he slowed up a little and I thought maybe he went after a gun; then he quit running toward the mowing machine, and he run about straight east, so by that time I got it into my head that I had to chase him. I knew if he ever got a gun or anything from the mowing machine it would be all off with me. I could not think of anything else, and all I thought of was, if he gets me, it is good night with the wife. I knew he might kill her for telling on him. He told me what he had done and I didn't know what he would do, so he started running out there, and I followed him out, and he ran over a border. The wind was blowing very hard, and it blew his hat off. He turned around and stopped like he was going to go after his hat or get me, and I shot at him twice more on the run; he kept going east and southeast, and he run pretty near south, and, when I saw him coming and crowding through there, I headed him off. I thought he was going back to the car or the mowing machine, or something, and then we got out on the place where it had been mowed. We were pretty near to the ditch or the levee or something there, and he was about 25 feet east of me, and I kind of run up on that levee and stopped, and he saw I was stopping, and he stopped and looked at me. He was maybe 15 or 18 feet east of the hump which I was standing on, and so I stood there and looked at him part of a minute, probably, and he looked at me, and he started straight toward me, and I kept standing there and threw up my hand with my gun beside me. I did not say anything to him. He looked at me and started toward me, and I kept motioning to him two or three times to try to make him stay away, and as he got 8 or 10 feet from me I kept ashooting until he was right close on me, and as he went almost past me he fell down and rolled over.”

This testimony of the appellant corresponds with the physical facts as to the shells being found close to the body of the deceased, and also to the testimony of Dr. Johnson that the fatal shot was fired after the pursuit had continued for the distance herein mentioned. It may be here stated that the testimony shows that the place where the deceased's body was found was much farther away from the automobile than the mowing machine; that the mowing machine, as shown by the testimony of Mrs. Loomis, was close by the automobile; and that the deceased was all the while getting farther and farther away from the automobile until he turned and faced the appellant just before the fatal shot was fired.

As disclosed by the physical facts and the testimony of the appellant and of the appellant's wife, to which we have referred, the appellant was beyond any reasonable doubt guilty of the crime of murder as charged in the indictment returned against him. This résumé of the testimony has become necessary by reason of the alleged misconduct of the district attorney, to which we will herein-after refer.

[2] Two grounds of reversal are urged by the appellant: First, that the court erred in its instructions to the jury in refusing to give certain instructions requested by the defendant; and, second, misconduct on the part of the district attorney. It is first urged by the appellant that the court erred in giving to the jury the following instruction:

"The defendant in a criminal action is by law presumed to be innocent until the contrary is satisfactorily proven by competent evidence."

A reference to the transcript shows that this is only an excerpt from the instruction given. Just preceding these words the court instructed the jury as follows:

"In criminal cases guilt must be established beyond a reasonable doubt and to a moral certainty, and the burden of proof is upon the people."

[3] Immediately following are the words which we have quoted as alleged to be error on the part of the trial court, but, as is readily seen when the whole instruction is read, no error appears. Immediately following is given an instruction relative to reasonable doubt, being the instruction taken from the Massachusetts case which has been followed in this state for years. It is also urged that the court erred in instructing the jury as follows:

"In viewing and weighing the testimony of each and all of the witnesses in the case you have a right to consider their demeanor and manner upon the stand, their interest in the result of the trial; how far their testimony appears consistent or inconsistent in itself; how far it is contradicted, if at all, by other facts and circumstances and testimony in the case, whether their recollection as to matters to which they testified is clear and distinct."

A number of authorities are cited by appellant having to do with cases where the trial court singles out the defendant and gave an instruction relative to his testimony, his demeanor upon the witness stand, interest, etc. These cases have no bearing upon the instruction given by the court. What the court instructed the jury is mere commonplace, and are matters which the jury, if reasonably intelligent, would take into consideration without any instruction from the trial court, and, being applicable to all the witnesses who testified, no error was committed by the court in the giving of the instruction just quoted. It has been held that an instruction singling out the testimony of the defendant is not sufficient ground for reversal, although the giving of such an instruction has consistently been condemned. *People v. Bojorquez*, 35 Cal. App. 350, 169 P. 922, and concurring opinion by Mr. Justice Hart.

[4] The court also gave to the jury the instruction which was given by the trial court in the case of *People v. Vukich* (Cal. Sup.) 257 P. 46. The instruction involved is the one relating to a defendant taking the law in his own hands to avenge a real or fancied grievance. In the *Vukich* Case the giving of the instruction was held proper, and in the case at bar, even though the appellant relied solely upon the plea of self-defense, all the circumstances detailed by the appellant himself and by Mrs. Loomis laid the foundation for the giving of the instruction. These circumstances were all well calculated to arouse in any normal man a feeling of hostility toward the violator of his home and a desire to avenge himself for the injury. The point is also made that the court refused to give certain instructions on the subject of self-defense, requested by the appellant. A reference to the transcript, however, shows that the court carefully and painstakingly instructed the jury upon this subject in language as clear and direct and as fully covering the subject as would have been the case had the court discarded the instructions given, and used the instruction proposed by the appellant.

[5] The refusal to give the instruction numbered 22 requested by the appellant is also alleged to constitute error. The proposed instruction reads:

"If any one, or any number of you, after deliberating upon all the evidence in the case, shall be of the opinion that the defendant has not been proven guilty by the evidence in the case to a moral certainty and beyond a reasonable doubt, those entertaining that opinion should vote for a verdict of not guilty, and should adhere to that point until convinced beyond all reasonable doubt that they are so wrong."

While the giving of an instruction similar in language to the one requested has been held proper in many cases, the refusal to give such an instruction has likewise consistently

been held not to constitute, in and of itself, sufficient cause for reversal. See *People v. Grahle*, 67 Cal. App. 183, 227 P. 227, and a large number of cases there cited. Without going further into the alleged errors of the trial court relative to the instructions given to the jury, it is sufficient to say we have carefully examined all the instructions given and refused, and find that the trial court fully and fairly instructed the jury as to all the law involved in this case, and that no reversible error can be found either by reason of the instructions given or the requested instructions refused.

[6] We have finally to consider the alleged misconduct of the district attorney. This misconduct consisted in asking questions in the cross-examination of Mrs. Loomis, while on the witness stand for the defendant, and also of questions asked the defendant. Before considering the questions, we will state that the transcript shows that the jury was instructed to disregard the questions asked by the district attorney, and to which no answers were permitted. It is, however, urged here that the misconduct was such as to render ineffective any instructions that might be given to the jury by the trial court. Upon cross-examination the district attorney asked Mrs. Loomis the following questions:

"Q. Isn't it a fact that at that time and place you had a conversation with Mrs. McAlpine that you had several operations; that you were all cut up inside; that you had your ovaries taken out; that the reason was that you had contracted a venereal disease in Modesto, and brought it home, communicated it to your husband, and told him as an explanation that you had gotten it off a toilet seat, or that he had gotten it off a toilet seat?" "Q. Had he within a year prior to this occurrence at any time, did your husband say anything to you concerning the fact of his parentage of your child?"

Upon cross-examination of the defendant the district attorney asked the following questions:

"Q. Do you know whether or not your wife's ovaries have been removed?" "Q. Isn't it a fact that in April, 1926, your wife filed a divorce complaint against you?" "Q. Isn't it a fact, Mr. Loomis, that your wife filed a divorce complaint against you within a year prior to this shooting, wherein she stated and alleged that you—"

At the time of asking the question of the defendant relative to a divorce action having been begun against him by his wife, the district attorney had in his hand what is said to have been a copy of the complaint in such action, but, as that is not a part of the record, we know nothing of its contents, and shall pass the incident by with the statement that the transcript shows absolutely nothing upon which to base the question, and with the further statement that the transcript shows nothing which would lead to the conclusion that the asking of this question amounted to any

serious misconduct, or could have had any prejudicial effect upon the minds of the jurors. With this statement, before considering the relevancy or irrelevancy or alleged prejudicial effect of the asking of the other questions, we will refer to the case of *People v. Cook*, 148 Cal. 334, 83 P. 43, upon which the respondent particularly relies to show the propriety of the district attorney propounding the various questions set forth herein. In the case just cited the defendant was being tried on the charge of having murdered one Max Krieger. The facts disclosed in the opinion in that case show that the defendant had a grown daughter with whom he was having illicit relations; that Krieger was paying attention to the daughter, whether with honorable or other intent does not appear, but, for the purpose of showing a motive for the killing of Krieger by the deceased, the prosecution was permitted to introduce testimony tending to show the illicit relation between father and daughter; that the defendant was actuated by the fear that Krieger, a rival for his daughter's favors, would become possessed of knowledge of the criminal relations existing between father and daughter, and therefore, through motives of jealousy, and to conceal his own criminal acts, killed Krieger. It is true that in that case the testimony was offered of illicit relations upon a promise of the district attorney to connect it up with the defendant to show a motive, as herein stated, subject to a motion to strike out, and no motion was made, but the court, in its opinion, held such testimony, under the circumstances, admissible. The judgment in that case, however, was reversed on other grounds.

The case of the *People v. Smith*, 143 Cal. 599, 77 P. 449, is also called to our attention in connection with the Cook Case. In the Smith Case the question turned upon the good or bad faith of the district attorney, and need not be further adverted to herein. The circumstances involved in the Cook Case are almost the antithesis of those involved in the case at bar. In the Cook Case the commission of a separate and distinct crime was sought to be shown as a motive for the commission of the offense upon which the defendant was being tried. Under such circumstances the law seems to be well settled that other offenses may be shown when there is a reasonable connection between the offense charged and the offense sought to be shown so that the latter may reasonably be said to be connected with, and furnish a cause for the commission of, the crime for which the defendant is being tried. All the cases relating to the introduction in evidence of separate offenses as the motive for a commission of a second offense are not pertinent here, for the simple reason that the questions involved do not relate to separate offenses committed by the defendant. A parallel set of circumstances would have been presented if, in the Cook Case, the daughter

of the defendant had been asked questions indicating that she had had certain operations performed upon her body by reason of some former unlawful relations with parties other than the defendant. If motive there was for the defendant killing Wilson in this case, it was the alleged violation of his home by the deceased. The fact that Mrs. Loomis had told something to a Mrs. McAlpine about her condition had absolutely nothing to do with the motive of the defendant in killing Wilson, assuming that he was actuated by a spirit of revenge and a desire to kill the deceased on account of the deceased's invasion of the defendant's home. If Mrs. Loomis were assumed to be a woman of dissolute character, as the question indicated, it certainly would not tend to show any additional motive on the part of the defendant to kill Wilson. If the killing took place under circumstances justifying the homicide on account of the invasion of the defendant's home, it would not be any more justified because the wife of the defendant was a dissolute character, nor would it be any less justified. At the time the questions were asked which we have set forth herein, there was nothing in the case indicating that the defendant relied upon anything other than the plea of self-defense; that the deceased was the aggressor in striking the defendant preceding the shooting. It was not a case of sudden passion or irresistible impulse following the discovery of the deceased in some illicit act with the wife of the defendant, and therefore what Mrs. Loomis may have told Mrs. McAlpine was wholly inadmissible. It could not have been admitted on the theory of proving the defendant at least guilty of manslaughter, for the simple reason that there was nothing in the case showing a homicide following a sudden heat of passion or an irresistible impulse, but only a homicide following, at most, the striking of a blow by the deceased upon one shoulder of the defendant sufficient to fell him to the ground. Likewise, the question relative to the paternity of the eight year old child involved in the second question presented nothing proper for the jury to consider, as disclosed by the facts set forth in the transcript. That the defendant was or was not the parent of the child bearing his name would not bear upon the question of whether the defendant did or did not kill the deceased in necessary self-defense.

The Supreme Court of this state has had occasion in numerous instances to condemn questions which have for their purpose only the degrading of the witness. That the first question which we have set forth herein, propounded to Mrs. Loomis, was inadmissible, clearly appears by reversing the situation placing Mrs. McAlpine on the witness stand and asking her if Mrs. Loomis did not relate to her what is set forth in the question. That the question tended to degrade the witness in the eyes of the jury seems to us clearly ap-

parent because of the imputations and intentions contained therein. Questions tending only to degrade the character of the witness have been condemned in the following cases: *People v. Wells*, 100 Cal. 459, 34 P. 1078; *People v. Un Dong*, 106 Cal. 83, 39 P. 12; *People v. Crandall*, 125 Cal. 129, 57 P. 785; *People v. Bowers*, 79 Cal. 415, 21 P. 752; *People v. Lee Chuck*, 78 Cal. 317, 20 P. 719; *People v. Tufts*, 167 Cal. 266, 139 P. 78. Other cases might be cited, but these are ample to show that, where such questions are propounded by the district attorney, sufficient misconduct is presented necessitating a reversal. In some of the cases, as in *People v. Smith*, 143 Cal. 597, 77 P. 449, where the question of misconduct of the district attorney upon argument of the cause to the jury was presented, a distinction is made between the good faith and bad faith characterizing the alleged misconduct. The effect on the jury in the case at bar from the asking of the questions which we have set forth herein could not very well be any different whether propounded in good or in bad faith, and differs from words that may be uttered in the heat of argument, because the jury, as ordinarily intelligent men, and under the instructions of the court, would readily make the distinction between the evidence and the argument of counsel. Some of the cases also present the question as to whether the trial court immediately instructs the jury to disregard the questions propounded by the district attorney. In the case at bar it appears that the vitally objectionable questions were immediately followed by instructions from the court to disregard the same.

[7] Admitting that the questions propounded by the district attorney were prejudicial in their character, and were questions which should not have been propounded, this cause still presents a different situation from one where, under sharply conflicting evidence, the jury has brought in a verdict of murder involving either life imprisonment or the infliction of the death sentence. Under the testimony set forth in the transcript and as summarized herein, whether the questions of the district attorney were propounded in bad faith or in good faith, or under the assumption that they were admissible, or from lack of familiarity with the rules of evidence, must be held immaterial. This is true, because, if the testimony of the defendant and the testimony of Mrs. Loomis be taken at full face value, it nevertheless appears that the homicide was committed under circumstances which establish that there could have been in the mind of the defendant no reasonable belief that his own person or the person of his wife was in actual peril. It is not enough that the defendant may believe himself in peril in order to justify the taking of human life, but the circumstances must be such as to give reasonable cause for such a belief. After the first shot was fired by the defendant, the testimony of the defendant himself and the testimony of

Mrs. Loomis, taken at its full face value, shows that there was no reasonable grounds or appearances for believing that the deceased was about to inflict upon either one of them any grievous or other injury. Their own testimony shows that the deceased was retreating; that he was unarmed; that the deceased retreated to the mowing machine, and then sought safety by further flight; and that the defendant followed the deceased for a trifle over 200 feet, and then and there inflicted the mortal wound. Under such circumstances the jury would have been justified in returning a verdict of murder, based upon the testimony of the defendant and Mrs. Loomis, accepting the testimony of both of them at full face value. The verdict of manslaughter returned by the jury in this case can only be reconciled with the testimony by concluding that the jury acted upon the assumption that a man who invades the home of another deserves to be shot. Under section 4½ of article 6 of the state Constitution we are prohibited from interfering with the verdict in this case because, no matter how objectionable the questions propounded by the district attorney may be, the jury was not warranted, under any aspect of the case, in returning a verdict of acquittal, and in returning a verdict of manslaughter the utmost leniency was extended to the appellant. The homicide in this case grew out of the invasion of the home of the appellant by the deceased, but, while juries usually modify the verdict in such cases, the law does not recognize homicide therefor as either justifiable or excusable except in certain instances not shown by the evidence in this case. Here the homicide occurred several days after the alleged invasion of the home of the appellant.

The judgment and order of the trial court are affirmed.

We concur: FINCH, P. J.; HART, J.

88 Cal. App. 659

BURGESS v. DORAN. (Civ. 5634.)

District Court of Appeal, First District, Division 2, California. Nov. 12, 1927.

1. Appeal and error ⇨854(6)—Order granting new trial will be affirmed if any of grounds therefor are supported by record.

If any of grounds for new trial are supported by record, order granting new trial will be affirmed.

2. New trial ⇨66—In unlawful detainer, verdict for defendant, not claiming renewal of lease for 10 years was in writing delivered to lessee, held "against law" (Code Civ. Proc. § 657, subd. 6; Civ. Code, §§ 1624, subd. 5, 1626).

Where defendant in action for unlawful detainer pleaded that lessor granted renewal of lease for 10-year period, but did not claim that

any writing renewing such term required by Civ. Code, § 1624, subd. 5, for leases over 1 year, was ever delivered to lessee, as required by section 1626 for contract to take effect, verdict for defendant was "against law," within Code Civ. Proc. § 657, subd. 6, providing for new trial when verdict is against law.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Against Law.]

3. Landlord and tenant ⇨88(1)—Document claimed to be lease renewing former lease, not shown to have been delivered to lessee, held in legal effect no lease (Civ. Code, § 1626).

In action in unlawful detainer against defendant claiming to have been granted renewal of lease for 10-year period, document claimed to be lease, not shown to have ever been delivered to lessee, was in legal effect no lease, under Civ. Code, § 1626, providing that contract takes effect on delivery.

4. New trial ⇨66—Jury's verdict on equitable issues is purely advisory, and, on trial court's failure to make findings thereon, verdict is against law, requiring new trial.

Verdict of jury on equitable issues is purely advisory, trial court being required to make findings thereon, and, on failure of trial court to make findings, verdict is against law and new trial should be granted.

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Action by C. W. Burgess against N. V. Doran. Verdict for defendant, plaintiff's motion for a new trial was granted, and defendant appeals, under Code Civ. Proc. § 953a. Affirmed.

James M. Hanley, of San Francisco, for appellant.

Sullivan & Sullivan, Theo. J. Roche, and Hugh K. McKevitt, all of San Francisco, for respondent.

STURTEVANT, J. The plaintiff commenced an action in unlawful detainer against the defendant. The defendant appeared and answered. A trial was had before the trial court sitting with a jury. The jury returned a general verdict in favor of the defendant. The plaintiff moved for a new trial. The motion was based on all of the statutory grounds except as to excessive damages. The trial court granted the motion and in its order it did not specify on which of the grounds of the motion it based its order. The defendant appealed under section 953a of the Code of Civil Procedure.

The defendant makes several points which are not controverted by the plaintiff, but in support of the order the plaintiff calls to our attention the condition of the record and contends that the trial court did not err in granting the motion. In this connection we think the plaintiff must be sustained.

In the defendant's answer an equitable defense was pleaded. In brief, that equitable defense was that the plaintiff had by certain conduct granted to the defendant a renewal, for a 10-year period, of a lease which it is conceded commenced on October 2, 1915, and expired October 5, 1925. After the jury had been impaneled the plaintiff and defendant stipulated to such facts that there remained no issue to be tried except the issues presented by the equitable defense. The defendant proceeded to introduce her evidence and the case was duly presented to the court and jury. On submitting his case the plaintiff presented and requested the trial court to submit to the jury certain special issues, but they were not presented to the jury by the court. On the other hand, the court gave to the jury two forms of general verdicts—one in favor of the plaintiff, and one in favor of the defendant. The jury returned a general verdict in favor of the defendant. Later the plaintiff made concurrently two motions. One motion was in the form of a request for the trial court (1) to disregard and ignore the verdict; (2) to decide and determine said action and file its findings; (3) to decide and determine the equitable issues and file its findings; and (4) to decide and determine all of the equitable issues tendered by the answer and to file its findings. The other motion was the motion for a new trial which we have noted above. The trial court ignored the motion to file findings, etc., and decided the motion for a new trial in favor of the moving party.

[1] The grounds on which the motion for a new trial was based included attacks that the evidence was insufficient to support the verdict and that the verdict was against law. The defendant contends that, as the order granting the motion did not specify that one of the grounds on which it was based was the insufficiency of the evidence to sustain the verdict, therefore it will be presumed on appeal that the order was not based upon that ground. However, if any one of the other grounds is supported by the record, the order appealed from should be affirmed. The verdict was against law for two different reasons.

[2, 3] The plaintiff requested and the trial court instructed the jury as follows:

"You are hereby instructed that any agreement for the leasing of the Land Hotel for a longer period than 1 year is invalid and not binding unless the agreement or some note or memorandum thereof was in writing and was signed by Mr. Burgess and was delivered to Mrs. Doran."

It is not contended that the instruction was erroneous. Civ. Code, § 1624, subd. 5. The evidence was all one way, and it is not even claimed that any writing renewing the term was ever delivered to Mrs. Doran. The plaintiff contends that, under these facts, the doc-

ument which the defendant claims to be a lease in legal effect was no lease. Civ. Code, § 1626; *Feigenbaum v. Aymard*, 71 Cal. App. 713, 236 P. 156. The authorities clearly sustain the plaintiff's contention. It is equally clear that, on the record as made, "the verdict * * * is against law." Code Civ. Proc. § 657, subd. 6; *Larrabee v. Western Pacific R. Co.*, 173 Cal. 743, 749, 161 P. 750.

[4] In the next place, the verdict of the jury on equitable issues was purely advisory. *Haggin v. Raymond*, 67 Cal. 302, 7 P. 721; *Adams v. Helbing*, 107 Cal. 298, 40 P. 422; *Swift v. Occidental Mining, etc., Co.*, 141 Cal. 161, 166, 167, 74 P. 700; *Bradley Co. v. Bradley*, 37 Cal. App. 268, 276, 173 P. 1013. The trial court should have made findings thereon, and until findings were made the record was incomplete. *Vallejo, etc., R. Co. v. Reed Orchard Co.*, 169 Cal. 545, 556, 147 P. 238. In such cases where the trial court fails to make findings, it has also been held that the verdict is against law and a new trial should be granted. *Haight v. Tryon*, 112 Cal. 4, 6, 44 P. 318.

The judgment is affirmed.

We concur: KOFORD, P. J.; NOURSE, J.

86 Cal. App. 653
BORADORI v. PETERSON. (Civ. 6009.)

District Court of Appeal, First District, Division 1, California. Nov. 16, 1927.

1. Master and servant ⇨80(10)—Evidence held not to show agreement to include lease as part of business so as to entitle employee to profit from sublease.

Evidence held not to show that parties to contract of employment for stated salary and fourth of net profits agreed on inclusion of employer's lease as part of business so as to entitle employee to profit from sublease.

2. Master and servant ⇨70(3)—"Net profits," within contract entitling employee to share, mean return exceeding expenses and losses.

"Net profits" of business, as in contract to pay employee a share thereof, mean what remains as clear gains of business venture after expenses incurred in its conduct and losses sustained in its prosecution.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Net Profits.]

3. Master and servant ⇨80(6)—Employee claiming share of profits of mercantile business, including profits from sublease, must show agreement to treat lease as merchandise.

Net profits of business of buying and selling merchandise being limited to difference between gross receipts for sale thereof and expense of conducting business, including rent, it was incumbent on employee, suing employer for share of net profits, including profits from sublease, to show agreement that employer's

rent or lease should be treated as merchandise in determining whether business resulted in a profit.

4. Contracts ⇨170(1)—Parties' contemporaneous and practical construction of equivocal contract is strong evidence of its meaning.

The contemporaneous and practical construction of a contract by the parties is strong evidence of its meaning, if its terms are equivocal.

5. Master and servant ⇨80(10)—Evidence held to warrant finding against employee's right to compensation for services rendered after termination of employment.

Evidence held to warrant finding that employee was not entitled to recover compensation for services rendered to employer after termination of employment.

Appeal from Superior Court, City and County of San Francisco; Edmund P. Mogan, Judge.

Action by William J. Boradori against Frank B. Peterson, doing business as the Frank B. Peterson Company. From a judgment for defendant, and an order denying a motion for new trial, plaintiff appeals. Affirmed.

William P. Cauby and Robert L. McWilliams, both of San Francisco, for appellant.

Francis V. Keesling and L. L. James, Jr., both of San Francisco, for respondent.

CAMPBELL, Justice pro tem. This action was brought by appellant against respondent, by whom he was employed for a number of years, to obtain a decree directing the payment of such sum as might be found to be owing to him. As stated by appellant in his opening brief, the case involves two principal questions. The first is whether or not appellant is entitled to share in the profits accruing from subletting certain premises in which respondent's grocery business had been located; the second, whether or not appellant is entitled to a reasonable compensation for services rendered by him following the termination of his employment by respondent. Judgment was entered in favor of respondent—defendant in the court below—and from such judgment and the order denying his motion for a new trial this appeal has been taken.

Respondent, Frank B. Peterson, was for many years engaged in the wholesale grocery business in Main street, San Francisco, and for a number of years appellant had charge of the business so far as the buying and selling of the merchandise and the direction and control of the salesmen were concerned.

The precise terms of appellant's employment at the outset do not appear. It is in evidence, however, as testified by respondent, Frank B. Peterson, that he, being the owner

of the business, charged the business 6 per cent. for the moneys invested by him and that the profits of the business, so far as his associates were concerned, were computed after the deduction of that 6 per cent. While the firm was in business at the Main street location it occupied leases premises, the lease on which had been purchased by Peterson. This lease was taken in the name of Frank B. Peterson personally and was regarded and treated as his personal affair. The grocery business was charged \$245 per month rent, and the lease, while handled in the firm's books, was handled in an account called "lease account." At the end of the year this account was closed out directly to Frank B. Peterson's investment account, which was a holding capital account, and did not affect the business. There were two other tenants in the premises—the Naknek Packing Company and the Velvetone Company—who paid rent, which rent went directly to Frank B. Peterson's personal account.

In December, 1913, appellant, Boradori, had planned to leave Peterson and to associate himself with the William Cluff Company. When this was called to the attention of Peterson he persuaded Boradori to abandon that plan and remain with him, and he agreed to give Boradori thereafter one-fourth of the net profits of the business. This understanding was embodied in a written memorandum reading as follows:

"San Francisco, December 8, 1913. This is to confirm verbal agreement whereby Mr. William J. Boradori is to receive \$200 per month from December 1, 1913, from Frank B. Peterson Company and one-quarter of the net profits, commencing February 1, 1924, for at least one year. [Signed] Frank B. Peterson."

The first of the two questions involved in this appeal is the meaning of the term "net profits" as used in this written memorandum of agreement.

This agreement was continued in force until the sale of the business in 1919. During the intervening years Boradori was paid various sums as his share of the profits. Some years there were no profits, and Boradori's income was limited to his salary. One year his profits went up to \$10,000 or \$12,000.

The question as to the construction to be placed on the agreement arises out of the circumstances surrounding the removal of the business from Main street to new quarters at Spear and Harrison streets. In the month of December, 1918, Peterson, casting about for a new location, rented from J. D. & A. B. Spreckels Securities Company a building on the corner of Spear and Harrison streets for a period of 10 years and to that location moved his grocery business. The removal was made with the consent of appellant, and no change was made in the business and re-

lations existing by virtue of the arrangement of employment made in 1913.

When Peterson commenced business at the Main street location there was a ground lease of the premises which had some years to run. The lessees had erected the building, which upon the termination of the lease was to become the property of the owner. Peterson himself paid the lessees a monthly rental. The building being in bad condition, Peterson threatened to leave unless substantial repairs were made. The landlord thereupon sold the lease to Peterson, who paid \$6,000 for the remainder of the term. This he spread over a number of years, charging the grocery business with \$245 rent per month and crediting his personal account with that amount. He also charged other lines of business in which he was interested with their proportionate shares. All of these matters were carried on the books of Frank B. Peterson Company, under what was termed "lease account" and were never considered by any one to be a part of the grocery business. When Frank B. Peterson Company moved to the new quarters in 1918 the same method of handling the lease account followed, except that for some unexplained reason the term "rent account" was used instead of "lease account," and thereafter under the Spreckels lease the grocery business was charged with the rent and credited with the rent received from the subtenants.

In 1919 Peterson concluded to dispose of his grocery business and found a purchaser in Getz Bros. & Co., who were willing to sublease the Spreckels premises from Peterson for the remainder of the term and pay Peterson a certain sum over and above that called for in the lease. Before consummating the transaction Peterson placed the matter before appellant and stated to him in effect that unless it met with his approval he would proceed no further, and appellant agreeing, the sale was consummated. As to the lease, appellant testified:

"Q. What was said about the lease? A. Mr. Peterson told me what he was asking for the lease and it was—and we understood them—we figured it was between fifty and fifty-five thousand dollars."

There is, however, no testimony that appellant was to receive any of the profit made on the lease, nor that he demanded any or even suggested that he was interested in it.

[1] The judgment is attacked upon the ground of the insufficiency of the evidence to justify the finding that the plaintiff received everything he was entitled to receive; that he had no interest in the lease and therefore none in the profit derived from the sublease to Getz Bros. & Co.

Under the written agreement of 1913 appellant was to receive 25 per cent. of the net profits of the grocery business. Parol evi-

dence was admitted to show the intention of the parties as disclosed by their own construction of the agreement, the circumstances under which it was made, and their previous, contemporary, and subsequent business relations. Appellant did not contend that any partnership relation existed between the parties. There is no question but that appellant was at the time the agreement was made an employee of Peterson in the grocery business alone as manager of that business. The execution of the agreement made no change in their relationship of master and servant. Appellant acquired no interest in Peterson's other business affairs. When the grocery business showed a profit, he received his share of it; when it showed a loss, Peterson sustained the loss, appellant at all times receiving his regular salary. The agreement was made December 8, 1913, and appellant was to receive "one-quarter of the net profits commencing February 1, 1914, for at least one year." It therefore appears that at the expiration of one year either party could terminate the agreement at will, and that if appellant was dissatisfied with the increased rent under the Spreckels lease or the fact that the entire rent was charged to the grocery business and credited with rent received from the subtenants, as he claims, he could have refused longer to remain in the employ of Peterson. He certainly cannot complain of the fact that after the removal to the new location the grocery business, from the net profits of which he received a part, was credited with the rent paid by the subtenants, while in the old location the rent paid by the subtenants went to Frank B. Peterson personally, and no part thereof inured to his benefit.

Appellant contends that the conduct of the parties shows that the profit on the lease was intended to be figured in determining the net profits of the business, specifying the particular circumstances to show such intent as follows: That at the time of the execution of the Spreckels lease Peterson said to appellant, Boradori: "I am signing my life away, and it is up to you to make good on this lease;" that it appeared from the books of the grocery business after the removal to the new premises that Naknek Packing Company and Red Salmon Company, who were subtenants, paid a monthly rental each of \$100 for the use of the premises occupied, which amounts were charged to profit and loss on the books of the Peterson Company in connection with the grocery business; that the accounting had after the sale of the business showed that under the heading "rent account" there were credited receipts of rent paid by two subtenants in the sum of \$600 as against rent paid out on the principal lease in the sum of \$2,787.82; that in the statement of accounts prepared by the expert accountant in August, 1919, for the purpose of clos-

ing out the business, an item of \$7,626.50 appears as a debit item for rent paid by the Peterson Company under the Spreckels lease; likewise an item appears of \$2,084.87 representing the rents received from the subtenants; that when Peterson was about to make the deal with Getz Bros. he showed a memorandum to appellant and said: "This deal, William, I want you to understand is up to you—dependent upon your yes or no; study it over;" that Peterson told appellant he was asking for the lease between fifty and fifty-five thousand dollars.

Appellant does not contend that there was any express agreement that the lease should be deemed a part of the grocery business, but relies upon what he terms "acquiescence."

The following colloquy between the court and Boradori shows the unimportance of the statement testified to by appellant as having been made by Peterson:

"The Court: You said Mr. Peterson said to you, 'You must make good on this lease,' and Mr. James said, 'Didn't he say you must make good on this business?' A. The lease was a part of the business.

"Q. Well, as contradistinguished from the business, is there such a thing as making good on the lease? A. Mr. James was differentiating.

"Q. As I understood it—as I understood, Mr. James said to you, 'You must make good in the business,' and you answered 'No; he said, "'You must make good on the lease.'"—what is the difference between making good on the lease or in the business? A. Well, there wouldn't be any difference, but he referred to the lease."

With reference to the same matter, Mr. Peterson testified:

"Q. What did you say—first, when you moved down to the new place, you expanded the business, did you not? A. Yes.

"Q. A greater expense and a greater overhead? A. With the prospects for a much larger business.

"Q. And the rental was \$1,300 a month? A. Nearly \$1,300.

"The Court: What did you say to Mr. Boradori? A. Something like this. I said, 'That is a frightful rent to pay; you will have to work pretty hard.'

"Mr. James: Did you say he had to work hard on the business? A. Well, he had to manage the business well, something like that."

It is evident that Peterson had some misgivings as to whether the business in the new location would increase in sufficient proportion to carry the additional rent, and therefore he wished to impress upon appellant the necessity for his own sake as well as for the interest of the business that he "make good on the lease," as stated by appellant, or as testified by Peterson, "he had to work pretty hard—had to manage the business well."

[2] The meaning of "net profits of a business" has been defined by the courts, if authority is necessary to define a meaning so generally and commonly understood. "The

words 'net profits' define themselves. They mean what shall remain as the clear gains of any business venture, after deducting the capital invested in the business, the expenses incurred in its conduct, and the losses sustained in its prosecution." *Park v. Grant Locomotive Works*, 40 N. J. Eq. 114, 3 A. 162; *Crawford v. Calkins*, 170 Mich. 587, 136 N. W. 369.

[3] Therefore, inasmuch as the net profits of a business, which consists of the buying and selling of merchandise, are limited to the difference between the gross receipts for sale of merchandise and the expense of conducting the business, of which rent is probably the most essential item, it is incumbent upon appellant to show some agreement between the parties that the rent or lease should be treated as merchandise in determining whether the business resulted in a profit in which appellant is entitled to share.

No authority directly in point has been cited by counsel for either side, due probably to the fact that none could be found, as it is not likely that the contention here made has been urged with any degree of frequency.

The case of *Amsden v. Dunham*, 78 App. Div. 33, 78 N. Y. S. 989, is more nearly analogous to the circumstances here presented than any of the cases cited. There the defendant was engaged in the business of buying and selling cheese. Plaintiff was employed at a fixed salary and a commission of 5 per cent. upon the net profits of the firm. While plaintiff was working under this agreement, defendants constructed a warehouse, which on dissolution of the firm, and while plaintiff was still in their employ, they sold at a profit of \$6,000. Plaintiff claimed he was entitled to share in this profit. The court says:

"We do not think that it was fairly within the contemplation of the parties that a profit or increase in valuation of such a piece of property as this should be the basis of commissions to plaintiff. The regular legitimate business of defendants when plaintiff entered their employ was, as stated, the purchase and sale of cheese. It is manifest that he was hired to help about that business. While one of the expressions above quoted from the evidence about his receiving commissions is quite broad, his complaint alleges his right to recover for work, labor and services performed for defendants 'in their copartnership business,' and which was the buying and selling of cheese. So far as the evidence and surrounding facts disclose that was the purpose for which he was hired. It does not appear that he was expected to render any particular services, with reference to such ventures as the erection and operation of this warehouse, and it is a reasonable construction of the contract that he should receive commissions upon the profits of the business which received the benefit of his services. While it is true that this warehouse was used in connection with defendants' business and was deemed advantageous for the proper conduct thereof, it can hardly be regarded as strictly

and properly a part of the business itself. It was simply a means of carrying on the work in which the copartnership was engaged. It was collateral and incidental to the same rather than a part thereof. It would be unreasonable to assume that the parties contemplated that any enterprise in which the copartners might engage, although with copartnership funds and however remote from their natural business, should be made the basis of swelling or reducing plaintiff's commissions. We assume that if defendants had made profits in any one year in the purchase and sale of cheese, upon which plaintiff was entitled to commissions, and such profits were entirely wiped out by some outside venture like the erection of this building, or the purchase of land or any other form of speculation, plaintiff very strenuously would have insisted that he should not be affected by such losses. The reverse of the illustration seems to us proper. We do not think that the erection of the building was a part of the copartnership business which plaintiff was hired to work in, and that he is, therefore, not entitled to compensation by way of commissions upon any apparent profit in the building."

See, also, *Hawley v. Coal Co.*, 48 Kan. 593, 30 P. 14.

[4] Appellant has cited several authorities to the effect that when the meaning of the nature of a contract is considered doubtful, the acts of the parties done under it afford one of the most reliable clues to the intention of the parties; that the contemporaneous and practical construction of a contract by the parties is strong evidence as to its meaning if its terms are equivocal. We are in perfect accord with the principles enunciated in those authorities, but are not of the opinion that the acts of the parties done under the contract here show that the profit, if any, to be made on subleasing the premises on the sale of the business was to be accounted for as a profit of the grocery business. We are unable to find any evidence in the record that suggests a meeting of the minds of Peterson and Boradori upon the inclusion of the lease as a part of the grocery business, or that it entered Boradori's mind until some time after the sale of the business.

[5] With reference to the second cause of action in which appellant alleges that he is entitled to a reasonable compensation for services rendered to Frank B. Peterson following the termination of his employment in the grocery business, and respecting which the court found he was not entitled to recover such compensation, it may be said that there is sufficient evidence in the record to sustain the finding of the trial court. According to the testimony of appellant he worked for Mr. Getz for one month following the sale of the business, and then was at Peterson's office nearly every day for about 10 or 11 days. On October 12, 1919, he left for the east on busi-

ness of his own, returning in about 6 weeks. He opened a brokerage office of his own at Peterson's, for which office Peterson did not charge him any rent. He spent about half of his time in December, 1919, and January and February, 1920, at Getz Bros., adjusting differences that had arisen in the price of merchandise and other matters connected with the transfer of the business. In March, 1920, he had another contract with Mr. Peterson on another matter which had no bearing on the matter in controversy, for which service he received \$3,000. Frank B. Peterson testified that he did not employ appellant at all after the sale to Getz Bros., except when he was buying groceries for the canneries, for which he was paid very handsomely. Otherwise there was no employment whatever. Appellant occupied office space with him, for which appellant was not charged rent, and he helped to establish appellant in the brokerage business. During the period of 9 months subsequent to September 1, 1919, appellant never requested or demanded of him that he pay him anything.

From what has been said, it follows that, in our opinion, the findings complained of find ample support in the evidence.

The judgment is affirmed.

We concur: TYLER, P. J.; CASHIN, J.

87 Cal. App. 1

DALTON v. GARDNER. (Civ. 5965.)★

District Court of Appeal, First District, Division 2, California. Nov. 17, 1927.

Hearing Denied by Supreme Court Jan. 16, 1928.

1. Trial $\S$ 396(2)—Findings outside issues made by pleadings are nugatory.

Findings outside of issues made by pleadings are nugatory.

2. Appeal and error $\S$ 1010(1)—Where there was evidence tending to support findings, court could not disturb judgment.

Where there was evidence supporting, or tending to support, each of trial court's findings, appellate court could not disturb judgment.

3. Partnership $\S$ 108—Where court appointed receiver for partnership, and thereafter made finding that debts were paid, and that there were no assets, no further accounting was prerequisite to valid money judgment against copartner in counterclaim.

In action for dissolution of copartnership and for accounting, where trial court appointed receiver, and, after accounts had been rendered, and after moneys were collected, receiver paid debts, and court made finding that all debts of partnership had been paid, and that there were no assets, an accounting was had, so that plaintiff's contention that pleadings were amended to allow defendant to take money judgment against copartner on counterclaim, without first causing accounting to be had, was without merit.

4. Partnership $\Rightarrow$ 108—Rule that partner cannot take money judgment against copartner without accounting being had first does not apply to cause of action created in proceedings collateral and prior to rights growing out of partnership relation.

Rule that partnership cannot take money judgment against copartner without first causing an accounting to be had applies to liability on claims arising out of partnership relation, and does not apply to cause of action created in proceedings collateral to, and prior to, any rights growing out of partnership relation.

Appeal from Superior Court, Los Angeles County; Russ Avery, Judge.

Action by Wallace S. Dalton against P. B. Gardner for dissolution of partnership and for an accounting, in which defendant filed a counterclaim. From a judgment for defendant, plaintiff appeals. Affirmed.

tiff and defendant commenced to transact

Warren L. Williams and Seymour S. Silver-ton, both of Los Angeles, for appellant.

E. O. Leake, of Los Angeles, for respondent.

STURTEVANT, J. The plaintiff commenced an action against the defendant to obtain a decree dissolving a copartnership and for an accounting. The defendant appeared and answered and filed a counterclaim. The trial court made findings in favor of the defendant, and judgment was entered thereon. From that judgment the plaintiff has appealed.

In his complaint the plaintiff alleged the formation of the partnership; that the plaintiff and defendant commenced to transact business; and that the defendant had been guilty of numerous wrongful acts, among others, that he had misappropriated the partnership funds. In his answer the defendant denied each of the alleged wrongful acts, and then, as an affirmative defense, he pleaded that the plaintiff was guilty of fraud in inducing the defendant to become a copartner.

On the trial of the case the plaintiff called the defendant as a witness, and proceeded to examine him under the provisions of section 2055 of the Code of Civil Procedure. He also called Mr. Wilson, the fiduciary agent of the partnership. On the hearing the trial court proceeded to take an accounting without referring the taking of an account to a referee, and without making an interlocutory decree. Both parties acquiesced in the procedure, and the record presents no objection or exception on the subject. The findings are numerous. All of the issues made by the pleadings are found upon. The fourth finding is as follows:

"The court further finds that an accounting was had of the profits and losses of said business up to and including the month of January, 1924, and that plaintiff and defendant up to said time received from said business the sum of \$100.26; that since said time no accounting has been had between the parties."

The sixth finding is as follows:

"The court further finds that all of the partnership debts have been paid and that there are no assets, and that a full accounting has been had between the partners."

[1, 2] The plaintiff contends that the findings are contradictory, and for that reason that the judgment should be reversed. The vice in that contention is that both findings are wholly without the issues made by the pleadings. Findings outside of the issues made by the pleadings, it has been held in numerous decisions, are nugatory. The plaintiff quotes findings 9 to 18, inclusive, and contends that they are not sustained by the evidence. Those findings are in response to the allegations of the defendant's pleading, in which he charged that he had been imposed upon by the fraudulent misrepresentations made by the plaintiff inducing him to become a partner. The defendant cites us to many passages showing that there was evidence introduced supporting, or tending to support, each of the findings. Under these circumstances this court may not disturb the judgment.

[3] After the cause had been submitted, the defendant applied for permission, and the permission was granted, authorizing the defendant to amend his answer. At this time the plaintiff asserts that it was error for the trial court to grant the permission. In this behalf it may be remarked that the nature of the amendment was purely formal to make the pleadings conform to the proof. As we understand the plaintiff, it is his contention that the amended pleading operated to allow the defendant to take a money judgment against a copartner without first causing an accounting to be had. But the assumption of the plaintiff is a misconception of the record. As stated above, the trial court took the accounting. It is conceded that the partners themselves settled their accounts down to February 1, 1924. The defendant was in charge of the business from February 1, 1924, to June 12, 1924, and produced his accounts covering that period. At the same time he brought forward \$792.64 and, on the order of the court, paid it over to the receiver. From June 12, 1924, to August 27, 1927, Mr. K. C. Wilson was in charge of the business, having been appointed by the defendant. He came forward with his accounts and the moneys on hand, and turned them over. The record discloses that a receiver was appointed by the trial court after the complaint was filed. The record does not disclose that any one item on any one of the several accounts was disputed. Neither party claimed that he was personally entitled to any of the moneys; but that all of the moneys on hand were needed to pay the debts, and were so used. After the above accounts had been rendered, and after the moneys were collected, the receiver paid the

debts, and the court made a finding that all of the debts of the partnership had been paid, and that there are no assets. It is clear, therefore, that an accounting has been had, and that the principle for which the plaintiff contends has not been violated.

[4] Moreover, the amount for which the trial court rendered judgment in favor of the defendant was based on his cause of action for alleged false representations. That cause of action was created in the proceedings collateral to, and prior to, any rights growing out of the partnership relation, whereas the principle for which the plaintiff contends is applicable to liabilities and claims arising out of the partnership relation. 30 Cyc. 461.

The judgment is affirmed.

We concur: KOFORD, P. J.; NOURSE, J.

86 Cal. App. 791

PEOPLE v. REITZ. (Cr. 1404.)★

District Court of Appeal, First District, Division 2, California. Nov. 17, 1927.

Rehearing Denied Dec. 7, 1927. Hearing Denied by Supreme Court Jan. 16, 1928.

1. Criminal law §321—Judgment in action in which defendant was charged with testifying falsely, not disclosing grounds, will be presumed based on fraud put in issue by complaint.

Where judgment in action to annul marriage, in which it was charged that accused testified falsely, did not show grounds on which it was granted, court must presume in support of integrity of judgment that it was based on the one legal ground put in issue by complaint—fraud specified in Civ. Code, § 82, subd. 4, on which issue accused was charged with testifying falsely.

2. Perjury §11(8)—Evidence of falsity of testimony in proceeding to annul marriage, that parties had never cohabited, held to sustain conviction of perjury; such testimony being material to issue of fraud.

Accused's testimony, in action to annul marriage, that he and wife had never cohabited as husband and wife, was character of testimony tending substantially to prove issue of fraud or to influence tribunal before whom proceeding was had, and proof of its falsity and that it was given under all legal restrictions defining crime of perjury, supported conviction for perjury.

3. Perjury §32(3, 4, 6)—Judgment roll in proceeding in which alleged perjury was committed was admissible to show proceedings, jurisdiction, and materiality of testimony.

In prosecution for perjury, judgment roll in marriage annulment proceeding, in which accused was charged with testifying falsely, was properly admitted to show pendency of proceeding, jurisdiction of court, and giving of testimony and its materiality.

4. Perjury §32(3)—In perjury prosecution, testimony of deputy county clerk held admissible to show legality of proceedings and court in which hearing was held.

In prosecution for perjury, testimony of county clerk was admissible for purpose of showing legality of proceedings and particular court in which hearing, in which accused was charged with testifying falsely, was held.

5. Perjury §32(5)—In perjury prosecution, court reporter's testimony held admissible to show that accused had been regularly sworn as witness and testified in open court.

In prosecution for perjury, testimony of court reporter was admissible to show that accused had been regularly sworn as witness and testified in open court upon trial in which he was charged with testifying falsely, and also to show particular testimony given by him on that occasion.

6. Criminal law §369(14)—That testimony otherwise competent tended to show accused was guilty of forgery could not affect admissibility in perjury prosecution.

In prosecution for perjury, testimony that answer and waiver of notice of trial reported to have been signed by wife, in proceedings for annulment of marriage, in which accused was charged with testifying falsely, were in fact not signed by her, was admissible to show criminal intent of accused in giving alleged false testimony in annulment proceeding, even though it also tended to show that accused was guilty of distinct crime of forgery.

7. Perjury §32(8)—Physician's testimony regarding facts discovered on examining accused's wife held admissible to show falsity of accused's testimony in marriage annulment proceeding.

In prosecution for perjury, testimony of physician to effect that accused's wife had been examined by him, and that she had not undergone an operation such as accused had testified to in marriage annulment proceeding, held admissible to show falsity of accused's testimony in annulment proceeding.

8. Perjury §32(8)—Testimony that accused lived with wife, contradicting accused's testimony in marriage annulment proceeding, held admissible in perjury prosecution.

In prosecution for perjury in which accused was charged with having testified falsely in action to annul marriage, testimony that accused and wife had lived together for some months after their marriage, in direct contradiction of accused's testimony in annulment proceeding, held admissible.

9. Criminal law §683(1)—Testimony in rebuttal in perjury prosecution covering admissions on part of accused showing that his testimony on direct examination was untrue, held admissible.

In prosecution for perjury, testimony in rebuttal covering admissions on part of accused showing that his testimony on direct examination was untrue, held admissible.

10. Criminal law §656(3)—Comments of judge pointing out to counsel materiality or propriety of testimony in overruling objection held not misconduct.

Trial judge's comments in overruling objections to testimony, pointing out why it was material or proper on cross-examination without expressing any belief as to its truth, held not improper, especially in view of instructions.

11. Criminal law §703—Overstatement by district attorney of what he intended to prove held not prejudicial.

In prosecution for perjury, overstatement by district attorney in opening statement of what he intended to prove held not prejudicial to accused.

12. Criminal law §721½(1)—Calling accused's former wife as witness in perjury trial and later referring to inability to use her because of accused's objection, held not error.

In prosecution for perjury, action of district attorney in calling accused's former wife as witness and in later referring to his inability to use her because of accused's objection held not error.

13. Criminal law §1144(16)—Court cannot presume that jury would disregard evidence showing falsity of material statements and convict accused of perjury on falsity of immaterial statement.

In prosecution for perjury, in which accused was charged with having testified falsely in action to annul marriage, where evidence in case unmistakably showed falsity of other material statements, court could not presume that jury would disregard such evidence and convict accused upon their belief that accused's statement in annulment proceeding that his wife was school teacher and wanted to quit was false.

14. Criminal law §1173(2)—Refusing instruction in perjury prosecution that certain evidence was immaterial held not prejudicial, in view of other evidence.

In prosecution for perjury, in which accused was charged with having testified falsely in action to annul marriage, refusal to instruct that testimony relating to conversation between accused and his wife, covering her desire to quit her position as school teacher, was immaterial, and had not been corroborated, held not prejudicial, where there was evidence which unmistakably showed falsity of other material statements.

Appeal from Superior Court, City and County of San Francisco; Raglan Tuttle, Judge.

Matt Reitz was convicted of perjury, and he appeals. Affirmed.

Walter McGovern, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Emery F. Mitchell, Deputy Atty. Gen., for the People.

NOURSE, J. The defendant was tried upon an information charging perjury. The

appeal is taken from the judgment following the verdict of conviction and from the order denying defendant's motion for a new trial.

The information charged that, in an action instituted by this defendant for the annulment of his marriage to Maybelle Nelson Reitz and pending in the superior court in the city and county of San Francisco, this defendant falsely testified under oath that he had never lived with his wife; that she misrepresented facts to him of which he had no knowledge at the time the marriage was contracted; that, on the night of the marriage, she informed him that "she had an operation performed on her about two years before I married her—a female operation"; that "she could not bear children"; and that he knew nothing of the condition of her organs, as he had no way of finding out and had no relations with her after their marriage.

On this trial it was shown by unimpeached evidence that the annulment proceeding was from its inception a fraud upon the wife and a fraud upon the court. The parties had lived together as husband and wife for several months following the marriage ceremony, and were both residents of Los Angeles county at the time the annulment proceeding was begun. The defendant brought that action in the city and county of San Francisco, where he filed an answer and waiver of notice of trial purporting to have been signed by his wife, but which were shown to have been forgeries. The testimony given by the defendant in that action was brought out by inquiries directed by the trial judge, and it was without doubt the basis of the judgment of annulment which the court entered. That such testimony was false cannot be open to question at this time. The jury believed it to be false, and its finding is supported by convincing proof offered by the state, as well as by the damaging admissions and contradictions made by the defendant while on the stand as a witness in his own behalf. The only element of proof lacking is the direct denial by the wife, and this, of course, was not available to the state because of defendant's objection that she was disqualified from appearing as a witness against him.

[1] On this appeal it is urged that the evidence fails to support the verdict because the testimony charged to have been false was immaterial to the issues of the proceeding in which it was given. The argument is that the annulment proceeding was based upon section 82, subd. 6, of the Civil Code, which specifies as one of the grounds for annulment "that either party was, at the time of the marriage, physically incapable of entering into the marriage state, and such incapacity continues, and appears to be incurable"; that the testimony only went to show that the wife was sterile, or incapable of bearing children, and did not tend to show that she

was impotent or physically incapable of coition, the ground specified in the subdivision quoted. The point is argued by appellant at great length and, though the argument is interesting, it is unavailing, for the following reasons: The complaint in annulment, in addition to the charge of impotency, also charged fraud (a ground specified in subdivision 4 of section 82 of the Civil Code); no findings of fact were made, and the judgment does not disclose the grounds upon which it was granted. This being so, we must presume, in support of the integrity of the judgment of that court, that it was based upon the one legal ground put in issue by the complaint—fraud. The circumstances constituting the alleged fraud, as pleaded in the annulment complaint, were "that, prior to and at the time of said marriage, defendant represented as a fact that she was entering into the marriage relations with plaintiff in good faith, and that she would treat plaintiff with consideration and live with him as husband and wife and demean herself accordingly, and that she was physically capable of entering into the state of marriage." It was then alleged that these representations were untrue, that the wife did not enter into the marriage contract in good faith, and that she was "physically incapable of entering into the marriage state."

In *Baker v. Baker*, 13 Cal. 87, 103, it is said:

"A woman, to be marriageable, must, at the time, be able to bear children to her husband, and a representation to this effect is implied in the very nature of the contract."

See *Barnes v. Barnes*, 110 Cal. 418, 422, 42 P. 904.

In *Millar v. Millar*, 175 Cal. 797, 802, 803, 167 P. 394, 396 (L. R. A. 1918B, 415, Ann. Cas. 1918E, 184), it is said:

"In consenting to a marriage, * * * each of the parties impliedly promises the other that he or she will perform the duties and obligations of the relation. * * * One who so promises and represents, thus obtaining the consent of the other, with the secret determination not to fulfill the promise, must be held to have obtained such consent of the other party by fraud."

[2] In the section of the Code above noted, fraud is made a ground for annulment unless the other party, with full knowledge of the facts, has freely cohabited as husband or wife. Here the defendant testified that he had knowledge of the facts constituting the "fraud" on the night of the marriage and that he had no relations with his wife at any time. The record on this appeal does not purport to contain all the evidence given at the trial of the annulment suit. It includes the testimony of the defendant charged to be false only. Thus we have no way of knowing what showing was made on the issue of false representations, but it is self-evident

that the testimony showing that the parties had never cohabited as husband and wife was the character of testimony which "tends substantially to prove the issues, or to influence the tribunal before whom the proceeding was had." 20 Cal. Jur. p. 1013; *People v. Patterson*, 64 Cal. App. 223, 229, 221 P. 394. This testimony alone was, therefore, of sufficient materiality as the basis of a charge of perjury, and, the state having in the criminal proceeding proved it to have been false and to have been given under all the legal restrictions defining the crime of perjury, the verdict of conviction is amply supported in the evidence.

[3-5] Criticism is made of the action of the trial court in permitting the state to put in evidence the judgment roll in the annulment proceeding and to tender the testimony of the deputy county clerk and the official court reporter covering the pendency of the proceedings in that court. The judgment roll was properly admitted to show the pendency of the proceeding, the jurisdiction of the court, the giving of the testimony and its materiality. *People v. Bradbury*, 155 Cal. 808, 815, 103 P. 215. The testimony of the deputy county clerk was admissible for the purpose of showing the regularity of the proceedings and the particular court in which the hearing was held. The testimony of the court reporter was admissible for the purpose of showing that the witness had been regularly sworn and testified in open court upon that trial and also to show the particular testimony given by him on that occasion.

[6] Criticism is also made of the admission of testimony of other witnesses tending to show that the answer and waiver of notice of trial reported to have been signed by the wife were in fact not signed by her, and that all the papers included in the judgment roll had been altered by placing at the top thereof the words "City and County of San Francisco," fixing the venue of that proceeding. This testimony was offered for the purpose of showing that the plaintiff in the annulment proceeding, a resident of the county of Los Angeles, after having exhibited some of these papers to his wife's attorney, had arranged to have them altered so that the proceeding could be brought in the city and county of San Francisco and that court could be lead to believe the wife consented to the proceeding and waived notice of time and place of trial. The purpose of the testimony was to show the criminal intent of the appellant in the giving of the testimony in the annulment proceeding which was alleged to have been false; the fact that it also tended to show that the appellant was guilty of a distinct crime—forgery—cannot affect the admissibility of the testimony in this proceeding.

[7-9] Criticism is also made of the admission of the testimony of the physician, to the

effect that she had made a physical examination of the wife of the appellant, and found that she had not undergone an operation such as the appellant had testified to in the annulment proceeding. This evidence, though weak, was admissible, because it tended to show the falsity of appellant's testimony. The same may be said as to the testimony of those witnesses to the effect that the appellant and his wife lived together for some months after their marriage, as this was in direct contradiction of the testimony of the appellant given in the annulment proceeding. Criticism is also made of the admission of the testimony of the witness Pendell, in rebuttal, covering the conversations which he had with appellant relating to the exhibition of the papers in the annulment proceeding to his wife and her attorney prior to the filing of the complaint in San Francisco. The appellant on his direct examination testified that he had shown all these papers to his wife in the office of her attorney, and that she had signed all those to which her signature was attached in her attorney's presence. This was specifically denied by the attorney, who was called as a witness in the perjury trial, and the testimony objected to merely covered admissions on the part of appellant showing that his testimony on direct examination was untrue.

[10] The appellant urges numerous specifications of misconduct on the part of the trial judge which he insists were improper comments upon the facts of the case. These comments were made by the trial judge while ruling upon objections to the admission of testimony in attempting to point out to appellant's counsel from the facts already in evidence why certain proposed testimony to which he objected was material or proper cross-examination. The trial judge did not in any instance intimate to the jury his own view as to the truth of the evidence referred to, and instructed the jury that they should disregard all statements made by him or by counsel and to make their own determination as to the truth of the evidence before them.

[11, 12] The appellant complains of the opening statement made by the assistant district attorney—that it was too long and covered an offer to prove facts which he was not able to make good. As said in *People v. Gleason*, 127 Cal. 323, 325, 59 P. 592, 593, an overstatement by the district attorney of what he hopes to prove is usually prejudicial to him. There was nothing prejudicial to the appellant in the statement made by the assistant district attorney. The action of the assistant district attorney in calling the former wife as a witness and in later referring to his inability to use her because of appellant's objection is assigned as error. The state, of course, was entitled to call the former wife as a witness, and her testimony

could have been received if the appellant had not entered his objection. There was therefore no error in calling this witness to the stand. The assistant district attorney referred to his inability to use the wife as a witness while he was arguing to the trial judge the necessity of giving him a wider latitude in the cross-examination of another witness. The appellant assigned this as misconduct, but did not request an admonition to the jury. Later in the course of the trial the assistant district attorney asked appellant's consent to put the former wife upon the stand to testify as to whether certain writing was hers. The consent was not given, and the remark of the assistant district attorney was assigned as misconduct. Although no admonition to the jury was requested, the court on that occasion did expressly warn the jury to disregard the remarks of counsel.

[13, 14] During the course of the oral argument in this court, the appellant complained of instruction No. 19 given to the jury, wherein the trial judge stated what portion of the testimony given by the appellant in the annulment proceeding was material, and that, if they found that, when such material testimony was given by the appellant, he was under lawful oath and stated such matter to be true, when he knew it to be false, they should bring in a verdict of guilty. The objection is that included in the testimony given in the annulment proceeding which the court held to be material was the statement of the witness that "she (Mrs. Reitz) was a school teacher and she wanted to quit teaching school and thought it made no difference to me"; that the jury therefore might have found that it was untrue that the wife had been a school teacher and wanted to quit teaching school, and could have convicted the appellant upon that statement alone. The argument is overtechnical, because there was no evidence of any character tending to prove that any part of this statement was untrue, and we cannot presume merely on argument of counsel that the jury would have disregarded all the evidence in the case which unmistakably showed the falsity of other material statements and would have convicted the appellant upon their belief that the statement that his wife was a school teacher and wanted to quit was false. In appellant's proposed instruction No. 47, he asked the court to instruct the jury that this portion of the testimony relating to the conversation between the appellant and his wife covering her desire to quit her position as a school teacher was immaterial and had not been corroborated as required by law. The court refused to give the instruction, but, in view of what we have just said, we are satisfied that no prejudice occurred.

We have read the record with care, and are satisfied that the appellant was given a fair

and impartial trial, and that the cause went to the jury upon instructions which fully and fairly covered all the material issues.

Judgment and order affirmed.

We concur: KOFORD, P. J.; STURTEVANT, J.

87 Cal. App. 33

PEOPLE v. YOUNG. (Cr. 998.)

District Court of Appeal, Third District, California. Nov. 18, 1927.

1. Incest §14—Evidence held to sustain conviction of incest.

Evidence held sufficient to sustain conviction of incest with daughter.

2. Incest §16—Instruction in Incest case held not error as authorizing conviction regardless of whether defendant was father of complaining witness, or regardless of when he committed offense.

Instruction in prosecution for incest, that evidence that daughter had sexual intercourse with others was to be considered only in disproof of fact that the condition of her sexual organs was caused by her father, and that if jury believed that he did have sexual intercourse with her to convict though other persons contributed to the condition of her sexual organs, held not error as authorizing conviction regardless of whether defendant was father of complaining witness if he committed offense on date alleged, or regardless of when he committed offense if he was father of complaining witness.

3. Criminal law §822(1)—Last sentence of instruction might not be considered separate from context.

Last sentence of instruction in incest case might not be considered alone separated from the context of the instruction.

4. Criminal law §823(10)—Instruction in incest case held not error as authorizing conviction regardless of whether defendant was father of complaining witness, or regardless of when he committed offense, in view of other instructions.

Instruction in prosecution for incest with daughter, that evidence that daughter had sexual intercourse with others could be considered only in disproof of fact that the condition of her sexual organs was caused by her father, and that if jury believed that he had sexual intercourse with her to convict though others contributed to condition of her sexual organs, held not error as authorizing conviction regardless of whether defendant was father of complaining witness if he committed offense on date alleged, or regardless of when he committed offense if he was father of complaining witness, in view of other instructions.

5. Criminal law §824(1)—Defendant, if desiring more specific instruction, should have requested it.

Defendant, charged with incest, if desiring more specific instruction than one given by court, was bound to request it.

Appeal from Superior Court, Lake County; M. S. Sayre, Judge.

Adam F. Young was convicted of incest, and he appeals. Affirmed.

E. S. Bell, of Oakland, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

FINCH, P. J. [1] The defendant was convicted of the crime of incest with his daughter. This appeal is from the judgment of conviction and the order denying a new trial. Appellant contends:

"That while there is a direct conflict in the evidence in this case, the testimony of the girl * * * is so inherently improbable that it is not entitled to belief."

The girl testified that the defendant committed the act charged and numerous similar acts. The defendant's son testified that he witnessed the commission of the act. The sheriff of the county testified that the defendant, after his arrest, said:

"I might as well tell you because I did it. * * * I am guilty and I might as well say so. * * * No use to hire an attorney because I can save the money for my wife."

There is other testimony of similar import. There is also testimony to the effect that at different times prior to the alleged act the girl made complaint of the defendant's conduct towards her. The defendant did not testify at the trial. The foregoing evidence is clearly sufficient to support the verdict.

[2-5] The court instructed the jury:

"That any evidence admitted in this case tending to show that any persons other than the defendant, Adam F. Young, had sexual intercourse with Marie Young does not excuse or mitigate his offense if you believe to a moral certainty and beyond a reasonable doubt that he did have sexual intercourse with Marie Young on the date alleged in the information and that she is his daughter. The reputation and character of Marie Young for chastity and virtue are not material in this case. Evidence tending to show that she had permitted others to have sexual intercourse with her is to be considered only in disproof of the fact that the condition of her sexual organs was caused by her father. If you believe from all of the evidence in the case to a moral certainty and beyond a reasonable doubt that he did have sexual intercourse with her, you should find the defendant guilty although other persons contributed to the condition of her sexual organs."

Appellant complains of the italicized parts of the instruction, but it is difficult to understand the nature of his objection thereto. He says:

"The evidence shows beyond dispute that she (the prosecutrix) was the daughter of the defendant. * * * That portion of the instruction was uncertain in its phraseology and would lead a juror of common ordinary understanding to believe he could find the defendant guilty if he found beyond a reasonable doubt that she was the daughter of the defendant. They could draw two conclusions from said instructions: (1) That they could find him guilty if he accomplished the act on the date alleged in the information whether he was the father or not of the complaining witness; or (2) they could find him guilty if he accomplished the act at any time if he was the father" of the complaining witness.

Even a hypercritical examination of the instruction would not warrant appellant's contentions further than that the last sentence, if separated from the context, would lead to the belief that the defendant might be convicted upon proof of acts of sexual intercourse other than the one charged. But instructions are not to be so considered piecemeal. In the instruction quoted, and in another instruction, the court stated that to warrant a conviction the jury must find that the alleged act was committed "on the date alleged in the information." In other instructions the court stated that a verdict of guilty should be returned if the defendant "committed the act as charged in the information." From the instructions as a whole the jury could not have understood that the defendant might be convicted of any offense except the one charged. If the defendant desired a more specific instruction, he should have requested it.

The judgment and the order are affirmed.

We concur: HART, J.; PLUMMER, J.

87 Cal. App. 5

PEOPLE v. CROSSAN. (Cr. 1492.)★

District Court of Appeal, Second District, Division 1, California. Nov. 17, 1927.

Hearing Denied by Supreme Court Jan. 16, 1928.

1. Criminal law §800(2)—Instructions requiring jury to find that aeroplane was operated without "due caution and circumspection" before convicting of manslaughter held not error in failing to define terms (Pen. Code, § 192, subd. 2).

In prosecution for involuntary manslaughter from operation of aeroplane without due caution and circumspection, brought under Pen. Code, § 192, subd. 2, instruction to consider whether defendant was exercising due caution and circumspection and instructions authorizing convictions if defendant operated aeroplane without due caution and circumspection causing

death of decedents held not error because of failure to define term "due caution and circumspection"; it being self-explanatory.

2. Homicide §34—One in charge of thing dangerous in use who fails to take precautions which person of ordinary prudence would use, resulting in death of another, is guilty of manslaughter; "involuntary manslaughter" (Pen. Code, § 192, subd. 2).

Where one in charge of thing which is dangerous in use fails to take precautions which person of ordinary prudence would use under circumstances and death of another results therefrom, he is guilty of involuntary manslaughter, under Pen. Code, § 192, subd. 2, even though his negligence does not amount to wanton and reckless disregard of human safety or life.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Involuntary Manslaughter.]

3. Jury §62(3)—Statutory provision as to selection of names for jury lists in proportion to inhabitants is directory, and jury commissioner's selection is not to be disturbed in absence of abuse of discretion (Code Civ. Proc. §§ 204a, 204e, 206).

Provision of Code Civ. Proc. § 206, that names for jury lists shall be selected from different wards or townships of counties in proportion to number of inhabitants therein, is directory merely, and selection made by jury commissioner, appointed under §§ 204a, 204e, is not to be disturbed in absence of showing of abuse of discretion.

4. Jury §62(3)—Statutory provision as to selection of names for jury lists in counties where sessions of superior court are held in cities other than county seat held directory merely (Code Civ. Proc. § 206).

Provision of Code Civ. Proc. § 206, that where sessions of superior court are held in cities other than county seat names for jury list for sessions in such a city must be selected from township in which city is located, and no names from that township shall be selected to serve in any other part of county, held directory merely.

5. Criminal law §1186(4)—Selection of persons for jury list from improper part of county held harmless error, where defendant did not exhaust peremptory challenges (Code Civ. Proc. § 206; Const. art. 6, § 4½).

That jury commissioner selected at least some of names for jury list from part of county prohibited by Code Civ. Proc. § 206, that at least two of these were drawn for service on jury and one actually served, held harmless error, within Const. art. 6, § 4½, where defendant did not exhaust his peremptory challenges.

6. Criminal law §1186(4)—Failure to comply with statute in selection of jury list held harmless error (Code Civ. Proc. § 206; Const. art. 6, § 4½).

Failure of jury commissioner to comply with Code Civ. Proc. § 206, in selecting names for jury list held harmless error, within Const. art. 6, § 4½; there being no showing of prejudice, and defendant not being entitled to any

particular juror or to a jury from any particular place.

7. Criminal law ⚡651(1)—View of premises rests in discretion of trial court (Pen. Code, § 1119).

Whether jury shall be permitted to view premises where material fact occurred is matter resting within discretion of trial court, under Pen. Code, § 1119.

8. Criminal law ⚡651(1)—Order directing view held not error in absence of abuse of discretion (Pen. Code, § 1119).

Whether jury shall be permitted to view places where material facts occurred rests in discretion of trial court, under Pen. Code, § 1119, and Court of Appeals might not disturb order directing view by jury of such places where there was no showing of abuse of discretion.

9. Criminal law ⚡1186(4)—Appointing deputy district attorney to show jury places to be viewed, if error, held harmless (Pen. Code, § 1119; Const. art. 6, § 4½).

Appointment of one of deputy district attorneys in charge of prosecution to show jury places to be viewed, if error, under Pen. Code, § 1119, held not prejudicial but harmless, within Const. art. 6, § 4½.

10. Homicide ⚡163(1)—Evidence of habit to show that defendant, charged with manslaughter, was operating aeroplane close to ground held inadmissible where there were many witnesses (Pen. Code, § 192, subd. 2).

Admitting evidence of habit of carelessness of defendant, charged with involuntary manslaughter, by operation of aeroplane without due caution and circumspection, under Pen. Code, § 192, subd. 2, for purpose of showing that he was not flying 1,000 feet in the air when his motor stopped, but in fact was flying just above beach where his aeroplane struck decedents, held error, where there were many witnesses to flight of aeroplane.

11. Criminal law ⚡1186(4)—Error in admitting evidence of habit held reversible where, without such evidence, jury might not have convicted (Pen. Code, § 192, subd. 2; Const. art. 6, § 4½).

Error in admitting evidence of habit of defendant, charged with manslaughter, by operating aeroplane too close to ground without due caution and circumspection, under Pen. Code, § 192, subd. 2, for purpose of showing that he was not flying 1,000 feet in the air when his motor stopped, but just above beach where aeroplane struck decedents, held reversible, where court could not say that defendant would have been convicted without such evidence, and not harmless, within Const. art. 6, § 4½.

12. Criminal law ⚡470—Expert testimony in prosecution for manslaughter, that it was not safe to fly aeroplane which was in either of certain conditions, held to invade province of jury (Pen. Code, § 192, subd. 2).

In prosecution for involuntary manslaughter by operation of aeroplane without due caution and circumspection, brought under Pen. Code, § 192, subd. 2, testimony of experts that it was not safe to fly an aeroplane with a loose

magnet or with only one gallon of gasoline in the tank held inadmissible as invading province of jury.

13. Homicide ⚡163(1)—Evidence in prosecution for manslaughter respecting custom of aviators as to inspecting aeroplanes held inadmissible, since care required might not be established by habit of others (Pen. Code, § 192, subd. 2).

In prosecution for involuntary manslaughter by operation of aeroplane without due caution and circumspection, brought under Pen. Code, § 192, subd. 2, evidence respecting custom of aviators as to inspecting machines before flying them held inadmissible, since standard of care required might not be established by habit of others.

Appeal from Superior Court, Los Angeles County; Victor R. McLucas, Judge.

Carrol B. Crossan was convicted of manslaughter, and he appeals. Reversed and remanded.

Hearing denied by Supreme Court: Seawell, Curtis and Shenk, JJ., dissenting.

Paul W. Schenck, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and H. H. Linney, Deputy Atty. Gen., for the People.

SHAW, Justice pro tem. [1, 2] Appellant was operating an aeroplane, and while it was in the air its engine stopped, making it necessary for him to land. He came down in the surf at Venice, and as he landed the aeroplane struck and killed two young girls who were in bathing. Thereupon an indictment was found against him in two counts, each of which charged the killing of one of the girls as manslaughter. At the trial he was convicted on both counts, and now appeals from the judgments and from an order denying his motion for a new trial.

Appellant complains that the court wrongly instructed the jury as to the degree of negligence necessary to constitute a case of manslaughter. There was no proof that the operation of the aeroplane at the time and place in question was an unlawful act, or that appellant was operating it in an unlawful manner. The offense of which he was guilty, if any, was therefore involuntary manslaughter of the kind defined in subdivision 2 of section 192 of the Penal Code, as resulting from "the commission of a lawful act which might produce death, * * * without due caution and circumspection."

The court gave the jury instructions defining manslaughter in the language of section 192, and further stated to them:

"In this connection you are further instructed that only the last of these kinds of manslaughter is involved in this case, that is, manslaughter in the commission of a lawful act without due caution and circumspection. Operating an airplane is in itself a lawful act. If you find from all the evidence that the de-

fendant was at the time and place in question operating an airplane, then you must further determine, first, whether operating an airplane is an act which might produce death, and, second, whether the defendant then and there operated an airplane without due caution and circumspection, and thereby caused the death of Madeline Jeannette Kupfer and Litizia A. Normandin, or either of them."

The court also gave two instructions relating to the two counts, in identical language, except as to the name of deceased, one of which was as follows:

"If you believe from the evidence beyond a reasonable doubt that the defendant operated an aeroplane within the county of Los Angeles, upon the date charged in the information, without due caution and circumspection, and as a result of the operation of the aeroplane in such manner defendant's aeroplane collided with the deceased, Madeline Jenette Kupfer, and thereby caused the death of said Madeline Jenette Kupfer, you should find the defendant guilty as charged in count I of the indictment."

Appellant criticizes these instructions because they do not define the terms "due caution and circumspection," and also claims that certain instructions requested by him, in which those words were declared to be equivalent to "criminal negligence" and the latter term was defined as "that degree of negligence which is so gross and so flagrant that it indicates to the minds of the jury a wanton and reckless disregard of the rights of others," should have been given. We think both of these contentions are disposed of adversely to appellant by *People v. Wilson*, 193 Cal. 512, 518, 226 P. 5; *People v. Seiler*, 57 Cal. App. 195, 201, 207 P. 396, and *People v. Anderson*, 58 Cal. App. 267, 208 P. 324. In the *Wilson* Case the Supreme Court said:

"* * * When a person is doing anything dangerous in itself, or has charge of anything dangerous in its use, and acts with reference thereto without taking those proper precautions which a person of ordinary prudence would have used under the circumstances and the death of another results therefrom, his act or neglect is a criminal act against the person so killed even though his negligence does not amount to a wanton or reckless disregard of human safety or life."

In the *Anderson* Case, where the defendant was convicted of manslaughter, it is said:

"The court instructed the jury quite fully as to the various elements of the crime of manslaughter and in doing so employed the words 'without due caution and circumspection.' The appellant offered and the court refused to give an instruction attempting to amplify the meaning of the words 'due caution and circumspection.' * * *

"Conceding that this proposed instruction is a correct exposition of the law, it adds nothing to the meaning of the words used by the Legislature in defining the offense. The average

juror is quite as much enlightened by one as by the other. All the words employed in the expression, 'due caution and circumspection,' are in common and daily use and are understood by the average person. 'Caution' means care to avoid accident or misfortune, but the definition informs us of little more than the meaning accorded to it by mankind in general.
* * *

"The instruction of which appellant complains as being inadequate is given in the very words of the statute. 'Negligence,' when so great as to be criminal in character, is stated in the proposed instruction as being the equivalent of want of 'due caution and circumspection.' 'Negligence' is a word that has acquired a highly specialized meaning and whole volumes have been written upon it; but the words 'due caution and circumspection' as used by the trial court have their common and ordinary meaning and no other. When these words are stated to the jury they import to them this common meaning without further amplification. The Supreme Court in a recent case says: 'From this it is argued that the instruction must be condemned as erroneous. But the Legislature has the power to declare what the law shall be on the subject. It has done so by this section. * * * However this may be, it cannot be disputed that error cannot be predicated upon an instruction which states the law as the Legislature has fixed it by statute and which is applicable to the case.' *People v. Fowler*, 178 Cal. 657, quoting from page 671 (174 P. 892, 897).

"But an attempt to expand upon and define 'due caution and circumspection' would, if successful, be no more when given than a mere 'commonplace'; and it is well settled that giving or refusing a mere 'commonplace' does not constitute reversible error. *People v. Raber*, 168 Cal. 316 (143 P. 317)."

[3] At the trial appellant interposed a challenge to the jury panel on the ground that the jury commissioner appointed for the county of Los Angeles, under the provisions of sections 204a and 204e of the Code of Civil Procedure, had failed to follow the provisions of section 206 of the same Code in making up the jury list. This challenge was denied and he now complains of the ruling as error. Section 206 provides:

"The names for such lists shall be selected from the different wards or townships of the respective counties in proportion to the number of inhabitants therein, as nearly as the same can be estimated by the persons making said lists."

It appears from the testimony of the jury commissioner that he made no substantial effort to comply with this provision of the Code, his method of selection bearing no discoverable relation to the population of the different wards or townships, but he did express an opinion that the result conformed to the provision above quoted "sufficiently for all practical purposes." In view of his testimony as to the manner of selection, this opinion cannot be given any weight, but the provision above quoted from section 206 is directory.

It is intended merely for the guidance of the person making up the list, and, in the absence of some showing of an abuse of discretion by such person, his action should not be disturbed. *People v. Danford*, 14 Cal. App. 442, 448, 112 P. 474.

[4, 5] Section 206 further provides that where sessions of the superior court are held in cities other than the county seat, as in the county of Los Angeles, where a session is held at Long Beach, the names for such list to serve in such outside city shall all be selected from the township in which said city is located, and no names from such township shall be selected to serve for any other part of the county. In this case the trial was held at the county seat and at least two names of persons who resided in Long Beach were drawn for service on the jury, and one of these persons actually served upon the jury. We think this provision of the Code must also be regarded as directory, and, besides, the defendant did not exhaust his peremptory challenges, and could by the use of one of them have removed the Long Beach juror from the panel, if he had any objection to such juror.

[6] A defendant is entitled to a fair and impartial jury, but not to any particular juror nor to a jury from any particular place, and no contention is made here that the jury was not fair and impartial, or that appellant suffered any prejudice as a result of either of the violations of section 206 complained of. All of these matters are fully within the saving grace of section 4½, art. 6, of the state Constitution. *Riley v. Davis*, 57 Cal. App. 477, 486, 207 P. 699.

[7-9] Appellant also complains of the action of the court in ordering a view by the jury of the place where the two girls were killed and of certain other places in that vicinity. This order was made on the application of the prosecution, over appellant's objection. To show the place in question, the court appointed one of the deputy district attorneys in charge of the prosecution and offered to appoint also appellant's counsel, but the latter declined to accept the appointment. Objection to the appointment of the deputy district attorney on the ground that he was an interested party was made by appellant and overruled. Under this order the jury were shown not only the place of the killing, but also several other places in that vicinity. As far as we can discover, all of these were places at which facts mentioned in the testimony occurred, and all were within the provisions of section 1119 of the Penal Code, which extends to any place in which any material fact occurred. The matter of a view of the premises is in the discretion of the trial court, and its action will not be disturbed on appeal in the absence of a clear showing of an abuse of such discretion. *People v. Pompa*, 192 Cal. 412, 421, 221 P. 198.

Appellant does not point out to us anything amounting to an abuse of discretion in this case. We have read the record of the proceedings at the view, and, assuming, without deciding, that it was an irregularity to appoint a deputy district attorney to show to the jury the place in question, we are unable to see that appellant was prejudiced thereby.

[10] Just before the time when appellant's aeroplane struck the two girls who were killed, according to the testimony of several eyewitnesses, he was flying his aeroplane southward along the beach, at an elevation variously estimated as from 40 to 150 feet above the sand. In this position he flew over Sunset Pier, rising somewhat as he did so and then coming down, and then flew a distance of several hundred feet to Walters Pier, which he barely cleared, and came down in the water a short distance south of Walters Pier, there striking the two girls. According to some witnesses his motor was still going when he crossed Sunset Pier, but others testified to the contrary. All agreed that it had stopped before he reached Walters Pier. Appellant himself was not a witness at the trial but there were read in evidence, by the prosecution, two statements made by him, in which he claimed that his engine quit working when he was 1000 feet in the air at a point about midway between Venice and Ocean Park and 200 feet out over the ocean; that the only safe place to land was on the beach, so, after trying and failing to start his motor, he glided toward Venice; that he saw an apparent open space on the beach and headed for it, but when he got nearly down saw that there were too many bathers and he would hit some one if he landed there, and then turned out toward the ocean, but the wind threw him against the bathers. Appellant also produced evidence tending to show that if he were at the place he stated when his engine stopped, it was doubtful whether he could have glided back to his flying field before reaching the ground.

The prosecution offered, and the court admitted, a large amount of evidence as to acts of negligent and reckless flying by appellant on other occasions previous to the fatal flight. This was offered and admitted, over objection by appellant on all possible grounds, for the avowed purpose of showing a habit of carelessness on the part of appellant, and thus rebutting his claim that he had used due caution and circumspection on the occasion in question. The evidence so admitted was very voluminous, occupying a large part of the 1,800-page transcript, and showed that on many previous occasions appellant had flown along the beach at a low altitude, barely clearing the numerous piers in that locality, and on some occasions frightening persons who were fishing on them; that about two months before the homicide, when flying low, he had fallen on the beach in the

same vicinity; that he made a practice of flying over the boulevard by his airport at a height below the tops of the lamp posts thereon, sometimes stirring up the dust on the pavement with his wheels; that he often flew down near the roofs of houses; that on various occasions he swooped down so close to automobiles that the occupants became alarmed; that at an air meet in Orange county he swooped down over the heads of the crowd while doing stunts, and that a number of police officers went to him, told him they had had complaints of his flying low, and warned him to quit the practice. The question as to the admissibility of this evidence is not altogether free from doubt. In considering it, we must notice the fact that there were numerous eyewitnesses of the fatal occurrence, who testified to appellant's conduct on that occasion.

In *Wallis v. So. Pac. Co.*, 184 Cal. 662, 195 P. 408, 15 A. L. R. 117, the Supreme Court had under consideration a similar question. That was an action for damages for the death of a man who had been struck by a train while driving a wagon over a highway crossing of defendant's railroad. The defendant pleaded contributory negligence, and thus raised the question whether the deceased had stopped, looked and listened before attempting to cross the track. The trial court admitted evidence that the deceased was in the habit of stopping his wagon at railroad crossings and when necessary going ahead to the track to ascertain if a train was approaching. This ruling was upheld, and in making its decision the Supreme Court several times called attention to the fact that there were no eyewitnesses of deceased's conduct at the time of the fatal accident, and the testimony in regard to it was entirely circumstantial. Thereupon the court said:

"The law governing this class of evidence is perplexingly inharmonious. The weight of authority, however, seems to uphold its use under the conditions stated, that there is an absence of satisfactory testimony of eyewitnesses as to the fact in controversy, while other decisions and authorities consider it legitimate evidence without such condition. This limitation upon the introduction of such testimony seems rather illogical. If the fact of the existence of habits of caution in a given particular has any legitimate evidentiary weight, the party benefited ought to have the advantage of it for whatever it is worth, even against adverse eyewitnesses; and if the testimony of the eyewitnesses is in his favor, it would be at least a harmless cumulation of evidence to permit testimony of his custom or habit."

The latter part of the language thus quoted is clearly obiter dictum, in view of the above-mentioned facts of the case, but the court then went on to discuss the matter further and review a number of authorities, finally referring to "the rule admitting evidence of habit to rebut or support conflicting testi-

mony of eyewitnesses, as adopted in this state." A few months later the case of *Starr v. Los Angeles Railway Corp.*, 187 Cal. 270, 201 P. 599, was decided. That was an action to recover damages for personal injuries suffered by plaintiff in alighting from a street car of defendant. One of the acts of negligence testified to by plaintiff was that the conductor of the car was sitting down in the car talking to another passenger when the car stopped for plaintiff to alight. Another witness testified to the same fact. Under these circumstances the court held:

"Evidence as to the previous conduct and habit of the conductor as to sitting down and talking to passengers was improperly received, not only because of the fact that the matter was not in issue, but also because of the fact that his habit was not competent (*Langford v. San Diego Electric Ry. Co.*, 174 Cal. 729, 732, 733 [164 P. 398]; *Steinberger v. California Elec., etc., Co.*, 176 Cal. 386 [168 P. 570]) to establish the condition at the time of the accident. We need not here consider the effect of the exception to this general rule considered in *Wallis v. Southern Pacific R. R. Co.*, 184 Cal. 662 (195 P. 408, 15 A. L. R. 117), where circumstantial evidence only is relied upon, and there are no eyewitnesses."

[11] We are unable to put any other construction on the language just quoted from the *Starr Case* than that the court intended to withdraw the dicta contained in the *Wallis Case*, and limit the admissibility of habit evidence to cases where circumstantial evidence only is relied on and there are no eyewitnesses. Neither can we discover any point of view from which the ruling complained of here appears to be without the scope of the decision made in the *Starr Case*. The attempt here was to show, by habit evidence, that appellant, instead of being 1000 feet in the air when his motor stopped, as he claimed, was in fact flying just above the beach—a fact exactly analogous to that involved in the *Starr Case*, and one to which there were many eyewitnesses. Since the *Starr Case* is a deliberate and carefully considered expression of the Supreme Court on this point, we feel bound to follow it, regardless of any opinion we might otherwise entertain on the matter, and hold that the trial court erred in admitting this habit evidence. The error is unquestionably of so grave a character as to require a reversal. As we have already said, a large part, perhaps exceeding half, of the record is occupied by this evidence, and the impression made on the jury by it must have been such as to bring about a conviction, regardless of any other evidence. The other evidence, while perhaps sufficient to uphold a conviction, is conflicting both as to the facts and as to the possible inferences to be drawn from them, and we cannot say that appellant would have been convicted upon it alone. There was, there-

fore, a miscarriage of justice, calling for a reversal.

Appellant complains of the ruling by which two police officers were allowed to testify as to their measurement of the amount of gasoline left in the tank of his aeroplane after the accident. We think a sufficient foundation was laid for this testimony. The objections made by appellant go rather to its weight than to its admissibility.

[12] Witnesses were also permitted, over appellant's objection, to testify as experts that flying with a loose magneto, or with only one gallon of gasoline in the tank, is not safe. There was other evidence tending to prove the existence of both of these conditions on appellant's aeroplane at the time in question. This testimony invaded the province of the jury and should not have been admitted. No doubt expert witnesses should be allowed to testify as to the probable consequences of flying with a loose magneto or a small supply of gasoline, but testimony that such flying was not safe went beyond the scope of expert testimony and covered the ultimate fact which the jury were required to determine. 10 Cal. Jur. 1013, 1014.

[13] Evidence was also admitted over appellant's objection regarding the custom of aviators as to inspecting their machines before flying them. This was also error. "The standard of care required of persons under given circumstances is not to be established by proof that others have been in the habit of acting in a certain manner." *Rudd v. Byrnes*, 156 Cal. 636, 642, 105 P. 957, 960 (26 L. R. A. [N. S.] 134, 20 Ann. Cas. 124).

The judgments and order appealed from are reversed, and the case is remanded for a new trial.

We concur: CONREY, P. J.; HOUSER, J.

86 Cal. App. 704

LOS ANGELES COUNTY v. SIGNAL REALTY CO. et al. (Civ. 5568.)

District Court of Appeal, Second District, Division 2, California. Nov. 15, 1927.

1. Evidence §474(20)—Striking testimony of defendant's witness as to rentals of building for ensuing 33 years after condemnation of strip of land held proper.

In suit in eminent domain for condemnation of 5 feet along boundary of an avenue, where plaintiff's witness testified that value of property taken was estimated on value it would produce from known rentals, striking testimony of president of landowner corporation that in his opinion amount of damage would be 22 per cent. of income from building for 33 years after condemnation held proper, where his testimony consisted of speculation and conjecture only.

2. Evidence §497—Witness for whose testimony proper foundation is laid may give opinion as to severance damages.

In condemnation suit, where purpose of inquiry is to ascertain damages to remaining property, which is measured by its loss in market value, any witness for whose testimony proper foundation has been laid may give opinion as to severance damage.

3. Evidence §502—Questions concerning collateral subjects which prospective purchaser might ask are properly propounded on cross-examination only or thereafter on redirect examination.

While scope of investigation as to severance damages is within trial court's discretion, questions concerning collateral subjects, touching property which one about to buy would ask, are properly propounded on cross-examination only or on redirect examination, where they have been entered into during cross-examination.

4. Evidence §474(20)—Difference in value of building before and after condemnation must be established by competent evidence and not by fanciful guess.

While measure of damages in condemnation suit is difference between building values before and after condemnation and is determinable by depreciation and reduction of income, such elements must be established by competent evidence and not by mere fanciful guess of witness as bearing on severance damages.

5. Evidence §474(18, 20)—Exception to rule excluding opinion evidence does not permit evidence of owner's idea on value of property taken and of loss to remainder.

In condemnation suit, notwithstanding exception is made in favor of building owners to general rule excluding opinion evidence by witnesses not shown to have special knowledge concerning market value, such exception does not permit owner to state his idea as to value of property taken and of loss to remaining portion.

6. Trial §89—Striking evidence of value of fixtures, cost of removal, and replacement held proper; tenant having right to remove them when lease terminated.

In suit to condemn a 5-foot strip of land along a street on which a building abutted and in which a drug store was maintained under a 5-year lease, striking tenant's evidence as to value of fixtures and cost of removal and replacement thereof was proper, where tenant had right to remove them at termination of lease.

Appeal from Superior Court, Los Angeles County; J. Walter Hanby, Judge.

Suit by the County of Los Angeles against the Signal Realty Company and others. From the judgment rendered, defendants Signal Realty Company and O. E. Culver appeal. Affirmed.

Hill, Morgan & Bledsoe, of Los Angeles, for appellant Signal Realty Co.

Hugh Gordon, of San Francisco, and Benj. M. Stansbury, of Los Angeles, for appellant Culver.

Everett W. Mattoon, County Counsel, and Leslie R. Tarr, Deputy County Counsel, both of Los Angeles, for respondent.

CRAIG, J. The respondent filed suit in eminent domain for condemnation of 5 feet along the northerly boundary of certain real property of appellant Signal Realty Company, on the southerly side of Florence avenue, extending easterly 160 feet from Long Beach boulevard, in the city of Los Angeles, for the purpose of widening Florence avenue. Appellant realty company was also the owner of a two-story brick and terra cotta building, which extended 152 feet easterly on Florence avenue and 122 feet southerly on Long Beach boulevard. Appellant Culver occupied a portion of said building, including the corner, in which he maintained a drug store and store-room, under a 5-year lease with an option of renewal for a like term, which said lease had been in effect for a period of 2 years. Referees appointed by the court reported that the appellant realty company was entitled to damages for the value of land to be taken in the sum of \$6,023, and for reconstruction of the improvements by use of old material, \$24,483, or a total of \$30,506. Appellant Culver was awarded nothing. Exceptions to the referees' report having been filed, the court heard evidence and concluded that the realty company was entitled to reconstruct its building with new material, whereupon the award for reconstruction was increased \$8,200, making a total compensation of \$38,706. As so modified, the report was approved.

Appellants base their appeal upon alleged prejudicial errors in law claimed to have been committed by the trial court in striking out certain evidence, and upon an asserted insufficiency of evidence, as a result thereof, to sustain said award which, it is insisted, would have been materially higher had the stricken testimony been allowed to stand. No question is raised as to compensation for the property taken.

It appears that an expert whose qualifications were stipulated by the parties, testifying for the plaintiff, swore that considering the life of the building at considerably more than that contended for by the defendant corporation, and having allowed the market value of the 5 feet of land, and of the building, together with the expense of tearing down and reconstructing the building for continued use at the same rental per square foot and deducting the rents which the realty company would necessarily be compelled to concede to tenants, he arrived at the amount of compensation fixed by the referees' report. During cross-examination of this witness on behalf of the defendants he testified that in

valuing business property with business upon it, it is usual to inquire into the rentals and determine what the property will produce as income property from known rentals, and that this was done in the instant case. The witness Seelig, president of the defendant corporation, had previously testified that he valued the building and the land at \$300,000; he said:

"In my opinion the amount of that damage will be 22 per cent. of our income. * * * I figured 22 per cent. of the cost of the land and the building, which is \$66,000. * * * I absolutely feel sure, in fact I know I am going to lose \$395 per month, which is \$4,740 yearly. This represents gross rentals. * * * The figure which I am being paid for the 5 feet of the building is not included in the \$66,000 figure, and I am being paid for the reconstruction of the 5 feet of the building that is being damaged, and that figure is not in the \$66,000 either. The \$66,000 is severance damages. * * * I have seen the figures in the referees' report. The value of the land taken is \$6,023, and the value of the improvements is \$24,483, less about \$1,500 for remodeling, making a total for the land and improvements about \$29,000, which, added to \$66,000, gives a total of \$95,000 compensation. * * * I believe that after the severance of the 5 feet from the land and building that, if we went out in the market to sell that building, based on the new rentals, we could not get much in excess of \$200,000 for it, whereas now we think we can get \$300,000 for the land and building. * * * In our agreement with Mr. Culver, the lessee of the drug store, the Signal Realty Company is to receive all of the damage which may be done to the leasehold interest, in return for which we have reached an agreement by which we will reduce his rental."

Like reductions in rents were made to other tenants. This witness further testified that, assuming the necessary reconstruction would consume a period of four months, he had allowed his tenants a total reduction in rent amounting to \$2,150 for loss of business. Appellant Culver testified that the condemnation of 5 feet of his store space would also take permanent fixtures valued at \$1,632, and that in order to resume business he would be compelled to relocate certain other fixtures at a cost of \$4,372.50, for both of which items he demanded compensation.

All of this testimony of the two witnesses last mentioned was admitted over objections of the plaintiff, upon the grounds that Seelig's testimony was remote and speculative, and was predicated upon loss of business, and that the evidence given by appellant Culver related to movable fixtures, and to the relocation of fixtures not taken, neither of which was a compensable item. At the conclusion of the hearing upon the referees' report, counsel for respondent moved that all of the testimony of the witness Seelig pertaining to the question of rental for the ensuing 33 years be stricken out, at which time it was agreed by the parties that the witness based

his estimated loss of \$66,000 upon the fact that the property would be rented for a certain figure for the next 33 years. Respondent also moved that the testimony of appellant Culver as to the value of fixtures, consisting of counters, shelving, showcases, signs, etc., located in the 5-foot strip, and pertaining to the necessity for removal of fixtures and relocation of fixtures, and the cost thereof, be stricken out. The motions to strike were submitted upon briefs, and thereafter each of the motions was granted, and the evidence offered by appellants upon the foregoing elements of damage was eliminated.

Appellant realty company contends that in striking out the testimony which was introduced in its behalf in this regard "and in awarding the Signal Realty Company nothing for severance damage," there remained nothing but the testimony of the respondent's witnesses upon which to base a valuation. It is insisted by respondent that the stricken testimony amounted to nothing more than an attempted showing of loss of income, after proper deductions had already been made by the referees for rents which the appellant company would cease to receive upon severance of 5 feet of the building. As we have heretofore observed from quotations of Seelig's testimony, he maintained that, in addition to about \$29,000 which the referees allowed him, he should have \$66,000, which he estimated as 22 per cent. of the cost of the land and the building, and almost in the same breath he stated that this latter amount was 22 per cent. of the income, and that it should be added to the amounts allowed for land taken, improvements, tearing down, and reconstruction of the building.

[1-4] We think the testimony was properly stricken, because it consisted of the witness' speculation and conjecture only. Of course, in so far as severance damages are concerned, the purpose of the inquiry is to ascertain the damage to remaining property which is measured by its loss in market value. Any witness for whose testimony a proper foundation has been laid may give his opinion upon this issue. The scope of investigation is largely a matter within the discretion of the trial court. It would not be an abuse of such discretion to permit the witness to state existing facts, such as location and surroundings of the property. *San Diego Land & T. Co. v. Neale*, 88 Cal. 50, 25 P. 977, 11 L. R. A. 604. However, questions concerning collateral subjects touching the property which one about to buy would feel inclined to ask are properly propounded upon cross-examination only or upon redirect examination where they have been entered into during cross-examination. *Little Rock Junction Ry. v. Woodruff*, 49 Ark. 381, 5 S. W. 792, 4 Am. St. Rep. 51, cited with approval in *San Diego Land & T. Co. v. Neale*, supra. Put in any event, even such inquiry into collateral issues

should be limited to conditions capable of proof, and mere conjectural statements and opinions are not permissible. As we have mentioned, it was stipulated between the parties that the testimony of the witness Seelig that the severance damages sustained would amount to \$66,000 was based upon his estimated loss of that amount in rentals during the next 33 years by reason of the loss of the land taken. In making this statement the witness was not relating a fact. He did not pretend to do more than tell the court what he believed would result, based upon his knowledge of the past. This was merely an estimate, and his testimony in that regard was only conjecture. It follows that the portion of the testimony of the witness Frisbie was properly stricken which was given on cross-examination based upon the assumed premise that the statements of the witness Seelig which had been stricken was correct. Authorities cited by appellants to the rule that where a portion of a building is taken the measure of damages to the building is the difference between its value before, and the value of the remainder after, condemnation, and is determined by a consideration of its use, depreciation, reduction of income, etc., are not inconsistent with what has been said herein. These elements are proper to be considered, but they must be established, if at all, by competent evidence and not the mere fanciful guess of any witness as bearing upon severance damages. It is not so much the subject with which the witness Seelig's testimony dealt that is objectionable, but it is its character as being speculative which rendered it incompetent and irrelevant.

[5] A further reason for sustaining the trial court in striking out the evidence is that, although an exception is made in favor of the owners to the general rule excluding opinion evidence of witnesses not shown to have a special knowledge concerning market value, that exception does not go beyond permitting the owner to state his idea as to the value of the property taken and of the loss to the remaining portion. We know of no instance, and are cited to none, in which an owner has been permitted to add to his testimony in that regard by opinion evidence upon collateral matters unless a foundation were first laid for his testimony in the same manner as that of any other witness by proof of his qualifications as an expert.

[6] The only remaining point worthy of discussion is appellant Culver's contention that he should be compensated for removal and damage to or destruction of store fixtures in the portion of the building which was demolished. Again, in this instance, testimony bearing upon the value of the fixtures and the expense of removal and replacement was received over objections of the plaintiff. During Culver's examination he testified that

in many respects he was compelled to purchase new fixtures, on account of the necessary rearrangement following the severance of the front of his store. Thereafter, upon motion of the plaintiff, this evidence was stricken out, and such ruling is assigned as error. Appellant's authorities relate wholly to permanent fixtures which constitute improvements in the ordinary use of that term, and we think they are not in point. Appellant's store fixtures consisted of screen doors, shelving, window display cases, signs, awnings, etc., much of which, it is said, were fastened to the building by nails, screws, and bolts. Testifying in his own behalf, however, this appellant said:

"The property I have testified to is property I have paid for. It belongs to me, and I knew when I paid for it that I had a right to remove it at the termination of the lease."

It cannot be doubted that such was the intention of the parties, and there is nothing in the record tending to indicate that the realty company claimed the right to ownership of its tenant's trade fixtures at any time. There is some evidence to the effect that even after severance there would remain more room than was actually utilized by Culver, and while he might prefer to remodel or replace certain fixtures following their removal, at considerable expense to himself, it remains that the plaintiff took no part of his property, and the cost of removal was not a compensable item. In *Jahnke v. Jahnke* (Cal. App.) 253 P. 752, it was held that as a general rule the question as to whether articles are so affixed as to become a part of the realty is one of fact to be determined by the trial court upon the evidence presented, and that the intent of the parties is the controlling criterion, citing *Gosliner v. Briones*, 187 Cal. 557, 204 P. 19; *Pennybecker v. McDougal*, 48 Cal. 160; *Miller v. Waddingham*, 91 Cal. 377, 27 P. 750, 13 L. R. A. 680; *Hendy v. Dinkerhoff*, 57 Cal. 3, 40 Am. Rep. 107; *Lavenson v. Standard Soap Co.*, 80 Cal. 245, 22 P. 184, 13 Am. St. Rep. 147; *Jordan v. Myres*, 126 Cal. 565, 58 P. 1061; *Western U. Tel. Co. v. Modesto Irr. Co.*, 149 Cal. 662, 87 P. 190, 9 Ann. Cas. 1190. Here, as in *Jahnke v. Jahnke*, "the trial court found by implication at least that the articles of property here involved were not affixed to the building so as to become a part thereof, and thereby constitute a part of the realty, and the findings of the court in this regard seem amply supported by the evidence." A case strikingly analogous to the instant one is *N. Y. C. & H. R. Co. v. Albany S. T. Co.*, 161 App. Div. 329, 146 N. Y. S. 674, wherein it was held that evidence as to the value and cost of removal of personal property was properly excluded. So, too, in *Ranlet v. Concord Railroad Corp.*, 62 N. H. 561, compensation was

demand for coal and wood bins and sheds constructed upon the realty, and it was there held that:

"The land covered by the plaintiffs' lease was taken by the defendants in the legitimate exercise of the power of eminent domain. The measure of the plaintiffs' damages was the market value of the unexpired lease, and the excluded evidence could furnish no aid in the determination of that question. Petition of Mt. Washington Road Co., 35 N. H. 134, 146; Col. Const. Lim., 565; *Lawrence v. Boston*, 119 Mass. 126. As the title to all property is held subject to the implied condition that it must be surrendered whenever the public interest requires it, the inconvenience and expense incident to the surrender of the possession are not elements to be considered in determining the damages to which the owner is entitled. A landowner is not entitled to the expense of removing personal property from the land taken. *Cent. Pacific Railroad Co. v. Pearson*, 35 Cal. 247."

No error appearing, the judgment appealed from is affirmed.

We concur: WORKS, P. J.; COLLIER, Justice pro tem.

BLAIR v. WILLIAMS. 86 Cal. App. 676 (Civ. 4481.)

District Court of Appeal, Second District, Division 2, California. Nov. 14, 1927.

1. Parent and child $\S$ 3(1)—Father held under primary duty to support child (Civ. Code, $\S\S$ 156, 196, 198).

Under Civ. Code, $\S\S$ 156, 196, 198, father is under primary duty to support child.

2. Parent and child $\S$ 3(1)—Father, writing nurse, wife, and child to move to his city, where he paid nurse's wages, held liable on contract to nurse for services to child (Civ. Code, $\S\S$ 156, 196, 198).

In suit by nurse for value of services rendered in caring for defendant's child, defendant, writing nurse urging her, his wife, and child to move to Los Angeles, where defendant was residing, and paying nurse's wages for some time after she arrived in Los Angeles, held liable in contract as well as under Civ. Code, $\S\S$ 156, 196, 198, for wages of nurse and cash advanced by her.

3. Divorce $\S$ 324—Divorced husband held not liable for nurse's services to child after order allowing alimony for support of wife and child understood by nurse to include her wages.

In suit by nurse to recover value of services rendered in caring for defendant's child, evidence that nurse was present in court pending divorce trial between defendant and wife, during which trial amount due nurse was discussed, and order made requiring defendant to pay monthly sum for support of wife and child, and that nurse understood her wages were to be paid

by the alimony, showed that nurse no longer relied on contract with defendant, but continued labor with understanding that she was to be paid out of alimony, and hence contract between defendant and nurse was superseded by order for alimony relieving defendant from any liability for nurse's wages subsequent to order.

4. Contracts ⚡167—Applicable laws in existence when agreement is made and state appellate court decisions interpreting laws form part of agreement.

All applicable laws in existence when agreement is made and decisions of appellate courts of state interpreting such laws enter into and form part of agreement as if they were expressly referred to and incorporated in its terms.

5. Parent and child ⚡3(1)—Father is not responsible for support of child awarded to custody of mother either with or without provision for maintenance (Civ. Code, §§ 196, 207).

Under Civ. Code, §§ 196, 207, father is not responsible for support of children after entry of order granting custody of children to mother either with or without their maintenance.

6. Courts ⚡91(1)—Decisions of Supreme Court are binding on appellate court until changed by court or Legislature.

Appellate court is bound by decisions of Supreme Court until it changes its views or Legislature enacts laws to the contrary.

7. Divorce ⚡324—Statutes relating to parent's duty to support child become part of contract between father and nurse for care of child, terminating contractual relation on entry of order for alimony, which thereafter determined defendant's liability (Civ. Code, §§ 196, 207).

Civ. Code, §§ 196, 207, relating to obligations of parents for support and education of child, held written into contract between nurse and father of child respecting care of child, and contractual relation whereby defendant was liable for nurse's wages was terminated on entry of order for alimony in trial of divorce between defendant and wife, and liability of defendant for wages was thereafter limited by order for alimony.

Appeal from Superior Court, Los Angeles County; Carlos S. Hardy, Judge.

Action by Agnes Blair against Edward Huntington Williams. Judgment for plaintiff, and defendant appeals. Modified and affirmed.

Schweitzer & Hutton, of Los Angeles, for appellant.

Lowenthal, Collins & Lowenthal and Victor Ford Collins, all of Los Angeles, for respondent.

COLLIER, Justice pro tem. Defendant and one Beatrice N. Williams were, at the trial of this action and for years prior thereto had been, husband and wife. A son, Ned Williams, was born to them. Some time prior

to July 6, 1919, they separated, the defendant coming to California, and his wife and infant son remaining in Montclair, N. J. The court finds, and there is sufficient evidence to support it, that the defendant hired the plaintiff as a nurse for said child, who was then, and up to the time of the trial continued to be a cripple, and practically helpless. On July 6, 1919, from Los Angeles, the defendant wrote to plaintiff urging that Mrs. Williams, the boy, and plaintiff should come to Los Angeles. Later on they did come, defendant defraying part of the expenses of the trip. Upon their arrival defendant located them in a residence, and visited them frequently, almost daily. These mutual relations continued for some time. Defendant likewise contributed to the support of the family, paid the plaintiff her wages from time to time by check, and also on some occasions paid incidental moneys advanced by plaintiff. Defendant and his wife had some sort of a separation agreement, but what it was was not made known to the plaintiff, and it does not appear in the transcript. As stated by the defendant in his opening brief, in October, 1920, the defendant instituted an action for divorce from his wife. In that action, and in February, 1921, the court made an order requiring defendant to pay his wife \$300 per month for the support of herself and their infant child, including the nursing of the said son. Subsequently, in the latter part of 1921, the court modified that order. The plaintiff was present in court on both of said occasions, and, although she testified that she did not hear all the court said, yet she did know the objects for which the hearings were held, and that she understood her wages were to be paid from the alimony money. The trial court awarded plaintiff a total judgment of \$885, of which \$75 was for cash advanced and \$810 for wages. We have separated the \$810 into two amounts, covering two different periods of time. The first period is up to the first court order for alimony, and the second period for all time thereafter.

Plaintiff's testimony as to the amounts due her during the first period is epitomized as follows:

Balance due for December, 1919, January and February, 1920	\$ 35 00
Balance due for wages for May, 1920.....	25 00
Pay for plaintiff increased from \$35 to \$50 per months in May, 1920.....	
Defendant did not pay for November and December, 1920	100 00
Defendant did not pay for January and February, 1921	100 00
Total due for first period.....	\$260 00
Total due for second period.....	550 00
Total award of court for wages.....	\$810 00
Award of court for cash advances.....	75 00
Total judgment of court.....	\$885 00

At the alimony hearing in the latter part of 1921 the court, in the presence and hearing of the plaintiff herein, said to defendant (it does not appear whether it was an order or merely a suggestion) that plaintiff had apparently not received her wages; that Mrs. Williams was supposed to pay her, and that she should be paid the sum of \$350; that that was all that was owing her at that time; and instructed defendant to pay plaintiff herein the sum of \$100 immediately, and the balance when defendant could. It further appears that defendant paid the said sum of \$100 on January 1, 1922, but it does not appear that he has ever paid the balance of \$250. It does appear that he paid all alimony orders up to the time of the trial of this action. We therefore hold that the defendant is entitled to a credit on said sum of \$260 for the first period in the amount of \$100, leaving a balance due for that period of \$160.

[1] "Sections 156, 196, and 198 of the Civil Code provide that the primary duty of the father is to support his minor children, that he is the head of the family, that if the support of the father is inadequate the mother must assist him to the extent of her ability." *Fox v. Ind. Acc. Comm.*, 194 Cal. 178, 228 P. 39. In the instant case, particularly having in mind that the child, Ned, is a cripple, and practically helpless, the *primary duty* to support him was on his father, the defendant herein. The evidence clearly shows that the defendant had assumed this burden until the first order for alimony in the divorce proceeding, but had fallen behind in his payments to the plaintiff in the sum of \$260 for wages and \$75 for incidentals, as above shown.

While it does not appear in the transcript, we may safely assume that the court order of February, 1921, awarded the custody of the child to the mother, otherwise she would not have been allowed a monthly sum for his support; and it appears from the evidence without conflict that the child was actually in the mother's custody.

[2] Up to the making of this order in February, 1921, the responsibility of the defendant for the plaintiff's wages and cash advanced is perfectly clear, particularly in view of the defendant's letter to the plaintiff of date July 6, 1919, written to plaintiff at Montclair, N. J., urging that Mrs. Williams, the son, and plaintiff should come to California and establish a home. This liability was upon the defendant herein, both by his contract evidenced by said letter and the common law, as well as our state statutes. What effect, then, does the divorce suit and the making of said alimony orders have upon said contract and responsibility?

It should be constantly borne in mind during this discussion that the plaintiff herein knew that the divorce action was pending,

was present at all the alimony hearings, knew their purpose, heard the amount due her discussed between the parties to the divorce action and the court, and knew that her back and future wages were to be paid from the alimony money. She testified: "My back wages I understood was to be paid; my wages was to be paid by the alimony." In other words, then, from February, 1921, on she "understood she was to be paid by the alimony"; and this is in keeping with the facts, for the only payments received by her thereafter, except the \$100 paid her on January 1, 1922, by the defendant, were from Mrs. Williams.

[3] In speaking of the first court order, the plaintiff testified:

"That was one what the court made, and then Mrs. Williams paid me while she would get the money from the court, and then after that they stopped my payments, because they could not continue paying me. After the court made the order, Mrs. Williams commenced paying me just while she received the \$350."

In speaking of the second order she testified:

"After the hearing before Judge Toland I received \$100 from Dr. Williams. I did not understand the \$100 was in accordance with any directions he received from the court to pay me. I did not receive any other money from Dr. Williams in 1922."

It thus seems clear that plaintiff no longer relied on any contract she had with defendant, but "understood she was to be paid by the alimony," and continued in her labors with that understanding. Therefore, commencing with the court order in February, 1921, the relations of the parties changed, and the contract was superseded by the order for alimony.

[4-6] And we think that plaintiff cannot recover against defendant beyond the court order of February, 1921, for other reasons. "All applicable laws in existence when an agreement is made enter into it and form a part of it as fully as if they were expressly referred to and incorporated in its terms." 6 Cal. Jur. 310, § 186. And decisions of the appellate courts of this state interpreting those laws are likewise a part of such contract. *Id.* With the foregoing in mind we approach a consideration of the authorities. At the outset it is well to state that, on the question of the responsibility of the father for the support of his children after the entry of an order granting the custody of the children to the mother, either with or without a provision for their maintenance, there is a wide difference of opinion among the courts of the various states. According to some textwriters there are two rules, and the one adopted by California that under such circumstances the father is not liable is the minority rule. 15 A. L. R. 573, note.

But, so long as our Supreme Court has spoken, and until it changes its views, or the Legislature enacts laws to the contrary, we are bound by the utterances of that court. In considering the decisions of our own courts and the courts of sister states following the same rule, there are few decisions dealing with orders entered pendente lite, but, in discussing such an order as the one before us, it has been said:

"The order as finally made has the characteristics of a permanent order; in other words, a final judgment." *Davies v. Fisher*, 34 Cal. App. 137, 166 P. 833.

With this ruling in thought, let us proceed:

"Interpreting and applying the several provisions of the Code, the decisions of this court are clear to the effect that when there has been a decree of divorce, and such decree vests the custody of the minor children in the mother, *the father is under no obligation to provide for such children any support of education beyond that which may be directed by the court which has granted the divorce, either in its decree or by subsequent modification.*" *Lewis v. Lewis*, 174 Cal. 336, 339, 163 P. 42, 44. (Italics ours.)

"When the court granting the divorce and assigning the custody [of the children] to the wife makes, under the authority of the statute, provision for their support out of the husband's estate, he would seem, upon principles already mentioned, to be relieved from all further obligation." 2 *Bishop on Marriage and Divorce* (6th Ed.) § 557.

We quote at length from the case of *Brown v. Brightman*, 136 Mass. 187, for the reason that that case and the instant case are nearly on all fours:

"The plaintiff has boarded and partly cared for the minor child of the defendant for the period of time named in the account annexed to the declaration, namely, three hundred and twelve weeks. Most of that period the mother of the child, who lived with the plaintiff, was away in the daytime at work. During this time the plaintiff cared for the child; but the mother of the child took care of the child at night, and when she was not away at work. A fair price for the board and care furnished by the plaintiff to said child, under all the circumstances of the case, was an average of three dollars for each week during the whole time. The defendant has paid the plaintiff through his wife \$35, which was applied by the plaintiff on this account.

"The board and care was furnished under the following circumstances: The mother, previously to the birth of the child, came to live with the plaintiff, *with the consent of the defendant*, and remained there with her child, with his consent, until the date of the writ. He paid the board of the mother until about five weeks before the child was born. He never lived with the plaintiff. He came to see the child at the plaintiff's house when the child was about ten months old, and never came there afterwards. Subsequently, he removed to Rhode Island, where he has since resided. He never

offered to take the child or the mother, or to assume the care of either. On April 21, 1877, the mother, with the knowledge of the plaintiff, but without the knowledge of the defendant, obtained a decree of the Supreme Judicial Court giving her the custody of the child; and, on November 12, 1879, the mother, with the knowledge of the plaintiff, but without the knowledge of the defendant, obtained a decree of divorce from the defendant, with the custody of the child.

"The auditor found that the defendant was liable to the plaintiff for the board and care of the child for 312 weeks at \$3 per week, less the \$35 paid by him, amounting to \$901, with interest from the date of the writ, *unless the obtaining of said decrees, or either of them, by the mother, relieved the defendant from liability from the time of the granting thereof.*

"At the trial in the superior court, before Mason, J., without a jury, the plaintiff contended that she was entitled to recover the amount found due by the auditor; and asked the judge so to rule. The defendant contended, and asked the judge to rule, that, if the plaintiff was entitled to recover at all, she was entitled to recover only from the time her claim began up to the time of the decree of April 21, 1877, or at most up to the time of the decree of November 12, 1879.

"The judge rules that the plaintiff was entitled to recover only up to the time of the decree of April 21, 1877; and found for the plaintiff in the sum of \$175.78. The plaintiff alleged exceptions. * * *

"Colburn, J. By the common law of this commonwealth, the defendant, if of sufficient ability, was under obligation to provide for and support his infant child. *Dennis v. Clark*, 2 Cush. [Mass.] 347 [48 Am. Dec. 671]. If this case depended upon the common-law liability of the defendant, under the facts found by the auditor, the plaintiff would doubtless be entitled to maintain her action. *Reynolds v. Sweetser*, 15 Gray [Mass.] 78.

"By the decree of this court in 1877, under the St. of 1874, c. 205, and the further decree of 1879, upon the libel for divorce, the care and custody of his child were taken from the defendant and given to the wife. *With these decrees in force, he had no right, either to take the child and support it himself, or to employ any one else to support it, without the mother's consent. The wife had no authority to bind the defendant by a contract for the support of the child, and no contract can be implied upon which the plaintiff can recover in this action.* The remedy to secure such provision for the support of the child as the defendant might have the ability to furnish, was under a decree of this court, which it had ample authority to make, in either of the proceedings before it, as part of the original decree, or at any subsequent time. * * * Exceptions overruled." (Italics ours.)

The Supreme Court of Maine, after quoting the above language from *Bishop*, says:

"It would be unjust to allow both a common law remedy and the statutory remedy to exist at the same time, and it would operate too severely on a husband for him to be constantly exposed to action by his divorced wife and also by strangers to recover of him sums ex-

pending by them for the support of his children, over whom he is not allowed to exercise any control." Hall v. Green, 87 Me. 122, 125, 32 A. 796, 797 (47 Am. St. Rep. 311). (*Italics ours.*)

"Where, pending divorce proceedings, an order for the payment of temporary alimony is made on petition accompanied by the affidavit of a physician setting out in the bill of particulars the value of his services rendered the wife and infant child of defendant, the presumption is that, in the allowance based on such petition, the physician's bill was included, and the allowance is a bar to a subsequent action against the husband by the physician for such services." Hyde v. Leisenring, 107 Mich. 490, 65 N. W. 536, syllabus 1.

In the instant case the plaintiff was present in court, knew the amount due her was discussed and that an order of court was made on such evidence before it. The rule in the Hyde Case is applicable here.

The earlier case of Selfridge v. Paxton, 145 Cal. 713, 79 P. 425, is therefore in point especially when we remember that the plaintiff here was aware of the nature of the preliminary orders entered in the divorce case and was present when they were made. In the Selfridge Case Bessie Paxton sued Blitz Paxton for divorce, and was granted a decree awarding to her the custody of the child, Roma Paxton, but making no provision for Roma's maintenance. Thereafter the plaintiff, a surgeon, with knowledge of the decree, rendered necessary surgical aid to Roma, charged a reasonable amount therefor, sent a bill to the father, and thereafter sued him. The court said, on pages 715 et seq. (79 P. 426):

"It is apparent that the evidence does not show any contract, either express or implied, on the part of defendant Blitz to pay for the said services rendered Roma; and the court does not find any such contract. The finding merely is, that the appellant was notified of the illness of Roma and did not object to respondent's services. The case, therefore, seems to present the naked legal question whether under the law of this state a third person can recover of a father for necessities furnished his infant child when by a decree of court the care, custody, and control of the child has been taken away from him and given to the mother, *who, to the knowledge of the person furnishing the services, is exercising such custody under such decree* [*Italics ours.*]; and our opinion is, that this question must be answered in the negative. * * * The law as to the liability of a parent for necessities furnished the child comes within the declaration of section 4 of the Civil Code of this state, that 'The Code establishes the law of this state respecting the subjects to which it relates.' The Civil Code, commencing with section 193, under the caption of 'Parent and Child,' clearly 'establishes the law' respecting the rights, duties, and liabilities which arise out of that relation; and the law touching the question involved in the case at bar is found in sections 196 and 207. These sections are as follows:

"196. *Obligations of Parents for the Support and Education of Their Children.* The parent entitled to the custody of a child must give him support and education suitable to his circumstances. If the support and education which the father of a legitimate child is able to give are inadequate, the mother must assist him to the extent of her ability.'

"207. *When a Parent is Liable for Necessaries Supplied to a Child.* If a parent neglects to provide articles necessary for his child who is under his charge, according to his circumstances, a third person may in good faith supply such necessities, and recover the reasonable value thereof from the parent.'

"By these sections the duty to support a child, and the liability to the third person for necessities furnished it, are clearly confined to a parent 'entitled to the custody' of the child, and having it 'under his charge'; and no such liability attaches to a parent who has been deprived of such custody and charge. * * * In *Ex parte Miller*, 109 Cal. 648 [42 P. 429], Justice Temple, in a concurring opinion, says: 'When a parent is deprived of the custody of his child, and, therefore, of the right to its services and earnings by a summary proceeding, *he is no longer liable for its support and education.*' This is true as a general proposition of law, and it is recognized by our Code. Section 196 of the Civil Code provides that a parent entitled to the custody of a child must give him support and education suitable to his circumstances, plainly implying that the parent does not owe that duty to a child when he is not 'entitled to its custody.'" And he further refers to section 207 as providing that when a parent neglects to provide the necessities for a child 'who is under his charge, then third persons may do so, and recover the value'; and he further says that in no instances except those specially provided for in the Code 'has the court power to deprive the parent of his authority and yet hold him liable for the maintenance of his child.' Whatever may be thought as to how the law should be on this subject, we must take it to be as it is written in the Code. * * * Of course, the court when rendering a judgment of divorce may provide for, and generally does provide for, the maintenance of the children of the parties; and it may afterwards so provide when it appears necessary."

This position of our Supreme Court has never been reversed, and has been approved in *Pacific Gold Dredging Co. v. Industrial Acc. Comm.*, 184 Cal. 465, 194 P. 1, 13 A. L. R. 725. To the same effect are *Crittenden v. Schermerhorn*, 39 Mich. 661, 33 Am. Rep. 440; *Hyde v. Leisenring*, *supra*; *Hall v. Green*, 87 Me. 122, 32 A. 796, 47 Am. St. Rep. 31, and *Ryder v. Perkins*, 219 Mass. 525, 107 N. E. 387.

[7] It follows, then, that the provisions of sections 196 and 207 of our Civil Code, as interpreted by our appellate courts as above set forth, were written into any contract between plaintiff and defendant respecting the care of defendant's child, and therefore, upon the entry of the order for alimony, particularly with plaintiff's knowledge, the contractual relation ceased, and the liability

of the defendant thereafter limited to the payment of the said order according to its terms. As the Court of Appeals of Maryland has well said:

"The father was under the common law obligation to support his child during its minority, and this obligation continued without regard to a divorce decree, unless in that decree the court should order that it be supported by some one other than the father. The fact that the decree ordered the father to pay \$3 per week to the mother for the support of the child, in no way affected his common law obligation to support it, *but only prescribed the amount to be paid for its support, and through whom the child was entitled to receive it.*" *Blades v. Szatai*, 151 Md. 644, 647, 135 A. 841, 842 (50 A. L. R. 232). *Italics ours.* In this case the orders made by the court, with the knowledge of the plaintiff, "prescribed the amount to be paid for its support, and through whom the child [and its creditors] was entitled to receive it."

Under statutes quite similar to ours the Supreme Court of Nebraska has held:

"When, in a divorce action, there has been such a judicial ascertainment of the amount the father should pay for the support of his minor children, that amount is presumed to be just and reasonable until it is reversed or modified by a subsequent order of the court. *The amount thus ascertained*, so long as the decree remains in full force, *is*, in this state, *the legal measure of the father's liability for the support of such children.* * * * While the decree in the divorce action, awarding the custody of the minor children to the mother and providing an allowance for their support and maintenance, remains in force, the father is not required to provide food, clothing and shelter for his minor children, *the measure of his liability in that respect being the amount provided in the decree.*" *Dimond v. State*, 110 Neb. 519, 194 N. W. 725.

Although in this case the plaintiff well knew of the divorce proceeding and the alimony orders made thereunder, and is therefore bound by that knowledge, it has been held that a father is not liable for medical attention furnished the child by a physician who was ignorant of such state.

"Where a husband and wife are living * * * apart, and there are separate maintenance proceedings pending in which there is an order for alimony pendente lite, and the husband is not in default on that order, he is not liable for medical services subsequently furnished during the pendency of the suit, and it is immaterial that the physician knows nothing about the litigation, since he is put on inquiry." *Steele v. Leyhan*, 210 Ill. App. 201.

In the instant case the plaintiff not only was put upon inquiry, but had actual knowledge of the orders.

We are therefore of the opinion that the judgment of the trial court, in so far as it awards any amount to the plaintiff for services performed and moneys advanced after the order of February, 1921, in the divorce case, is erroneous, and should be modified. As we have already stated, prior to said February order in the divorce action there was due the plaintiff the sum of \$335 for wages and cash advances, on which was paid the sum of \$100 on January 1, 1922, leaving a balance of \$235.

It is therefore ordered that the judgment heretofore entered herein be reduced to \$235, and that, as so modified, it be affirmed, each party to pay his own costs on this appeal.

We concur: CRAIG, Acting P. J.; THOMPSON, J.

judgment in the District Court of Appeal annulling award (254 P. 279).

John L. Kearney and Verge & Cooney, all of Los Angeles, for petitioners.

G. C. Faulkner, of San Francisco, for respondents.

202 Cal. 517

YORK JUNCTION TRANSFER & STORAGE CO. et al. v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al. (L. A. 9811.)★

Supreme Court of California. Dec. 1, 1927.

Rehearing Denied with Modification Dec. 29, 1927.

1. Master and servant ⇨367—Furniture repairer held employee of transfer company, and not independent contractor.

In workman's compensation proceeding, facts held to warrant finding of Industrial Accident Commission that claimant, employed to repair furniture at \$.75 per hour for transfer and storage company, under an agreement to do all its repair work at its shop or at houses to which company would transport him, was an employee, and not an independent contractor, at the time of accident.

2. Master and servant ⇨367—Right of control determines whether workman is independent contractor or employee.

Right of control, and not the actual giving of specific directions or control of method of doing work, determines whether workman is independent contractor or employee.

3. Master and servant ⇨417(7)—Industrial Accident Commission's finding is conclusive, if sustained by evidence.

Finding of Industrial Accident Commission that relation of employer and employee exists, if warranted by the evidence, is binding on reviewing court.

4. Master and servant ⇨403—Burden was on employer to show compensation claimant performing services was independent contractor, and not employee (Workmen's Compensation, Insurance and Safety Act of 1917, § 8, subd. [b]).

Where compensation claimant was rendering services for employer at time of his injury, there was a presumption under Workmen's Compensation, Insurance and Safety Act of 1917, § 8, subd. (b) (St. 1917, p. 835) that he was an employee, until employer and insurer proved that he was an independent contractor, and burden of proof was on them.

In Bank.

Proceeding under the Workmen's Compensation, Insurance and Safety Act for injuries by Arthur Eckstrom, claimant, opposed by the York Junction Transfer & Storage Company, employer and the Zurich Accident & Liability Insurance Company, insurance carrier. The Industrial Accident Commission awarded the claimant compensation, and the employer and insurance carrier bring certiorari. Award affirmed on hearing after

LANGDON, J. This is an application by an employer and its insurance carrier for a writ of certiorari to review an order of the Industrial Accident Commission awarding compensation to respondent Arthur Eckstrom for injuries which he received in an automobile collision. The commission found that Eckstrom sustained these injuries in the course of and arising out of his employment; that he was performing services as an employee of the Transfer & Storage Company, and was not, at the time of his injury, acting as an independent contractor. The award made was of the sum of \$20.83 weekly, during the period of disability.

The petition for review shows the facts to be that Eckstrom was a furniture repairer and finisher and operated a shop in the city of Los Angeles, where his work was generally done; that he held himself out to the public as an expert cabinetmaker and furniture repair man, furniture polisher, upholsterer, and mattressmaker, and that he did work for the general public; that the Transfer & Storage Company, in their business of moving furniture, from time to time, broke or damaged some of this furniture and, thereupon, would take such furniture to the shop of Eckstrom, where it would be left for repair at a fixed price; that on or about the 2d day of October, 1925, one of the copartners of the Transfer & Storage Company went to the shop of Eckstrom and informed him that some furniture had been damaged by the company, and asked Eckstrom to accompany him to the house into which the furniture had been moved and there repair such furniture; that no price was agreed upon for such work, but Eckstrom based his charges upon an hourly rate of pay; that the Transfer & Storage Company transported Eckstrom to the house in which the damaged furniture was to be repaired, and Eckstrom completed the work without advice or direction from the Transfer & Storage Company as to method of work; that after the work had been completed the Transfer & Storage Company undertook to transport Eckstrom back to his shop, and in doing so the collision and injury occurred.

It is alleged in the petition that after the award of the Industrial Accident Commission in favor of Eckstrom, the employer and insurance carrier petitioned said commission for a rehearing, which petition was denied.

The grounds urged for a reversal of the award by this court are that the commission acted in excess of its jurisdiction, and that the facts established do not support the award; that the award is unreasonable, and

there is no evidence that Eckstrom was an employee of the Transfer & Storage Company at the time of his injury.

[1, 2] The determination of the status of Eckstrom is the key to all the objections. The facts with reference to such status were that Eckstrom did not work "full time" for the Transfer & Storage Company, but he had made an agreement with that company whereby he was to do all their repair work, either at his shop or at houses to which they would transport him, and he was to be paid for such work at the rate of 75 cents an hour for the time spent upon the work and in going back and forth when the work was outside of his shop, and he had been working under this agreement for three years. On the occasion in question he was taken to the house where the work was to be done by the employer and the employer remained there, indicating the work to be done, until it was finished, and then undertook to transport the employee to his shop. It does not appear that there was any occasion for specific directions or control of the method and manner of doing the work, or that control was exercised by the Transfer & Storage Company. However, this is not vital to the status of Eckstrom as an employee, if the right of control existed. As was said in *Hillen v. Ind. Acc. Com.*, 199 Cal. 577, 250 P. 570:

"One of the best tests to determine whether the relation between the parties is that of an independent contractor or of employer and employee is the right of control; and it is not the fact of actual interference with the control but the right to interfere, that makes the difference between an independent contractor and a servant or agent."

[3] It is conceded by the respondent commission that the situation would support a finding either that Eckstrom was an independent contractor or that he was an employee, and we think that is the most that

can be said in favor of petitioners. Under such circumstances, the finding of the Industrial Accident Commission is binding upon this court. *Hillen v. Ind. Acc. Com.*, supra.

The case of *Victory Auto Painting Co. v. Ind. Acc. Com.*, 75 Cal. App. 729, 243 P. 61, presents a situation similar in many respects to the situation in the instant case, and in the case cited the injured man was held to be an employee, although working for the employer at an hourly rate of wage and merely on occasional jobs, while maintaining his own shop in which to do work for other persons when not engaged in work for the employer.

Moreover, section 8, subd. (b) of the Workmen's Compensation, Insurance and Safety Act (St. 1917, p. 835) creates a presumption of status of employee upon a showing of services rendered. "Any person rendering service for another, other than as an independent contractor, or as expressly excluded herein, is presumed to be an employee within the meaning of this act."

[4] It is not disputed that Eckstrom was rendering services for petitioner at the time of his injury. This raises a presumption that he was an employee until the petitioner has proved the defense that he was an independent contractor. The burden of proving that Eckstrom was an independent contractor was upon the petitioner. *Hillen v. Ind. Acc. Com.*, 199 Cal. 577, 250 P. 570; *County of Monterey v. Ind. Acc. Com.*, 199 Cal. 221, 248 P. 912, 47 A. L. R. 359; *Victory Auto Painting Co. v. Ind. Acc. Com.*, supra.

The commission has found, upon facts sufficient to sustain the finding, that the injured man was an employee and not an independent contractor.

The petition for rehearing is denied.

We concur: WASTE, C. J.; PRESTON, J.; RICHARDS, J.; CURTIS, J.; SHENK, J.; SEAWELL, J.

202 Cal. 468

JACKSON v. DOLAN et al. (L. A. 9060.)

Supreme Court of California. Nov. 21, 1927.

1. Appeal and error $\S$ 345(1)—On reversal of order granting new trial, judgment stands as originally entered, as regards time for appeal (Code Civ. Proc. $\S$ 939, as amended by St. 1915, p. 205).

On reversal of order granting new trial, no new judgment is entered, but judgment as originally entered stands as judgment in action, and has effect from date of its original entry in determining time for appeal under Code Civ. Proc. $\S$ 939, as amended by St. 1915, p. 205.

2. Appeal and error $\S$ 345(1)—Appeal from judgment more than three months after entry, but within one month after going down of remittitur on reversal of order granting new trial, held not timely; "other termination" (Code Civ. Proc. $\S$ 660, as amended by St. 1923, p. 234, $\S$ 939, as amended by St. 1915, p. 205).

Appeal taken from judgment more than three months after entry, but within one month after going down of remittitur on reversal of order granting new trial, held not taken within "thirty days after entry in the trial court of the order determining such motion for new trial or other termination," and therefore subject to dismissal as not taken in time under Code Civ. Proc. $\S$ 660, as amended by St. 1923, p. 234, $\S$ 939, as amended by St. 1915, p. 205, where motion was improperly granted after judge's term had expired; "other termination" including termination of new trial proceedings by operation of law.

In Bank.

Appeal from Superior Court, Imperial County; Phil D. Swing, Judge.

On rehearing superseding former opinion. Appeal dismissed.

For former opinion, see 259 P. 329.

Randall, Bartlett & White, Vincent C. Hickson, and A. P. G. Steffes, all of Los Angeles, for appellants.

Harry W. Horton, of El Centro (M. W. Conkling, of El Centro, of counsel), for respondent.

SHENK, J. This is a motion to dismiss an appeal from a judgment in favor of the plaintiff rendered by the superior court in and for the county of Imperial. The action is one to recover damages for personal injuries sustained by the plaintiff, which were alleged to have been caused through the negligent operation of an automobile. The cause was tried by a jury, and a verdict in the sum of \$1,000 was returned in favor of the plaintiff. Judgment was entered on the verdict on December 15, 1920. On December 17, 1920, the defendants moved for a new trial. The minutes of the court as originally recorded showed that the motion was granted as to

the defendant Ashe and denied as to the defendant Dolan on Friday, December 31, 1920. Within due time the plaintiff served and filed his notice of appeal from the order granting the motion for a new trial to the defendant Ashe. On March 23, 1921, and pending the determination of his appeal from the order granting the new trial, the plaintiff filed in the trial court a notice of motion to direct the clerk of said court to correct its minutes so as to show that the order purporting to grant a new trial to the defendant Ashe had in fact been made and entered on Sunday, January 2, 1921, and not on the preceding Friday, as the minutes of the court then indicated. The significance of the motion to have the minutes corrected lies in the fact that the term of office of the superior judge who made the order granting the new trial had expired on December 31, 1920, the day the order bore date. After hearing, the trial court made an order denying the plaintiff's motion to correct the minutes. Upon an appeal therefrom the District Court of Appeal reversed said order, with directions to the trial court to ascertain the true date of the order granting the new trial and to correct its minutes accordingly. Jackson v. Dolan, 58 Cal. App. 372, 208 P. 315. Thereafter the plaintiff renewed in the trial court his motion to correct the minutes, whereupon, on May 16, 1924, the court made its order correcting its minutes. As corrected, the minutes show that the order granting the new trial was made and entered on Sunday, January 2, 1921, which was two days after the expiration of the term of office of the judge purporting to make the same. The defendant Ashe appealed from the order of the trial court correcting its minutes, and this appeal terminated in an affirmance of the order. Jackson v. Dolan, 72 Cal. App. 48, 236 P. 318. On the same day, to wit, March 27, 1925, the District Court of Appeal filed its decision reversing the order of the trial court granting the defendant Ashe a new trial. Jackson v. Dolan, 72 Cal. App. 51, 236 P. 319. On May 21, 1925, and within 30 days after the decision reversing the order granting to him a new trial had become final, the defendant Ashe filed his notice of appeal from the judgment entered in favor of the plaintiff on December 15, 1920. The appeal last mentioned is the one now sought to be dismissed. The ground of the motion is that the appeal was not taken within the time prescribed by law in which an appeal may be taken from a judgment.

The respondent contends that, as the District Court of Appeal has declared that the order purporting to grant the new trial was a nullity, and that the motion for a new trial was denied by operation of law at the expiration of two months after the rendition of the verdict (section 660, Code Civ. Proc.;

Jackson v. Dolan, 72 Cal. App. 51, 236 P. 319), the time within which an appeal could have been taken from the judgment began to run from such denial, and expired 30 days thereafter, under section 939 of the Code of Civil Procedure. The appellant contends that, as his motion for a new trial had been granted, the time for taking an appeal from the judgment was suspended until the order granting a new trial was reversed and the remittitur had gone down, at which time, and not until then, he contends, the time for taking an appeal from the judgment began to run. He bases his contention on the provisions of section 939 of the Code of Civil Procedure as amended in 1915. The portion of the section inserted by the amendment is as follows:

"If proceedings on motion for a new trial are pending, the time for appeal from the judgment shall not expire until 30 days after entry in the trial court of the order determining such motion for a new trial, or other termination in the trial court of the proceedings upon such motion."

It is insisted that the going down of the remittitur to the trial court reversing the order granting the new trial was other termination in the trial court of the proceedings on said motion as contemplated by the amended Code section.

[1, 2] We think that the position of the respondent must be sustained. When the trial court enters an order denying a new trial, the time for an appeal from the judgment immediately begins to run. This is the established practice, and, of course, is not disputed. Prior to the amendment of 1915, in cases where the court entered an order granting a new trial, the time for appeal from the judgment likewise immediately began to run. True, there is confusion in the earlier authorities on this point. For example, in the case of *Kower v. Gluck*, 33 Cal. 401, a case relied on by appellant, it was said that an order granting a new trial had the effect to vacate the judgment from which the defendants appealed, "and hence their appeal is inconsequential, and must be dismissed." In that case the order granting a new trial was affirmed, and under such circumstances the appeal from the judgment was necessarily inconsequential. But that case was cited with apparent approval in *Knowles v. Thompson*, 133 Cal. 245, 65 P. 468, as authority to the effect that an order granting a new trial has the effect of vacating the judgment, "and the party cannot thereafter proceed on said judgment by appeal therefrom or otherwise." In the last case cited, *Bronner v. Wetzlar*, 55 Cal. 419, was approvingly cited to the effect that an order granting a new trial vacated the judgment, and the judgment no longer existed for the purpose of appeal. In the *Knowles* Case it doubtless escaped the attention of the court that in *Pierce v. Birkholm*, 110 Cal. 669, 43 P. 205, this court held that

the statement in *Kower v. Gluck* was not authoritative because unnecessary to the determination of the question involved in the appeal. The same may be appropriately said of the *Knowles* Case and the *Bronner* Case. In the case of *Puckhaber v. Henry*, 147 Cal. 424, 81 P. 1105, this court discussed a situation almost identical with the one involved herein. It was there held that an appeal from a judgment taken within the statutory time would be dismissed, unless the appeal so taken was perfected within the time limited by the rules of court. In that case the trial court had granted a new trial. The adverse party had appealed from the order granting the same, and such appeal was then pending. In her opposition to the motion to dismiss her appeal from the judgment, the appellant contended that she should be protected so that, in the event the order granting a new trial be reversed, she might then proceed with her appeal from the judgment. This court said:

"If an appellant from such a judgment is not satisfied to rest upon the subsequent order which he obtains granting him a new trial, it remains his duty to prosecute his appeal from it with diligence. If, upon the other hand, he is satisfied with the security afforded him by the order granting him a new trial he may submit with complaisance to a dismissal of his appeal from the judgment. It would subject the adverse party to an unjust and unwarranted delay if, as here, after prevailing upon his appeal from the order granting him a new trial, he was still to be confronted with the postponed appeal from the judgment which had been left slumbering to abide the issue of the appeal from the order."

In *Mountain Tunnel G. M. Co. v. Bryan*, 111 Cal. 36, 43 P. 410, it was held that an order of the trial court granting a new trial, until affirmed on appeal or until the time to appeal therefrom has expired, does not have the effect of vacating the judgment so as to prevent an appeal from being taken therefrom. Certain rights under the judgment are suspended, but it is still a potential judgment sufficient to support an appeal taken from it. *Puckhaber v. Henry*, supra. Upon a reversal of an order granting a new trial, the law does not provide for the entry of a new judgment in the trial court on the going down of the remittitur, but the judgment as originally entered in that court stands as the judgment in the action, and has effect from the date of its original entry. *Pierce v. Birkholm*, supra; 2 Cal. Jur. 148.

In determining the effect of the amendment of section 939 of the Code of Civil Procedure in 1915, a reference to the statutes of that year discloses that, by an amendment to section 660 of the same Code, it was provided that the power of the court to pass on a motion for a new trial should expire within three months after the verdict of a jury without further order of the court. Stats. 1915, p. 202. By amendment in 1923 the time was

changed from three months to two months. Stats. 1923, p. 234. In 1915 the Legislature amended said section 939 by enactment subsequent to the enactment amending said section 660 (Stats. 1915, p. 205), and inserted the language especially relied on by appellant. It would seem to be clear that the words "other termination in the trial court" were intended by the Legislature to refer to the termination in the trial court of the proceedings on motion for a new trial by operation of law, as the same had been provided for in the prior enactment at the same session amending said section 660. There is no indication in the statute of an intention to enlarge the time for an appeal from the judgment. If it were intended to postpone the time for such an appeal until the final determination of the new trial proceedings on appeal, it would have been an easy matter for the Legislature to have so indicated. On the contrary, it was provided that the termination of such proceedings in the trial court should set the time for an appeal from the judgment in motion. We conclude that the going down of the remittitur was not such termination of the new trial proceedings in the trial court as was contemplated by the amended section. Furthermore, such a prolonged extension of time for taking an appeal from the judgment as is now claimed by appellant, would seem to be entirely out of harmony with the manifest purpose of the legislative branch to expedite and hasten the disposition of causes on appeal.

It is earnestly insisted by appellant that to dismiss his appeal under the circumstances here shown would be tantamount to a denial of the right to appeal. But such is not the case. He had his right of appeal from the judgment within the statutory time, and, not having availed himself of that right, he must be deemed to have assumed the consequences of his failure to act. The motion is granted, and the appeal is dismissed.

We concur: WASTE, C. J.; RICHARDS, J.; LANGDON, J.; SEAWELL, J.; CURTIS, J.; PRESTON, J.

202 Cal. 513

HUTTON v. CHAPMAN et al. (L. A. 8426.)★

Supreme Court of California. Dec. 1, 1927.

Rehearing Denied Dec. 29, 1927.

Mortgages  **605—Payment of redemption money to county clerk under court order, instead of to purchaser or elisor, held effective under statute (Code Civ. Proc. § 704).**

Payment of redemption money to county clerk under court order, in lieu of payment to purchaser at foreclosure sale or elisor who made sale pursuant to direction of court, held effective under Code Civ. Proc. § 704, particularly where attorney for purchaser at execution sale failed to keep appointment as agreed

to perfect mortgagor's redemption and elisor could not be found.

In Bank.

Appeal from Superior Court, Los Angeles County; Wm. D. Dehy and Franklin J. Cole, Judges.

Action to quiet title by Kathryn W. Hutton against William Chapman and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Superseding opinion in 253 P. 942.

Charles Lantz, W. P. Hyatt, and F. C. Huber, all of Los Angeles, for appellants.

Charles S. Conner, of Los Angeles, for respondent.

PER CURIAM. This action was instituted by the plaintiff to quiet her title to certain real property situate in the county of Los Angeles. The court found the allegations of the complaint to be true, and entered judgment as prayed for. From this judgment the defendants prosecuted their appeal.

It appears that a mortgage had been executed upon the said real property at a time prior to the commencement of this action to quiet title, which is based in part upon respondent's asserted redemption of the property after foreclosure sale. The foreclosure sale was conducted by an elisor regularly appointed by the superior court, wherein the foreclosure proceedings had been litigated. In this connection the court in this action found, among other things:

That "it is true that, prior to the expiration of the time for redemption, the plaintiff herein became seized and possessed of the title to said real estate and was desirous of redeeming said real estate from the lien of said mortgage and the said judgment and decree and the said sale. That she was ignorant of and not informed of the appointment of said Garroway as elisor, and did not know that a sale had been made by him as elisor, and did, on the 25th day of November, 1922, apply to Messrs. Charles Lantz, W. P. Hyatt, and F. C. Huber, attorneys for said William Chapman, at their office at 314 Wilcox building, city of Los Angeles, to make the said redemption. That for the purpose of such redemption and that the plaintiff herein might receive a certificate of redemption it was agreed by and between Charles S. Conner, attorney for the plaintiff herein and the attorneys for said William Chapman, aforesaid, at their office aforesaid, that the attorneys for the plaintiff, Kathryn W. Hutton, and the defendant William Chapman should meet on the 27th day of November, 1922, at the office of the sheriff of said Los Angeles county in the city of Los Angeles and perfect said redemption, and the plaintiff, by and through her said attorney, Charles S. Conner, at the time agreed upon and at the office of said sheriff as agreed upon, appeared for the purpose of said redemption, but the attorney for the said defendant William Chapman did not appear as agreed or at all and

the plaintiff, acting by and through her attorney duly authorized thereunto, the said Charles S. Conner, and being ignorant as to the whereabouts of the said Garroway, applied to this honorable court, to wit, Frank R. Willis, judge thereof, as to how and in what manner such redemption might be made, and the said court, on the 27th day of November, 1922, made and entered its order of redemption in said cause No. B44611 in the words and figures, following, to wit:

"Good cause being shown, it is ordered that the entered amount of money in the case necessary for the redemption be paid by Kathryn W. Hutton as successor in interest to certain defendants herein and be paid to the county clerk of this county in lieu of the payment to the purchaser or the elisor who made the said sale. [Signed] Frank R. Willis, Judge."

"That pursuant to the said order and the provisions thereof the plaintiff herein did deposit and paid to the clerk of said court the sum of \$2,000 for the use and benefit of said William Chapman in the redemption of said real estate and the whole thereof sold as aforesaid. That the sum of \$2,000 was sufficient and more than sufficient to redeem the said property from said sale, and that by reason of such payment the plaintiff herein claims the right to have the title of said real estate and the whole thereof quieted in her favor and against the defendants."

Our examination of the record discloses that the foregoing finding has ample support therein.

It is contended by the appellants that the respondent's purported redemption of the property was ineffective for any purpose in that she failed to comply with the provisions of section 704 of the Code of Civil Procedure, which require that redemption payments "be made to the purchaser or redemptioner, or for him, to the officer who made the sale." As appears from the above-quoted finding, the respondent's redemption payment was, pursuant to order therefor, made to the clerk of the superior court wherein the foreclosure proceedings had been heard. While we are aware that the right and procedure to redeem property sold under execution are statutory (Bangham v. Michael, 179 Cal. 390, 177 P. 161), yet we are of the view that respondent's payment into court of the redemption money, though not a strict compliance with the provisions of section 704 of the Code of Civil Procedure, was sufficient compliance therewith to accomplish the desired result. An elisor is but an officer of the appointing court, and it would seem, therefore, that respondent's payment into court, under the circumstances presently to be narrated, should be held to constitute payment to such officer. There is evidence in the record which tends to disclose that earnest effort had been made on behalf of the respondent to ascertain the whereabouts of the officer who had conducted the foreclosure sale in order that the contem-

plated redemption might be successfully effectuated. Inspection of the Los Angeles city directory revealed to counsel for respondent that the elisor maintained a joint office with counsel for the appellant Chapman, the then holder of the certificate of sale issued by such elisor. The testimony of the elisor likewise indicates that his office address was, for a time at least, identical with that of counsel for the appellant Chapman. Inquiry for the elisor at that office failed to bring the parties together. In view of this apparently sincere but fruitless effort to find the officer who had conducted the foreclosure sale, and in view of the finding of the trial court that appellant Chapman's counsel neglected to keep an appointment with respondent's counsel to complete and effectuate a redemption of the property, we are of the opinion that respondent's payment into court was sufficient compliance with the statutory provisions to work a redemption of the property here involved. We have examined and considered the numerous other contentions advanced by the appellants, and have found therein nothing that would suggest a conclusion differing from that announced.

The judgment appealed from is affirmed.

202 Cal. 490

IN RE PHILLIPS' ESTATE. ★

MILLS v. PFEIFFER.

(L. A. 9253.)

Supreme Court of California. Nov. 23, 1927.

Rehearing Denied Dec. 22, 1927.

1. Wills ⇐55(7)—Evidence held not to show testamentary incapacity of man 93 years of age.

Evidence that man of 93 years of age took interest in management of property, and made decisions respecting it, and kept track of his money matters in general way, but not showing he was unable to understand nature and extent of property or natural objects of his bounty, held not to show testamentary incapacity.

2. Wills ⇐55(1)—Where testimony as to mental incapacity conflicted, trial court had discretion to resolve conflict one way or another.

Where testimony in will contest conflicted as to mental condition of testator at the time of execution of will, trial court had discretion to resolve conflict one way or the other.

3. Wills ⇐52(1)—Contestant had burden to show testator's mental incapacity.

Where will was contested for testator's mental incapacity, burden to show incapacity was on contestant.

★Rehearing denied.

4. Evidence $\S$ 553(4)—Hypothetical question, assuming that testator drafted will unassisted, held improper under evidence.

In will contest, hypothetical question, propounded by contestant to expert, which assumed that testator drafted will unassisted by any one, was improper, where evidence showed testator did not prepare draft of will unassisted.

5. Wills $\S$ 166(2)—Evidence held not to show that 93 year old testator was unduly influenced by manager of his household.

In contest of will, where man of 93 years of age distributed his property by will, leaving bulk thereof to widow who managed his household, evidence held not to show that legatee unduly influenced making of the will.

6. Wills $\S$ 286—Proponent of will, not having denied allegation that contestant was beneficiary, thereby admitted that contestant had interest to contest.

Where proponent of will did not deny allegation of written opposition that contestant was beneficiary under prior will, by her failure to deny allegation of interest, she admitted that contestant had sufficient interest to contest subsequent will, and hence finding of trial court that contestant lacked interest was without supporting evidence.

7. Wills $\S$ 384—Contestant was not prejudiced by finding he had no contesting interest, where, had court found otherwise, judgment admitting will to probate would nevertheless stand.

In will contest finding that contestant had no interest to contest will was without prejudice to contestant since, if court had found contestant had interest, judgment admitting will to probate would nevertheless stand.

8. Executors and administrators $\S$ 16—Where contestant named as executor refused to sign petition for probate of will, he renounced right to serve as executor.

Evidence that contestant, named as executor in will, refused to sign petition for probate of will, held to authorize finding that contestant renounced his right to serve as executor and to authorize appointment of proponent, named as executrix, as sole personal representative.

9. Appeal and error $\S$ 77(2)—Minute order denying probate of prior will and admitting last will to probate, but providing for submission of findings and conclusions, was not appealable.

Where minute order, stating that testator's prior will be denied probate, and that last will be admitted to probate, was not a final determination of trial court, since there was incorporated therein a direction for proponent to submit draft of findings of fact and conclusions of law, appeal from such minute order was improper.

In Bank.

Appeal from Superior Court, Los Angeles County; F. C. Valentine, Judge.

In the matter of the estate of Fred Phillips, deceased, Kathryn Pfeiffer petitioned for

probate of decedent's will, and George E. Mills contested. From a judgment admitting the will to probate, contestant appeals. Affirmed.

William Ellis Lady, of Los Angeles, for appellant.

Frank F. Oster, of Los Angeles, for respondent.

SHENK, J. This is an appeal from a judgment admitting to probate the last will and testament of Fred Phillips, deceased. The proponent and respondent, Mrs. Kathryn Pfeiffer, and the contestant and appellant, George E. Mills, are strangers to the blood of the deceased. They will be referred to as the proponent and contestant.

On the 10th day of January, 1925, the proponent filed in the superior court, in and for the county of Los Angeles, her petition for the probate of a will of decedent dated February 3, 1922. In addition to formal allegations, she alleged that Fred Phillips died on the 15th day of December, 1924, in the county of Los Angeles, leaving an estate therein, consisting of real and personal property producing an approximate annual revenue of \$10,000; that she and the contestant were named in said will as executrix and executor thereof; that the contestant refused to sign the petition for probate of said will, and had renounced his right to appointment as executor; that the decedent left no next of kin or heirs at law, and was, at the time of his death, of the age of about 95 years. A copy of the will, sufficient in form to entitle it to probate, was attached to the petition. By the terms of the will the following bequests and devises were made: To Fred Phillips Turton of Garfield, Utah, \$500; to Mrs. Bennett Botsford of Chicago, \$3,000; to Mrs. Adalade Young of Chicago, \$3,000; to Mary Holman of Los Angeles, \$500; to Clara Williams and Jessie Shoup, both residing in Idaho, the testator's interest in a group of mines and mining properties located in Lemhi county, Idaho; to Kathryn Pfeiffer, the proponent, a residence property, the home of the decedent, and the furniture therein, located at the corner of Twenty-Fifth street and Gramercy place, in the city of Los Angeles; also an interest in certain mines and mining properties in Custer and Lemhi counties in Idaho. The proponent was also made the sole residuary legatee and devisee. She and the contestant were nominated executrix and executor, and all former wills were expressly revoked. Donald M. Redwine and M. M. McPherson were the subscribing witnesses. By this will no portion of the estate was left to the contestant.

On January 13, 1925, the contestant filed his written opposition to the probate of said will, wherein it was alleged that, at the time

the decedent executed said will, he was wanting in testamentary capacity by reason of unsoundness of mind; that said will was obtained from the decedent through undue influence and fraud on the part of proponent. It was further alleged that the decedent left a will of date October 12, 1914, wherein he devised and bequeathed a large portion of his estate, to wit, a portion in excess of \$10,000, to the contestant. On March 11, 1925, the contestant filed his amended contest, wherein he realleged substantially, but more in detail, the matters set forth in the original opposition, and further alleged that in and by said will of 1914 the decedent had made Mrs. Pfeiffer and himself the residuary devisees and legatees, to share equally, and that the contestant's interest in the residuum was in excess of \$50,000, and that said will of 1914 had never been revoked. In her answer to the amended opposition the proponent made certain admissions, hereinafter noted, but denied that the will of 1914 had never been revoked, and specifically denied the contestant's allegations with reference to the incompetency of the decedent, undue influence, and fraud.

The contest was tried by the court sitting without a jury. The court found in favor of the proponent on all the issues presented, and admitted the will of February 3, 1922, to probate. The contestant contends that the findings are unsupported by the evidence and that the court committed prejudicial error in a number of its rulings. The trial was protracted, and the record is voluminous. Some 42 points are presented by the contestant for determination. To discuss them all would unduly prolong this opinion, and would serve no useful purpose as a basis for our conclusions. Only those necessary for a determination of the appeal will be discussed.

[1-4] The evidence disclosed without conflict that the testator was a man of very advanced age at the time of his death. The weight of 95 years naturally bore down upon him. Physically he was suffering an impairment of sight and hearing, but it may be said that he was well preserved for a man of his age. He died about two years after the will of 1922 was executed, not because of his advanced age, but more directly as the result of complications which developed after a fall, which occurred about ten days or two weeks before his death. As to his mental condition, it was in evidence that he was absent-minded, and repeated questions already asked and answered a short time previously, and at times seemed confused and unable to recognize those about him. The proof, even on behalf of contestant, however, fell short of the requirements of the law necessary to establish testamentary incapacity. While the testator required assistance as to his personal wants and constant care, he continued to take an interest in the management of his property, and was able to make decisions respecting the

same. He kept track of his money matters in a general way and signed checks until shortly before his death. It was not shown that he was afflicted with general insanity nor that he was unable to understand the nature and extent of his property, nor that he did not have in mind those who would be the natural objects of his bounty. It was not shown that he suffered delusions which would affect the testamentary act, nor was it disclosed that he was unable to comprehend the nature and purpose of the testamentary act when the will of 1922 was executed. In the preparation of the will he had the assistance of Mr. McPherson, an old-time friend, who devoted parts of four days in going over with the decedent the terms of the proposed will and perfecting it as to form. The testimony of the lay witnesses as to the mental condition of the testator at or about the time of the execution of the will of 1922 presented a conflict in the evidence. It was the province of the trial court to resolve that conflict one way or the other in the exercise of its discretion. The burden was upon the contestant, and a review of the record discloses that there was no abuse of such discretion. The testimony of the expert witnesses for both parties in response to a hypothetical question propounded by counsel for proponent was in substantial accord to the effect that, at the time of the execution of the 1922 will, the testator was not suffering such a degree of mental incapacity as would prevent him from making a valid will. The contestant objected to the form of this hypothetical question, but we find that, in substance, it was based upon facts proved during the trial. The expert witnesses, produced on behalf of contestant, testified, in response to a hypothetical question propounded by counsel for contestant, that, assuming the facts incorporated in the question to be true, the testator was mentally incapable, unassisted, of drafting the will of 1922. But the question propounded to those witnesses by contestant was improper, in this, that it assumed that the testator drafted the will unassisted by any one. The will was correct and precise in form and phraseology, and was complete in its description of real and personal property. The evidence was undisputed that the testator did not prepare the draft of the will unassisted, but, on the contrary, was afforded the assistance of McPherson, who remained in the company of the testator in the preparation of the draft of the will. In this preparation there were exemplars at hand available for comparison consisting of copies of former wills, one of which had been prepared under the supervision of a lawyer. There was also at hand a handbook of forms showing the proper language to be used in preparing a will. In view of this undisputed testimony, the hypothetical question propounded by contestant to his expert witnesses assumed facts not supported by the rec-

ord. The evidence in support of the issue of incompetency of the testator was not only insufficient to establish testamentary incapacity as required by numerous decisions of this court, but supported abundantly the finding of the trial court on the subject. A few of our more recent decisions reiterating the rule in such cases are *Estate of Perkins*, 195 Cal. 699, 235 P. 45; *In re Shay's Estate*, 196 Cal. 355, 237 P. 1079; *Estate of Gunther*, 199 Cal. 119, 248 P. 514; *Estate of Sexton* (Cal. Sup.) 251 P. 778; *Estate of McDonough* (Cal. Sup.) 251 P. 516; *Estate of Haupt* (Cal. Sup.) 252 P. 597, and *Estate of Smith* (Cal. Sup.) 252 P. 325.

[5] Nor was the finding of the court on the issue of undue influence unsupported by the evidence. In this connection the relationship existing for many years between the proponent and the testator is worthy of note. The testator was born in England, and came as a young man to the United States. He found his way to Idaho, where he engaged for a long period of time in the general merchandise business. He prospered and accumulated a considerable fortune. He married, but had no children. He and his wife knew the proponent from her childhood in Idaho, and were deeply attached to her. His acquaintanceship continued through the years. Mrs. Phillips died in 1911. It was in evidence that on her deathbed she exacted from proponent a promise to remain with, and care for, Mr. Phillips as long as he should live; that at the same time Mrs. Phillips exacted from her husband a promise to provide well for proponent; that, in accordance with such promises, Mr. and Mrs. Pfeiffer took up their residence at the home of Mrs. Phillips, and remained there until the death of the testator in December, 1924. During those 13 years Mr. Pfeiffer, although regularly employed elsewhere, spent much time in caring for the grounds, garden, and flowers at the testator's home. The proponent devoted herself to the care of Mr. Phillips. She managed the household, did the ordering and buying, nursed Mr. Phillips when he was ill, looked after his clothing, and attended to his wants and necessities as a daughter would do for her father. For this service neither the proponent nor her husband received any compensation.

Prior to 1919, and before the execution of the 1914 will, the testator owned another residence property located at 919 South Burlington avenue in Los Angeles. In the will of 1914 he devised this property to the contestant, whom he had known for many years, and with whom he had been associated in business. In 1919 the testator conveyed this property to the contestant by deed of gift. Early in the year 1922 Mr. McPherson came from his home at Pacific Grove to visit Mr. Phillips, at the latter's request, communicated by letter through the proponent. In this letter Mr. McPherson was advised that Mr.

Phillips desired to see him and to have him assist in redrafting the will. During the days when the will was in the course of preparation, the proponent was attending to her household duties. Her part in the preparation of the document was to copy the same in pen and ink from the pencil notes prepared by McPherson. When this was done, the draft was taken to a public stenographer to have the same typewritten. When the will was ready for execution, it was read to the testator by McPherson. Just before the will was signed the subscribing witness Redwine, who was well known to the testator, had occasion, without special prearrangement, to call at the testator's home. He was requested to sign as a witness to the will. The evidence as to whether the proponent was at the side of the testator or was elsewhere in the house when the will was signed was conflicting, and the court undoubtedly resolved this conflict in favor of the proponent. It found that no undue influence had been exercised by her bearing upon the testamentary act. "In order to set aside a will for undue influence, there must be substantial proof of a pressure which overpowered the volition of the testator at the time the will was made." *Estate of Kilborn*, 162 Cal. 4, 120 P. 762; *In re Langford*, 108 Cal. 608, 41 P. 701; *Estate of Mauvais*, 43 Cal. App. 779, 185 P. 987. A confidential relationship, assuming that one existed between the proponent and the testator, as contended by contestant, was not sufficient, in the light of the facts disclosed and found, to require a finding of undue influence. *Estate of Presho*, 106 Cal. 639, 238 P. 944; *Estate of Morcel*, 162 Cal. 188, 121 P. 733. Under well-recognized rules, the evidence was insufficient to support a finding of undue influence. On the contrary, the contrary finding is well supported.

The issue of fraud tendered by the contestant is entirely lacking in evidentiary support on the record presented.

[6, 7] The court further found that the contestant had no interest in the estate sufficient to enable him to contest the will of 1922. It is contended that this finding is without support in the evidence. The will of 1914 was not produced, and no attempt was made to establish it as a lost or destroyed will. The written opposition, however, alleged the interest of the contestant as a beneficiary of a substantial portion of the estate under the will of 1914. The answer of the proponent admitted "that some time about the year 1914 said Fred Phillips executed a will, but she alleges that she has no knowledge as to the date or year of the execution thereof." She denied that the will of 1914 had never been revoked and denied that the same was a subsisting will. She further denied that contestant was entitled to receive any portion of the estate under the said will. There was no denial of the allegation of the written op-

position that the contestant was a beneficiary under that will. The interest of the contestant must therefore be deemed to have been admitted by proponent by her failure to deny the allegation of interest, and the finding of the court to the effect that the contestant lacked sufficient interest to contest the will of 1922 is without support in the evidence. The insufficiency of the evidence to support this finding, however, cannot prejudice the contestant, for the reason that, if the court had found that contestant had the necessary interest, the judgment would otherwise have to stand.

[8] It is further contended that the court was in error in holding that the contestant had renounced his right to serve as executor and in appointing the proponent as the sole personal representative. The evidence is sufficient to justify the conclusion that the contestant refused to sign the petition for the probate of the 1922 will. Such being the case, the court properly exercised its discretion in making the order holding in effect that the contestant's attitude was so inimical to the best interests of the estate as to exclude him from his right to participate in its administration.

[9] There is an appeal in the record from an order entered in the minutes of the court on the 15th day of December, 1925, stating that the will of 1914 be denied probate; that the will of 1922 be admitted to probate and appointing the proponent sole executrix without bond. This minute order, however, does not purport to be a final determination of the matter in the trial court, for there is incorporated therein a direction to counsel for proponent to prepare and submit to the court a draft of findings of fact and conclusions of law in favor of the proponent and against the contestant. The decision and judgment subsequently filed and entered pursuant to the minute order constituted a final determination of the matter in the trial court. The appeal from said order was therefore improper, and the same should be dismissed.

Other points made by the contestant do not require specific treatment.

While this controversy throughout has been spirited, the contestant's criticism of the

trial judge is unwarranted. His opening brief contains disrespectful matter unjustified by the record. If our attention had been drawn to the same prior to the submission of the cause, some action might have been required to the extent, at least, of striking the brief from the files.

The appeal from the minute order of December 15, 1925, is dismissed, and the judgment admitting the will of February 3, 1922, to probate is affirmed.

We concur: WASTE, C. J.; RICHARDS, J.; SEAWELL, J.; CURTIS, J.; PRESTON, J.

202 Cal. 500

In re PHILLIPS' ESTATE.

MILLS v. PFEIFFER.

(L. A. 9284.)

Supreme Court of California. Nov. 23, 1927.

In Bank.

Appeal from Superior Court, Los Angeles County, F. C. Valentine, Judge.

William Ellis Lady, of Los Angeles, for appellant.

F. E. Oster, of Los Angeles, for respondent.

PER CURIAM. This is an appeal from a judgment for costs entered March 3, 1926, against the contestant, George E. Mills, following a judgment admitting to probate the will of date February 3, 1922, as the last will of the decedent. The contest was determined in the trial court, and on appeal in favor of the proponent of the will. Estate of Phillips, 200 Cal. —, 261 P. 709. In ordering that said will be admitted to probate, the court further ordered that the proponent recover her costs, and the judgment from which this appeal was taken was entered after the court had retaxed the costs on motion. It does not appear from the record that the judgment for costs was made a part of the judgment admitting the will to probate. It is therefore assumed that said judgment for costs is separately appealable. The proponent concedes that the allowance of costs so made to her was premature and improper in view of the decision of this court in Estate of Johnson, 198 Cal. 469, 245 P. 1089.

The judgment for costs is therefore reversed.

87 Cal. App. 20

HOWARD v. HOWARD et al. (Civ. 6019.)★

District Court of Appeal, First District, Division 1, California. Nov. 18, 1927.

Rehearing Denied Dec. 16, 1927. Hearing Denied by Supreme Court Jan. 16, 1928.

1. Appeal and error ⇐1145—"Judgment of affirmance" is determination that judgment "appealed from" be affirmed.

A judgment of affirmance is a determination that judgment "appealed from" be affirmed.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Affirmance.]

2. Appeal and error ⇐803—Dismissal for reason that appeal has not been prosecuted as required by statute operates as "affirmance" only to extent of precluding further appeal (Code Civ. Proc. § 955).

Dismissal of appeal by Supreme Court or District Court of Appeal, for reason that appeal has not been prosecuted as required by statute and rules governing appeals, operates as an affirmance, under Code Civ. Proc. § 955, only to extent of precluding further appeal and leaves judgment appealed from unimpaired.

3. Appeal and error ⇐803—Dismissal for want of prosecution of appeal from judgment conflicting with later judgment involving same parties and subject-matter, and which was affirmed on merits before dismissal of other appeal, is not "affirmance" annulling later judgment (Code Civ. Proc. § 955).

Where subject-matter of controversy was fully and fairly determined in trial court and this determination was affirmed by Supreme Court after hearing on merits, subsequent dismissal of appeal from a former judgment of trial court conflicting with later judgment between same parties, and involving same subject-matter, could not be deemed an affirmance, under Code Civ. Proc. § 955, in sense of overriding and annulling latter judgment, when dismissal of former appeal was based upon failure to further prosecute same.

Appeal from Superior Court, Mendocino County; H. L. Preston, Judge.

Action by Mack Howard, administrator of the estate of Rachel Howard, deceased, against W. H. Howard and others. Judgment for defendants was affirmed on appeal. From an order of sale and a writ of assistance, plaintiff appeals. Affirmed.

Charles A. Shurtleff, of San Francisco, and A. L. Wessels, of Ukiah, for appellant.

Mannon & Mannon, of Ukiah, for respondents.

PARKER, Justice pro tem. This is an appeal by plaintiff, as administrator of the estate of Rachel Howard, deceased, from an order of sale made on the 8th day of May, 1925, and entered of record on July 3, 1925, granting a writ of assistance in favor of Lucia C. Hopkins, as administratrix of the

estate of Ann Cleveland, deceased, and in favor of Lucia C. Hopkins, in her individual capacity directing the sheriff of Mendocino county to remove said Mack Howard, as administrator of the estate of Rachel Howard, deceased, and said Mack Howard individually from certain lands and premises, and to put said Lucia C. Hopkins as administratrix and individually in possession of said lands and premises.

The lands constituting the subject-matter of this litigation have been the source of much dispute between the parties. A rather complete and detailed history will be found in the reported case of Howard v. Howard, 67 Cal. App. 56, 226 P. 984. At the oral argument in the instant case it was stated that the case cited correctly set forth the facts of the present controversy up to the date thereof, namely, April 30, 1924. A petition for hearing before the Supreme Court was denied on June 26, 1924. Therefore no detailed recital of the same facts will be made here. However, some facts may be stated to illustrate the present issue.

The parties involved here for some years were in dispute as to the title to certain tracts of land. For convenience here these tracts of land will be hereinafter referred to as "Cleveland lands" and "Lucy Howard lands." In 1917 Lucia C. Hopkins, as administratrix of the estate of Ann Cleveland, deceased, commenced an action against Mack Howard, as administrator of the estate of Rachel Howard, seeking therein to have her title to the "Cleveland lands" determined. The action was in the usual form of quiet title actions. In that case issue was joined, and on August 20, 1918, judgment was filed and entered in said cause decreeing that the plaintiff therein had no ownership or right or rights whatever in or to said lands or any part thereof, and further adjudging the title to be in defendant as administrator. To retain the identity of this action, it was entitled Hopkins v. Howard, and involved the "Cleveland lands." Thereafter the plaintiff duly served and filed notice of appeal to the Supreme Court on November 12, 1918, and on the same day duly filed a request for transcript, and the court duly ordered such transcript to be prepared.

On November 12, 1918, the parties to the Hopkins Howard suit filed a stipulation, the essential recitals and terms thereof being as follows: Reciting the pendency of the appeal and the fact that there were other lands, for convenience called the "Lucy Howard lands," concerning which there were title defects similar to those involved in the action of Hopkins v. Howard; stipulating then that defendant in Hopkins v. Howard should immediately commence and diligently prosecute to final judgment an action to have it deter-

mined that the "Lucy Howard lands" belonged to defendant as administrator; further stipulating that plaintiff Hopkins need take no further step in the appeal until after the judgment in the later action shall have become final, extending her time to file transcript or to take any other step necessary on the appeal to and including 30 days after the said final judgment in the action agreed to be commenced—stating "It is the intention hereof that the said plaintiff and appellant shall have the right, and she is hereby given the right to have the said judgment appealed from reviewed on appeal on the facts and merits in case the final judgment in the contemplated action shall be that the Lucy Howard land is not the property of defendant in his capacity as administrator"; and further stipulating that, should it be finally adjudged that the Lucy Howard land is the property of the estate of defendant as such administrator, then the appeal in Hopkins v. Howard shall be immediately dismissed and the land in controversy deemed to be in defendant as administrator aforesaid.

Thereafter no further proceedings were had affecting the appeal in Hopkins v. Howard until disposition of the second suit now to be referred to.

The defendant Howard in the Hopkins Howard suit did commence an action in the superior court of Mendocino county, which is the action in which was issued the writ of assistance now before us and which will be definitely referred to as Howard v. Howard. That action was commenced on February 28, 1921. By it plaintiff sought to quiet his title to the Lucy Howard lands and also the Cleveland lands as against the defendants named, and also as against the said Lucia C. Hopkins. In other words, in this latter action plaintiff went beyond his stipulation in the Hopkins Case to the effect that he would bring an action to quiet title to the Lucy Howard lands and included in this action the Cleveland lands. Issue was joined, and the said issue embraced exactly the same questions and involved the identical properties litigated in the former action of Hopkins v. Howard. The judgment of the trial court was made and entered on December 12, 1921, and by said judgment it was decreed that plaintiff take nothing and that the defendants were the owners of the lands involved, and that plaintiff be debarred and perpetually enjoined from asserting or making any demand or claim to said real property or any part thereof.

In this case of Howard v. Howard, the instant case, an appeal was taken as noted and the judgment affirmed. Howard v. Howard, 67 Cal. App. 56, 226 P. 984. Thereafter on February 7, 1925, by order of the Supreme Court, on motion of respondent, the appeal in the case of Hopkins v. Howard was dismissed.

The chronology of events is as follows:

Hopkins v. Howard: Date of judgment of trial court, August 20, 1918; stipulation holding appeal in abeyance, November 12, 1918; appeal dismissed by Supreme Court, January 6, 1925. Howard v. Howard: Date of judgment of trial court, December 12, 1921; affirmed by appellate court, April 30, 1924; appellant's petition to have cause heard by Supreme Court denied June 26, 1924; order for writ of assistance herein, May 8, 1925.

Throughout the foregoing outline we have omitted all reference to the fact that the rights of the parties are as administrators rather than in individual capacities. No particular point is urged in that respect, and, owing to many cases of similarity of names, the record would become quite confusing if continual reference to all of the heirs was being made throughout.

The point urged by appellant, and upon the determination of which the case depends, may be stated thus: The dismissal of the appeal in the Hopkins Howard Case was an affirmance of that judgment, and such affirmance was a final judgment and final as of the date of affirmance, January 6, 1925; that the date of the final judgment in the Howard v. Howard Case was as of the date of affirmance by the District Court of Appeal April 30, 1924. It being conceded that there is a conflict between said judgments, then appellant contends that the Hopkins v. Howard judgment, later in time, prevails. It is further contended by appellant that, irrespective of his other contention, a fair conflict of claims was presented in the court below, and in such case a writ of assistance should not issue, but the parties should be left to pursue their remedies in separate actions.

Inasmuch, however, as it is evident that the claim last urged rests wholly upon the first point, a determination on the propriety of the issue of the writ of assistance as a separate question would be of little importance. If we conclude that the appellant is entitled to claim under the Hopkins Howard judgment, that disposes of all questions. If we determine otherwise, then the next question becomes moot in so far as the record discloses that the rights urged were based solely on the Hopkins judgment and no other claims presented in the court below.

It may be admitted that in the case of Howard v. Howard the defendant Lucia C. Hopkins could, had she chosen, have set up the pendency of the appeal in the Hopkins Case and demanded an abatement as to such issues as were already in that controversy. The fact is she did not do so but went to trial. Accordingly the case of Howard v. Howard went to trial and judgment and affirmance without regard to what was determined in the Hopkins Case. The record before us and the stipulation entered into regarding the appeal in the Hopkins Case show clearly

that it was the intent of all the parties that their rights should be concluded by the Howard v. Howard final judgment, assuming at the time of the stipulation that the Cleveland lands would not be involved in the subsequent proceedings. By the stipulation, as noted, if it was held that plaintiff prevailed in the second case as he had in the former (there being defendant), then his rights would be conceded; if he lost and the basis of his title was removed, then the appeal should go on, evidently more of a formality than otherwise. Yet it is apparent that the consideration of the stipulation failed, or the purpose thereof, rather, removed, when plaintiff herein deliberately chose to litigate again the same issues involved in the first case. We think, upon an analysis of this stipulation and from the facts pertaining to the case at that time, it could be well shown that the appellant here is not entitled to be further heard. Surely there are no equities on his side, nor does he attempt to present any.

[1] No hard and fast definition of "final" judgment applicable to all situations can be given, since its finality depends somewhat upon the purpose for which and the standpoint from which it is being considered, and it may be final for one purpose and not for another. Freeman on Judgments (5th Ed.) § 27. This is so manifest that it would be idle to attempt any exhaustive examination into the different cases in which the word "final" is employed. If we should take the word as used in one instance and attempt to formulate any rigid definition to stand in all cases, we would find a condition of hopeless confusion and obvious inconsistency. In any event we feel that such an analysis is unnecessary to this discussion. However, it might not be amiss to state that a judgment of affirmance, even if given all of the attributes of finality contended for, is, as it purports to be, a determination that the judgment appealed from be affirmed. We think that the question here may be and should be determined from a construction of section 955 of the Code of Civil Procedure. That section reads:

"The dismissal of an appeal is in effect an affirmance of the judgment or order appealed from, unless the dismissal is expressly made without prejudice to another appeal."

[2] The section is merely declaratory of what must be obvious. In the case of Hopkins v. Howard no record on appeal was ever prepared. The trial court, on motion of the defendant in that case, made its order that the proceedings therein pending were terminated, and the Supreme Court dismissed the appeal for failure of appellant to prosecute the same. Even in the absence of the statute the necessary effect of this dismissal

would have been to leave the judgment as though no appeal had been taken, and the judgment of the trial court then stood unassailed. It is manifest that this had the same effect, considered simply as a result, as would have followed had the Supreme Court disposed of an appeal perfected, heard and affirmed. The section, as noted, simply announces the effect of the dismissal, but in no sense attempts to enlarge the meaning of the term "dismissal" or declare the same to be in the strict sense a judgment on the merits. Possibly, in the absence of the section, after an appeal had been dismissed the appellant could again appeal and thus prolong the litigation interminably, unless restricted by other provisions of the statute. It was undoubtedly the intent of the lawmaking body to preclude such a course and give to an order of dismissal the effect of an affirmance, at the same time reserving in the appellate tribunal the power to make express provision that a dismissal might be ordered without prejudice to the right of another appeal. An appeal dismissed because there was nothing to appeal from will not preclude another appeal in the same case when a record shall have been made up from which an appeal can be taken. In re Rose, 80 Cal. 166, 22 P. 86. In our opinion, a dismissal of an appeal by the Supreme Court or District Court of Appeal for the reason that the appeal has not been prosecuted as required by statute and the rules governing appeals operates as an affirmance only to the extent of precluding further appeal and leaves the judgment appealed from unimpaired. No court is permitted to pass upon issues not before it for determination; and when the appellate court in its order of dismissal concludes that there is no question presented to it for hearing, and in effect that the appellate jurisdiction has not been invoked, it would seem difficult to say that this is a solemn judgment per se, determining the questions which the court refuses to consider.

[3] The precise point involved here has never been passed upon directly, as far as our research discloses. The briefs of counsel cite no authority exactly in point. As a case of first impression we would announce the rule as applicable to the case at bar. Where the subject-matter of a controversy is fully and fairly determined in the trial court, and this determination affirmed by the Supreme Court after a hearing on the merits, the subsequent dismissal of an appeal from a former judgment of the trial court, conflicting with the later judgment between the same parties and involving the same subject-matter, will not be deemed an affirmance in the sense of overriding and annulling the latter judgment when the dismissal of the former appeal is based upon a failure to further prosecute the same. The status of the former judgment

will be as though no appeal had been taken therefrom.

The order appealed from is affirmed.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

86 Cal. App. 689

CALIFORNIA BEAN GROWERS' ASS'N v. SANDERS. (Civ. 3212.)

District Court of Appeal, Third District, California. Nov. 14, 1927.

- 1. Damages** ⚡79(5)—Contract for liquidated damages for failure to deliver crop to marketing association held valid and enforceable (Civ. Code, § 1671).

Contract for liquidated damages for grower's breach of agreement to deliver his bean crop to co-operative marketing association held valid and enforceable under Civ. Code, § 1671; it being impracticable or extremely difficult to fix actual damage.

- 2. Appeal and error** ⚡1122(2), 1175(5)—Appellate court may make proper findings and enter correct judgment, where trial court's findings are contrary to evidence (Code Civ. Proc. § 956a added by St. 1927, p. 583).

Where trial court's findings are contrary to evidence, proper findings may be drawn from evidence and correct judgment entered by appellate court, under Code Civ. Proc. § 956a, added by St. 1927, p. 583.

- 3. Agriculture** ⚡6—Finding marketing association, alleging breach of contract did not eliminate waste, prevent speculation, effect economies, or stabilize prices, held contrary to evidence.

In action by co-operative marketing association for grower's breach of contract to deliver his entire bean crop to plaintiff, finding that plaintiff did not eliminate any waste, prevent any speculation, or effect any economies or stabilization of prices in handling, marketing, or distribution of beans, held contrary to evidence.

- 4. Agriculture** ⚡6—Evidence held to require finding marketing association was damaged by grower's sale of crop to others.

In co-operative marketing association's action for grower's breach of contract to deliver his entire bean crop to it, evidence held to require finding that plaintiff was damaged by defendant's sale of beans to others.

- 5. Agriculture** ⚡6—Evidence held to require finding marketing association, alleging breach of contract, was always ready, willing, and able to perform.

In action by co-operative marketing association for grower's breach of contract to deliver his entire bean crop to it, evidence held to require finding that plaintiff was at all times ready, willing, and able to perform all the conditions, covenants, and terms of its agreement.

- 6. Agriculture** ⚡6—Evidence held to require finding association could not secure crop it contracted to sell, or prevent price manipulation, because of grower's fault.

In action by co-operative marketing association for grower's breach of contract to deliver his entire bean crop to it, evidence held to require finding that plaintiff was unable to secure amount of beans it had contracted to sell or to prevent manipulation of prices by speculators because of defendant's failure to deliver beans.

- 7. Agriculture** ⚡6—Evidence held to require finding member's failure to deliver crop to marketing association raised other member's pro rata marketing costs.

In action by co-operative marketing association for grower's breach of contract to deliver his entire bean crop to it, evidence held to require finding that pro rata cost of marketing of members delivering beans to plaintiff, in accordance with contract, was raised because of defendant's failure to deliver beans.

- 8. Agriculture** ⚡6—Evidence held to require finding cost of handling crop was raised by grower's failure to deliver to marketing association.

In action by co-operative marketing association for grower's breach of contract to deliver his entire bean crop to plaintiff, evidence held to require finding that cost of handling beans was raised by defendant's failure to deliver.

- 9. Agriculture** ⚡6—Evidence held to require finding marketing association was damaged in incalculable amount, authorizing recovery of liquidated damages, from grower's breach of contract (Civ. Code, § 1671).

In action by co-operative marketing association for grower's breach of contract to deliver his entire bean crop to plaintiff, evidence held to require finding that plaintiff was damaged in incalculable amount, so as to authorize recovery of liquidated damages under Civ. Code, § 1671.

- 10. Agriculture** ⚡6—Evidence held to require finding marketing association could not fill contracts for sale because of grower's failure to deliver crop.

In action by co-operative marketing association for grower's breach of contract to deliver his entire bean crop to it, evidence held to require finding that plaintiff, by terms of contract, accepted delivery of beans only from its members, could not go into open market therefor, and was unable to fulfill contracts for sale of beans to others because of defendant's failure to deliver.

- 11. Agriculture** ⚡6—Marketing association held entitled to \$100 attorney's fees in action for liquidated damages for failure to deliver crop.

Co-operative marketing association held entitled to recover \$100 from grower for attorney's fees in prosecution of action for liquidated damages of one cent per pound for breach of contract to deliver to it 23,000 pounds of beans produced by defendant in certain year.

Appeal from Superior Court, Stanislaus County; J. C. Needham, Judge.

Action by the California Bean Growers' Association, a corporation, against Frank S. Sanders. Judgment for defendant, and plaintiff appeals. Reversed, with direction.

Sapiro & Hayes, of San Francisco, for appellant.

Dennett & Zion, of Modesto, for respondent.

BURROUGHS, Justice pro tem. The plaintiff is a nonprofit marketing association without capital stock, and was organized by a large number of bean growers to co-operate in the business of growing and marketing beans. The defendant is one of its members. On June 14, 1921, plaintiff and defendant entered into an agreement whereby plaintiff agreed to market, and defendant agreed to consign and deliver to plaintiff, as his agent, all of the beans produced by him, except those which the plaintiff might release in writing for personal use or garden seed varieties. The agreement covered a series of years commencing with, and including, the year 1921. The agreement is very full and complete, and sets forth the obligations of the respective parties in minute detail. One of its provisions is for liquidated damages in case the defendant shall fail to deliver to the plaintiff his crop of beans, and is set forth in the following language:

"Inasmuch as it is now and ever will be, impracticable and extremely difficult to determine the actual damage resulting to the association should the grower fail to so consign and deliver their beans, the grower hereby agrees to pay to the association one cent (\$.01) for each pound of beans produced or acquired by or for him which he has failed to deliver to the association in accordance with the terms hereof, as liquidated damages for the breach of this agreement, all parties agreeing that this agreement is one of a series dependent for its value upon the adherence of each and all of the contracting parties to each and all of the said contracts."

It is also provided in said contract:

"If the association brings any action to enforce any provision hereof or to secure specific performance hereof or to collect damages of any kind for any breach hereof, the grower agrees to pay to the association any reasonable attorney's fees expended or incurred by it in any such proceeding, together with any other costs incurred in such action."

[1] The complaint is based upon an alleged violation of defendant's obligation to deliver to the plaintiff his 1921 bean crop, and also for an attorney fee for the prosecution of this action. The general features of the plaintiff organization and the agreements which it makes with its members are similar to those considered in *Poultry Producers, etc., v. Barlow*, 189 Cal. 278, 208 P. 93; *California Canning Peach Growers' Ass'n v. Downey*, 76 Cal.

App. 1, 243 P. 679; *Poultry Producers, etc., v. Murphy*, 64 Cal. App. 450, 221 P. 962; *Anaheim Citrus Fruit Ass'n v. Yeoman*, 51 Cal. App. 759, 197 P. 959; and *California Bean Growers' Ass'n v. Rindge L. & N. Co.*, 199 Cal. 171, 248 P. 658, 47 A. L. R. 904. The foregoing cases hold that a contract for liquidated damages such as the one here sued upon is valid and enforceable, and falls within the rule of section 1671 of the Civil Code, which provides:

"The parties to a contract may agree therein upon an amount which shall be presumed to be the amount of damage sustained by a breach thereof, when, from the nature of the case, it would be impracticable or extremely difficult to fix the actual damage."

In the case of *Anaheim Citrus Fruit Ass'n v. Yeoman*, supra, it is held:

"The association was organized for the purpose of the better handling of citrus fruits through the co-operative and joint effort of its members. From the nature of the organization and the statement of its purposes as found in its articles and by-laws, it can be fairly and reasonably inferred that by the cooperation of its members, mutual advantages would accrue to all through greater economy in handling and shipping and the securing of more advantageous marketing facilities. These results would be dependent directly upon the performance by the members of their agreement to deliver their fruit into the hands of the association for the purposes declared. Defendant sought to show at the trial that the damage which would accrue to the association by reason of any of its members failing or refusing to market their fruit through the association could be easily and exactly ascertained, and that such damage would consist wholly of a proportionate amount of overhead operating cost. By the line of questioning pursued, it was made clear that the association would suffer an actual monetary loss by reason of the failure of defendant to deliver his fruit at the association packing house for market, as he had agreed to do, but in the very nature of the case we do not think that such damage should be the only damage considered to have been suffered by the plaintiff. Other elements have already been suggested. The existence and life of the association itself depended upon its being furnished fruit to dispose of in the public market. A reduction in the amount of fruit so handled would not only tend to increase the overhead cost to the non-transgressing members, but, we may assume, to some extent affect the prestige and standing of the association as a marketing concern. * * * Enough has been said, we think, to show that the case falls within the class as to which the law permits damages to be liquidated by contract in advance of their occurrence. It follows as a necessary conclusion that plaintiff was entitled to recover the exact amount fixed in its contract as the sum per box which defendant should pay by reason of his failure to market this fruit in the manner agreed."

These authorities are conclusive that the contract here sued upon is enforceable.

The cause was tried by the court and judgment entered in favor of the defendant, and plaintiff appeals.

The cause has been submitted to this court by stipulation of the parties upon the appellant's opening brief; there being no appearance by the respondent either through the filing of a brief or oral argument.

The court made the following findings adverse to the plaintiff:

"Second. * * * That it is not true that the said plaintiff did, in the handling of its business, eliminate any waste, or prevent any speculation, or give any benefits of any economies, or that there were any economies, or any stabilization in the collective or co-operative handling, or marketing or distribution of beans."

"Fourth. * * * That it is not true that said plaintiff was damaged as the result of the acts of the said defendant in selling said beans to persons other than the plaintiff, and that said plaintiff suffered no damage on account of the said acts of the said defendant.

"Fifth. That it is not true that the plaintiff was at all times ready, or willing, or able, to perform all of the terms or conditions, covenants, or terms of said agreement.

"Sixth. That it is not true that, by the defendant's failure to deliver beans under said agreement, the plaintiff was unable to secure the amount of beans it had contracted to sell, or that, by reason of such act of the defendant, the plaintiff was unable to prevent manipulation of the price of beans by speculators.

"Seventh. That it is not true that, because of the defendant's failure to deliver said beans to the plaintiff, the pro rata cost of marketing of the members of plaintiff who delivered beans in accordance with their contract was raised.

"Eighth. That it is not true that the cost of handling beans was raised by defendant's failure to deliver.

"Ninth. That it is not true that the plaintiff was damaged in an incalculable amount, or any amount, by reason of the failure of the defendant to deliver said beans."

"Eleventh. * * * But it is not true that, by reason of the failure of the defendant to deliver said beans, the said plaintiff was unable to fulfill any contract made by it in connection with the sale of any beans by it to other persons.

"Twelfth. That it is not true that plaintiff is entitled to attorney's fees in this action.

"Thirteenth. That the defendant never signed any by-laws as a member of said association, but that plaintiff has adopted by-laws as provided by law."

The pleadings admit that the defendant raised 23,000 pounds of black-eye beans during the season of 1921, which were subject to the terms of the contract, and which were sold to other parties. C. L. Danly, secretary-treasurer of the plaintiff, testified that during the year 1921 he was employed by the plaintiff, and ever since said time has been in its employ, and the custodian of the records of the plaintiff corporation. He produced the stub book of certificates of membership, which shows that on June 14, 1921, certificate of

membership No. 1712 was issued to the defendant. The witness testified that the certificate was signed by the secretary and forwarded to defendant. He further testified that Sanders did not deliver any beans of the 1921 crop to the association; that the association during 1921 had an office in San Francisco with a sales department, a warehouse department, and an accounting department; that it had arrangements with about 300 brokers throughout the United States who assisted in disposing of its crops, and it had arrangements with warehouses to receive and clean beans. It also had clerks in its various departments and department head managers, and it had prepared all the necessary paper work, printed forms, and reports in expectation of handling all the beans of its members who had signed contracts. The form of contract signed by Mr. Sanders was a standard form signed by all the members. He further testified that, if Mr. Sanders had delivered his 23,000 pounds of beans to the association, they could have been handled without any additional overhead expense or cost, and that the portion of overhead that should have been borne by Sanders was paid by those members who delivered their beans to the association; that the failure of Sanders to deliver the beans caused the unit cost of operating the association to increase; that the plaintiff was able and willing to receive the beans, and made demand for them, and was ready to market them in accordance with the terms of the general contract; that the association receives beans from its members only, and that, if a member fails to deliver it affects the trade standing and prestige of the company; that, when contracts were made with the trade throughout the United States, they were informed of the nature of the association and the source from which the beans were obtained. He further testified that they relied upon the beans of its members, and, if they failed to deliver, the association was unable to carry out its contracts, and lost prestige with the trade; that from the 1921 crop the association contracted to deliver black-eye beans at a specific time, and were unable to do so because the members did not deliver, and the association got in difficulties with the trade; that, if the defendant Sanders had delivered his beans in time, the association would have been in a position to have filled some of its contracts. He further testified that the breach of a contract by one member caused others to breach, and thus created dissatisfaction and demoralization in the association. The witness further stated that he did not know just what effect Sanders' failure to deliver his bean crop had upon other members, but there were other members at that time who did not deliver their crops. Further, that by Sanders' failure to deliver his bean crop to the association, said bean crop came into competition with the beans of

the association, and prevented the association from maintaining a stable market and stable price.

It was stipulated that, if Robert Frazier, a grower member and director of the association, and for a period of two years its general manager, were present, his evidence would be the same as that of Mr. Danly in reference to the effect of a breach of the agreement on the part of a member-grower of the association.

It was stipulated that, should the plaintiff recover a judgment, the amount of the attorney's fee should be fixed by the court.

[2] The foregoing is all of the evidence bearing upon the findings of the court hereinafore set out, and, as said findings are contrary thereto, proper findings may be drawn from the evidence, and a correct judgment entered thereon, and this cause terminated without further litigation by this court exercising the authority conferred by section 956a of the Code of Civil Procedure (St. 1927, p. 583).

[3] It is therefore ordered that the second finding be amended by striking therefrom the following:

"That it is not true that the said plaintiff did, in the handling of its business eliminate any waste or prevent any speculation or give any benefits of any economies, or that there were any economies or any stabilization in the collective or co-operative handling or marketing or distribution of beans."

[4] It is further ordered that finding 4 be amended to read as follows:

"Fourth. That in the year 1921 defendant produced 23,000 pounds of beans, and that the said beans were not delivered to the said plaintiff, and were not used by the said defendant for seed nor released by the association for personal use. That demand was made upon the said defendant by said plaintiff to deliver said beans, but that said defendant did not deliver any of said beans produced by him in the year 1921, and that said defendant sold said beans to persons other than the plaintiff. That it is true that said plaintiff was damaged as a result of the acts of said defendant in selling said beans to persons other than the plaintiff, and that said plaintiff suffered damage on account of said acts of said defendant."

[5] It is further ordered that finding No. 5 be amended to read as follows:

"Fifth. That it is true that the plaintiff was at all times ready, willing and able to perform all of the terms or conditions, covenants, and terms of said agreement."

[6] It is further ordered that finding No. 6 be amended to read as follows:

"Sixth. That it is true that, by the defendant's failure to deliver beans under said agree-

ment, the plaintiff was unable to secure the amount of beans it had contracted to sell, and that, by reason of such act of the defendant, the plaintiff was unable to prevent manipulation of the price of beans by speculators."

[7] It is further ordered that finding No. 7 be amended to read as follows:

"Seventh. That it is true that, because of the defendant's failure to deliver said beans to the plaintiff, the pro rata cost of marketing of the members of plaintiff who delivered beans in accordance with their contract, was raised."

[8] It is further ordered that finding No. 8 be amended to read as follows:

"Eighth. That it is true that the cost of handling beans was raised by defendant's failure to deliver."

[9] It is further ordered that finding 9 be amended to read as follows:

"Ninth. That it is true that the plaintiff was damaged in an incalculable amount by reason of the failure of the defendant to deliver said beans."

[10] It is further ordered that finding No. 11 be amended to read as follows:

"Eleventh. That it is true that by the terms of said agreement the plaintiff accepts delivery only of beans delivered by its members and that it is not so constituted that it can go into the open market and obtain beans, and it is true that, by reason of the failure of the defendant to deliver said beans, the said plaintiff was unable to fulfill contracts made by it in connection with the sale of beans by it to other persons."

[11] It is further ordered that finding No. 12 be amended to read as follows:

"Twelfth. That the plaintiff has incurred a reasonable and necessary expense of \$100 as and for attorney's fees in the prosecution of this action."

It is further ordered that finding No. 13 be stricken out.

It is further ordered that the conclusions of law be amended to read as follows:

"That the plaintiff is entitled to judgment against the defendant in the sum of \$230, together with \$100 attorney's fees, and its costs of suit herein expended."

The judgment is reversed, and the trial court is directed to enter judgment in favor of the plaintiff against the defendant in accordance with the aforesaid findings and conclusions of law, the appellant to recover its costs of appeal.

We concur: FINCH, P. J.; PLUMMER, J.

86 Cal. App. 523

CLARK v. CONLEY SCHOOL DIST. OF KERN COUNTY. (Civ. 5921.)

District Court of Appeal, First District, Division 2, California. Nov. 2, 1927.

1. Contracts ⇨176(11)—Court, finding repudiated contract employing architect, which was indefinite regarding compensation, was executed, properly refused to allow full amount demanded in cause of action alleging contract.

Where court found that repudiated contract, fixing no compensation for plaintiff's services as architect in drawing plans for buildings, but fixing his compensation for supervising construction of buildings at 6 per cent. of total cost of construction, was executed, court did not err in refusing to render judgment for full sum demanded under cause of action alleging contract, in view of indefinite nature of contract.

2. Evidence ⇨571(7)—Court was not bound to believe plaintiff's uncontradicted testimony regarding value of his services as architect, where contract was evidence thereof.

Where architect, suing for value of services in drawing plans for buildings not constructed, testified that his services were reasonably worth \$14,348, which was 6 per cent. of total estimated value of buildings, and there was no testimony contradicting it, but contract calling for payment of 6 per cent. on total cost of construction not only for preparation of plans but for supervision of construction was evidence of reasonable value of services, court was not bound to accept plaintiff's testimony, but was justified in reaching conclusion of reasonable value of services from all facts before it.

3. Interest ⇨19(2)—Where amount due for services could not be determined by mere calculation, claim could not bear interest from time services were rendered (Civ. Code, § 3287).

Where judgment was based on cause of action in quantum meruit and upon evidence offered under that cause of action amount due thereunder could not be determined by mere calculation, claim could not bear interest from date services were rendered, under Civ. Code, § 3287, but should bear interest from rendition of judgment only.

Appeal from Superior Court, Kern County; Erwin W. Owen, Judge.

Action for services by Orville L. Clark against the Conley School District of Kern County. From the judgment, plaintiff appeals. Affirmed.

Oliver O. Clark, of Los Angeles, and Kaye & Siemon, of Bakersfield, for appellant.

Claffin & Lambert, of Bakersfield, for respondent.

NOURSE, J. Plaintiff sued for services rendered, praying for judgment in the sum of \$13,552. The cause was tried before the court without a jury and resulted in a judgment in favor of plaintiff in the sum of \$3,000.

From this judgment the plaintiff has appealed on a typewritten record.

The complaint pleaded three distinct causes of action. The first was based upon a written contract with the members of the board of trustees of the defendant district wherein the plaintiff was employed as the architect of the district for the preparation of plans and specifications for new buildings and additions and alterations to present buildings, and also to supervise the construction, completion, and alteration of said buildings as required by the board. The second cause of action pleaded the same facts and added allegations covering the conduct of the defendant district for the purpose of invoking an estoppel upon the defendant from asserting any invalidity in the contract. The third cause of action was in the ordinary form of quantum meruit. Following the trial, upon which the validity of the contract was vigorously attacked upon the ground that it had not been authorized or approved by the board of trustees in a legally called meeting, the trial court made its findings in which these defenses were not touched upon, but in which it was found that the contract was executed at the time alleged in the complaint; that plaintiff commenced the performance of services under it, prepared and delivered certain plans and specifications for new buildings, expended certain moneys in the performance of this labor, and was prevented from completing the contract because of its termination by the trustees. It was then found that the reasonable value of the services rendered by the plaintiff under the contract was the sum of \$5,000, of which sum \$2,000 had already been paid, and judgment was accordingly given for the balance.

[1] On this appeal the appellant attacks the judgment upon two grounds: First, that the trial court erred in disregarding the uncontradicted evidence of appellant that the reasonable value of his services was \$14,348; and, second, that he was entitled to interest upon the amount found due for the period during which payment was withheld. In his reply brief the appellant has for the first time argued that the trial court having found that the contract was executed as alleged in the first cause of action he was entitled to the full sum demanded, under that cause of action irrespective of any question of the reasonable value of his services. Although we are not inclined to consider points which are raised for the first time in the final brief, it is sufficient to say that the contract which is the basis of the first cause of action is so indefinite in its terms that we cannot say that the trial court erred in this respect. The contract seems to have been drawn with the intention of employing appellant in two capacities—as an architect to advise the board

of trustees, and to prepare plans and specifications for new buildings and alterations in the present buildings, and, secondly, as a supervising architect in the construction, completion, and alteration of such buildings. For the services mentioned under the first heading no compensation was fixed, while for the services mentioned under the second heading the appellant's compensation was fixed at 6 per cent. of the total cost of construction and alteration of the buildings. It may be assumed that, under the general custom covering the services of architects, the fee fixed in the contract would cover the services rendered in the preparation of the plans and specifications. It should be noted, however, that under the contract the appellant was called upon to perform such services "as may be required of him," and that the fee fixed was to be based upon the total cost of the construction and alteration of the buildings, and not upon the estimated cost of that work. Therefore, whether the contract contemplated payment to the appellant for services rendered merely in the preparation of plans and specifications for new buildings or for alterations of present buildings if none of such buildings or alterations were made, was a question which should have been determined by the trial court upon issues properly drawn. Again, if these services were to be paid for on the basis of 6 per cent. of the actual cost of construction and alteration of the buildings, the trial court must determine upon what basis the appellant should be paid for services rendered in the preparation of plans and specifications only. The appellant lays stress upon the fact that he was prevented from completing the services under the contract by the action of the trustees in bringing about its termination, but it appears that this action was prompted by the determination of the trustees that the buildings could not be constructed because the electors of the district had refused to authorize the issuance of bonds for that purpose, and because the district was otherwise financially unable to raise the fund for that purpose. This is a fact which must have been contemplated by all parties at the time the contract was executed. It explains the insertion in the contract of the proviso that the services were to be rendered as required by the trustees.

[2] The trial court found that the reasonable value of appellant's services was \$5,000. It is said that because the testimony of the appellant that his services were reasonably worth \$14,348 was not contradicted, the trial court was bound to find in that amount. The appellant was asked:

"What was the reasonable value of your services in preparing these plans and specifica-

tions?" Answer: "Six per cent. on the total estimated value of each of the three buildings, * * * that was a total of \$398,000, and the value of my services would be 6 per cent. of that amount, * * * \$14,348."

But the contract itself was some evidence of the reasonable value of these services and that called for a payment of 6 per cent. on the total cost of construction, not only for the preparation of the plans and estimates, but for the supervision of the construction of the buildings. The trial court was not therefore bound to accept this testimony of the appellant, but was justified in reaching its conclusion of the reasonable value of the services rendered by the appellant from all the facts and circumstances before it. *Ehlers v. Wannack Bros.*, 118 Cal. 310, 50 P. 433; *Meyer v. Buckley*, 22 Cal. App. 96, 98, 133 P. 510.

It is argued that the trial court erred in refusing to allow the appellant interest from the time when the services were rendered until the date of the judgment. The argument is based upon the rule that appellant's recovery was capable of being made certain by calculation (Civ. Code, § 3287) because the contract fixed his compensation at 6 per cent. of the cost of construction of the buildings. We have already said that this fee was based upon his services to be rendered not only in the preparation of plans and estimates, but also in the supervision of the construction of the buildings. If the cause were being tried upon the first cause of action alone, it may be that evidence could be had of the prevailing customs and of the surrounding circumstances which would justify an interpretation of the contract fixing a promise to pay for the services rendered in the preparation of plans and estimates in the event the building program was abandoned and in such a case the certainty of the amount due might be easily determined by mere calculation. But so far as appears from this record, such evidence was not before the trial court, and in any event no finding was made thereon. The judgment was manifestly given on the third cause of action alone—an action in quantum meruit.

[3] The reasonable value of services rendered was the precise question to be determined by the trial court upon the evidence offered under that cause of action, and the amount due thereunder could not be determined by mere calculation. Such being the case, the claim should bear interest from the rendition of the judgment only. *Meyer v. Buckley*, 22 Cal. App. 96, 99, 133 P. 510.

Judgment affirmed.

We concur: KOFORD, P. J.; STURTEVANT, J.

86 Cal. App. 527

CLARK v. CONLEY SCHOOL DIST. OF KERN COUNTY. (Civ. 5932.)

District Court of Appeal, First District, Division 2, California. Nov. 2, 1927.

1. Contracts ⚡313(1)—Where happening of event upon which payment became due under contract was prevented by defendant's repudiation, plaintiff could recover damages for breach.

Where happening of event upon which payment for architect's drawing plans for buildings and supervising construction would become due was wrongfully prevented by repudiation of contract by defendants, architect could recover damages for breach.

2. Schools and school districts ⚡86(2)—School board's resolution authorizing contract employing architect sued on held properly admitted, without showing whether meeting was general or special.

Resolution of board of trustees of school district authorizing execution of contract with architect sued on *held* properly admitted, without showing whether resolution was passed at general or special meeting, where counsel had offered official minute book of board in which resolution was recorded as having been adopted at "meeting of the board of trustees," since board was authorized to act at either special or regular meeting.

3. Evidence ⚡158(17)—Minutes of school board showing adoption of resolution authorizing contract sued on were best evidence.

In action by architect for services, minutes of board of trustees of school district showing adoption of resolution authorizing contract with architect were best evidence of this fact.

4. Evidence ⚡87—Where evidence showed school board adopted resolution authorizing contract, presumption that official duty had been regularly performed cast upon board burden of showing irregularity.

In action by architect for services rendered to school district under contract, minutes of board of trustees showing adoption of recorded resolution authorizing contract with architect were best evidence of this fact, and presumption that official duty had been regularly performed cast upon board burden of proof to show any irregularity in proceedings of board.

5. Schools and school districts ⚡86(2)—Where prior to school board's repudiation of contract, district made use of architect's report and he performed services requested, he could recover reasonable value of services.

Where prior to repudiation of contract with architect, by board of trustees of school district, whereby architect was to furnish plans for buildings and supervise construction, the district received and made use of report and survey of school facilities made by architect, and architect performed all services required by him under contract and at request of district, and he expended in preparation of plans and specifications for new buildings under contract sum of \$9,000, he was entitled to reasonable value of his services to district, which court

found to be \$5,000, of which \$2,000 had been paid.

6. Schools and school districts ⚡86(2)—School district could not refuse to pay for architect's services accepted on ground of irregularity in proceedings for employment of architect.

School district could not make use of report and survey of school facilities made by architect employed under contract and accept services performed by him under contract at request of district, and then refuse to pay for same on ground that there were irregularities in giving notice of meeting of board of trustees of school district, in adoption of resolution authorizing architect's employment, or in execution of contract in suit.

Appeal from Superior Court, Kern County; Erwin W. Owen, Judge.

Action for services rendered by Orville L. Clark against the Conley School District of Kern County. From a judgment for plaintiff, defendant appeals. Affirmed.

Clafin & Lambert, of Bakersfield for appellant.

Oliver O. Clark and W. W. Kaye, both of Los Angeles, and Alfred Siemon, of Bakersfield, for respondent.

NOURSE, J. Plaintiff sued for services rendered as an architect in preparing plans and specifications for new buildings to be erected by the district and for additions to and alterations of existing buildings and to supervise the construction of the same. The trial court found that the reasonable value of the services rendered by the plaintiff to the defendant was the sum of \$5,000; that the defendant had paid to the plaintiff on account thereof the sum of \$2,000; and that the plaintiff was entitled to recover the balance of \$3,000, for which sum judgment was accordingly rendered. From this judgment the defendant has appealed upon a typewritten record.

Appellant's opening brief consists entirely of a reprint of the reporter's transcript, with a few running interpolations stating that error has occurred. These specifications of error are generally not followed by any argument or citation of authority, while the authorities which are cited are all from other jurisdictions and are either wholly beside the point at issue or directly contrary to the authorities in this state interpreting the statutes under which the issues arise.

The complaint was framed in three causes of action. The first pleaded a written contract executed by the qualified trustees of the defendant district on October 7, 1920, whereby the plaintiff was employed to perform the services mentioned. It was then alleged that immediately thereafter the plaintiff began work under the contract, made and filed with the defendant the survey

report and recommendations called for, prepared and filed the plans and specifications requested by the defendant, incurred a large expenditure of money, labor, and time in the performance of his services and held himself at all times ready, willing, and able to perform everything incumbent upon him under the contract; that on September 10, 1921, the defendant discharged plaintiff, repudiated and abandoned the contract, and refused to pay him for the services rendered, all to his damage in the sum of \$13,552. The second cause of action pleaded the same material facts and added facts showing a ratification and estoppel on the part of the defendant. The third cause of action was framed in the form of a common count for the reasonable value of services rendered.

[1] On this appeal the appellant urges that the complaint does not state a cause of action because it does not appear that in the written contract with the district a time of payment for the services was specified, and that, because of this, payment would become due only upon the completion of the buildings, which event it appears did not occur. The specification goes only to the first cause of action and is wholly without merit because it does appear in the pleading of that cause of action that the happening of the event upon which payment would become due was wrongfully prevented by the repudiation of the contract by the district and that that cause of action was one for damages for this breach. But aside from this no attack is made upon the pleading of the second or third causes of action, and either one of these is sufficient to support the judgment.

[2-4] It is said that the trial court erred in the admission into evidence of the resolution of the board of trustees of the appellant district authorizing the execution of the contract in question because it had not been previously shown that the resolution was passed at either a regular or special meeting of the board. The objection is wholly without merit. Counsel had offered the official minute book of the board of trustees in which the resolution was recorded as having been adopted at a "meeting of the board of trustees." Inasmuch as the board is authorized to act at either a special or a regular meeting, it was not necessary for the respondent to show what kind of meeting was being held at the time the resolution was passed. The minutes of the board showing

the adoption of the recorded resolution were the best evidence of this fact, and the presumption that official duty had been regularly performed cast upon the appellant the burden of proof to show any irregularity in the proceedings of the board. Running through the appellant's brief are statements to the effect that the action of the board should have been taken on a regular meeting day, or that notice should have been given of a special meeting to the outgoing trustee, but no evidence is offered to show that either one of these things had not been done.

[5, 6] Aside from anything which may be said as to the impropriety of any judgment under the first cause of action because of any irregularity in the giving of notice of the meeting of the trustees, in the adoption of the resolution authorizing the employment of respondent, or in the execution of the contract in suit, the pleadings and findings under the second and third causes of action are in themselves sufficient to support the judgment. The trial court found that prior to the repudiation of the contract the district received and made use of the report and survey of the school facilities made by the respondent; that the respondent performed all the services required by him under the contract and at the request of the district; that he expended in the preparation of the plans and specifications for new buildings under the contract the sum of \$9,000; and that the reasonable value of his services to the district was \$5,000, of which sum \$2,000 had been paid. On this phase of the case the judgment is within the rule announced in *McCormick Lumber Co. v. Highland School District*, 26 Cal. App. 641, 643, 147 P. 1183, and *Warren Bros. Co. v. Boyle*, 42 Cal. App. 246, 261, 183 P. 706. It is said in the case last cited:

"Even if it be that certain provisions of the charter, or ordinances, were not strictly complied with, the city, under well-settled legal principles, should not be allowed to accept, use, and retain the benefit of petitioner's property, and then refuse to pay for it upon the plea that in making the contract it has not proceeded in strict conformity with some part of the complicated internal machinery of its complex corporate organization" (citing cases).

Judgment affirmed.

We concur: KOFORD, P. J.; STURTEVANT, J.

87 Cal. App. 60

Ex parte SCOTT. (Cr. 1432.)

District Court of Appeal, First District, Division 1, California. Nov. 21, 1927.

1. Habeas corpus ☞30(3)—Habeas corpus will not be granted for committing magistrate's error in designating offense.

Where evidence before committing magistrate established the making of false pretenses, their falsity, obtaining of property, reliance of victim upon representations, inducing her to part with her property, intent to defraud, and conspiracy, defendant will not be granted a writ of habeas corpus merely because of error in committing magistrate in designating offense as grand larceny by trick and device.

2. Habeas corpus ☞111(1)—Petitioner on habeas corpus will not be discharged for defects in form of charge against him, when probably guilty of criminal offense.

It is not the duty of court to discharge the petitioner on habeas corpus where it appears that, notwithstanding defects in form of charge against him, he is probably guilty of criminal offense.

Original application by H. W. Scott for a writ of habeas corpus, prayed to be directed to the Sheriff of Alameda County. Writ discharged, and petitioner remanded.

Frank P. Webster and Keith Ferguson, both of San Francisco, for petitioner.

Earle Warren, Dist. Atty., and R. H. Chamberlain, Jr., Deputy Dist. Atty., both of Oakland, and Stanley C. Smallwood, Deputy Dist. Atty., of Pleasanton, for respondent.

TYLER, P. J. Application for a writ of habeas corpus. The petition recites that applicant is restrained of his liberty by the sheriff of Alameda county. That said restraint is illegal in this, that petitioner has been committed on a criminal charge of grand larceny of an automobile without reasonable or probable cause therefor, as the evidence of the prosecuting witness taken at the preliminary examination shows that she voluntarily delivered title to and possession of the automobile to petitioner. The return of the sheriff shows that petitioner was received by him into custody by virtue of a commitment issued out of the police court of the city of Oakland charging grand larceny by trick and device. That thereafter and on September 7, 1927, the district attorney of Alameda county filed an information charging petitioner with the commission of grand theft, based upon the same transaction shown at the preliminary examination. That on the following day, September 8, 1927, the superior court in and for Alameda county issued a writ of habeas corpus on behalf of petitioner, returnable September 12th, and on said day, after hearing, discharged the same. That on September 12, 1927, petitioner was duly arraign-

ed on the information above mentioned and pleaded not guilty. The case was set for trial for September 26, 1927, by consent. Prior thereto, on September 23d, petitioner filed the present application in this court. Pending the hearing thereof trial was had which resulted in conviction.

The facts elicited at the preliminary examination show that petitioner in May, 1927, bought 80 acres of land from the Central Pacific Railway Company. This land, which was unimproved, was situated in the county of Butte, and according to the testimony of the assessor of the county it was assessed for \$2.50 per acre. After the purchase of the land, petitioner, with one John J. Martin, who was charged with the same offense, appeared at the office of a title insurance company in Oroville and inquired for and procured insurance of title upon the same. At that time petitioner stated that he was going to sell the property and take back certain trust deeds thereon, the sale to be made to Martin, who was introduced as Mr. Clark. Thereafter advertisements appeared in an Oakland newspaper wherein petitioner announced that he was willing to trade or exchange certain trust deeds for secondhand automobiles. In answer to these advertisements, the complaining witness, Mrs. Cumbers, telephoned petitioner at his apartment in Oakland and made an appointment to see him. A meeting of the parties was had, at which time petitioner informed Mrs. Cumbers that he had sold a 10-acre tract in Butte county to a man named Clark for \$2,500, and had taken back a promissory note and trust deed from Clark for \$1,350. This land was a portion of the tract above referred to. He represented that the trust deed was a first lien upon the land which was worth \$3,000; that it was improved with a bungalow and other buildings and was planted to fig trees which were four years old. After some negotiations, Mrs. Cumbers, relying upon these representations as to the land, traded her Dodge sedan automobile to petitioner for the note and trust deed which he assigned to her. During the negotiations, and before the transaction was consummated, petitioner referred Mrs. Cumbers to a "Mr. Martin," who, petitioner stated, could be found at the Key Route Inn, in Oakland, and petitioner also stated that Martin had seen the land and would verify his statements with reference to it. The person to whom Mrs. Cumbers was referred was John J. Martin, jointly accused with petitioner. Mrs. Cumbers endeavored to get in touch with Martin, but without success. A witness, Snyder, testified to a similar transaction had with petitioner Scott, during the course of which transaction Scott made the same representations. Snyder visited Martin at the Key Route Inn, and during the course of the conversation had between the parties

Martin informed Snyder that Scott owned property in Los Angeles and was worth from seventy-five to eighty thousand dollars and that if Snyder made a trade with Scott to have him indorse the note and he would cash it for a 10 per cent. discount. Martin further stated that he was familiar with the land in Butte county and that it was valuable. It further appeared in evidence that there were no buildings upon the land, nor were there any fig trees or any improvements whatsoever. Petitioner Scott and Martin were identified as being the parties who acknowledged the notes and deeds of trust transferred to Snyder and Mrs. Cumbers. It was also shown that Martin had signed and acknowledged these notes and trust deeds as James Clark. Other testimony was to the effect that the value of Mrs. Cumbers' automobile was between \$950 and \$1,000, and that it was accepted by petitioner upon that value.

At the close of this testimony the committing magistrate, as above stated, held petitioner to answer for the crime of grand larceny by trick and device. It seems to be conceded that the evidence fails to show that petitioner was guilty of grand larceny and should have been held for the crime of fraudulently obtaining property by false pretense. The commitment was dated August 24, 1927. Prior thereto and on July 29, 1927, the statute defining the crime of grand theft (Pen. Code, § 484 [as amended by St. 1927, p. 1046, § 1]), went into effect. This statute merged into the crime of grand theft the offenses which were formerly known under the names of larceny, embezzlement, and obtaining money by false pretenses. Section 487 of the Penal Code (as amended by St. 1927, p. 1047, § 4), which took effect on the same day, defines grand theft as being "1. When the property taken is of a value exceeding two hundred dollars. * * *" It was under these circumstances that the district attorney filed the information against petitioner for grand theft.

It is here contended that petitioner should have been held, if at all, for the crime of fraudulently obtaining property by false pretense, as the testimony clearly shows that he was not guilty of the crime of larceny. It is further claimed that his trial was a nullity for the reason that it occurred after the *ex parte* writ of habeas corpus issued out of this court, as such writ acted as a supersedeas; and, finally, that the statute defining the crime of grand theft, under which petitioner was prosecuted, is *ex post facto* as to the crime charged as it occurred prior to the taking effect of said statute. It is respondent's contention that after the rendition of a verdict of guilty the sufficiency of the evidence before the committing magistrate is not open to inquiry by means of the writ of habeas corpus; that the verdict rendered against

petitioner is a valid one and the statute under which he was convicted is not *ex post facto*, it being procedural merely; that the trial court was not deprived of jurisdiction to try petitioner by reason of the issuance of the writ of habeas corpus out of this court. It is further contended that the objection, that there was no reasonable or probable cause for holding petitioner to answer, has been waived, for the reason that no objection was made to the information by way of demurrer or motion to set aside. We do not deem a discussion of these various questions or the manner in which they may be taken advantage of, to be necessary, as we are of the opinion that we are here only concerned with what transpired up to the time the commitment was made to the sheriff.

[1, 2] There can be no question but that the preliminary examination discloses a clear case of obtaining property by false pretenses. Every element of this crime is shown. The prosecution proved the making of the false pretenses, their falsity, the obtaining of the property, the reliance of the victim upon those representations, which induced her to part with her property, the intent to defraud, and the conspiracy between Scott and Martin. The error of the committing magistrate was merely in the designation of the offense upon which petitioner was held to answer. In *Ex parte Severin*, 188 Cal. 348, 205 P. 101, it is held that it is never the duty of the court to discharge a petitioner on habeas corpus where it appears that, notwithstanding defects in the form of the charge against him, he is probably guilty of a criminal offense. In that case the petitioner had been held to answer to the superior court on a charge of embezzlement. The evidence taken at the preliminary examination, so the Supreme Court held, could not sustain a commitment for that crime, but as was said:

"The evidence shows probable cause to believe that the petitioner is guilty of either one or the other of three distinct crimes: (1) Larceny by trick and device * * *; (2) embezzlement of money obtained by trick and device, * * * or (3) obtaining money by false pretenses."

The language of the late Justice Beatty in *Ex parte Nicholas*, 91 Cal. 643, 28 P. 48, is there quoted as follows:

"He has been examined upon a charge which the committing magistrate has denominated larceny, but it may well be that the depositions prove embezzlement. It not infrequently happens that the facts of a particular case leave it extremely doubtful under which definition the offense falls—that of larceny or embezzlement; and if the committing magistrate should give it a wrong designation in his order of commitment, that would not prevent the district attorney from charging it correctly in the information."

The petitioner was accordingly remanded. The instant case presents the identical situa-

tion. See, also, *In re Moore*, 70 Cal. App. 483, 233 P. 805.

The writ is discharged and the petitioner remanded.

We concur: CASHIN, J.; CAMPBELL, Justice pro tem.

87 Cal. App. 793

Ex parte John J. MARTIN, on Habeas Corpus.
(Cr. 1433.)

District Court of Appeal, First District, Division 1, California. Nov. 21, 1927.

Application for a writ of habeas corpus prayed to be directed to the Sheriff of Alameda County to secure the release of the petitioner from custody upon commitment for grand larceny. Writ discharged; petitioner remanded.

Frank P. Webster, of San Francisco, for petitioner.

Earle Warren, Dist. Atty., and R. H. Chamberlain, Jr., Deputy Dist. Atty., both of Oakland, and Stanley O. Smallwood, Deputy Dist. Atty., of Pleasanton, for respondent.

TYLER, P. J. Application for writ of habeas corpus.

Petitioner was jointly charged with the crime of grand larceny with one H. W. Scott. The facts are identical with those in *Ex parte Scott* (Cr. 1432), 261 P. 725, this day decided. Upon the authority of the case, the writ heretofore issued is discharged and the petitioner remanded.

We concur: CASHIN, J.; CAMPBELL, Justice pro tem.

87 Cal. App. 176

Ex parte RISSMAN. (Cr. 1575.)

District Court of Appeal, Second District, Division 1, California. Nov. 29, 1927.

Habeas corpus §30(2)—Defendant held not entitled to discharge on habeas corpus where complaint in municipal court contained attempt to charge crime (Const. art. 6, §§ 1 and 12).

Since Const. art. 6, §§ 1 and 12, provides that municipal courts are courts of record, as distinguished from inferior courts, where complaint therein charged at least attempt to commit crime, failure to state facts necessary to constitute such crime did not entitle defendant to discharge by means of writ of habeas corpus.

Original application by Daniel Rissman for a writ of habeas corpus prayed to be directed to the Chief of Police of the City of Los Angeles. Petition denied.

William M. Morse, Jr., of Los Angeles, for petitioner.

CONREY, P. J. The complaint in the municipal court contained at least an at-

tempt to charge defendant therein with commission of the crime of obtaining money by false pretenses, a misdemeanor. Where this is so, and the jurisdiction challenged is that of a court of record, the failure to state all of the facts necessary to constitute such crime does not entitle the defendant to discharge by means of the writ of habeas corpus. *Ex parte Ruef*, 150 Cal. 665, 89 P. 605. The writ is available for that purpose in an inferior court. *In re Hernandez*, 64 Cal. App. 71, 220 P. 423.

But the Constitution, in providing for municipal courts, has made them courts of record, and has plainly distinguished them from "inferior courts." Const. art. 6, §§ 1 and 12.

Assuming, without deciding, that the complaint against defendant, in the count on which he was convicted is defective in the particulars stated by him in his petition herein, and that thereby the facts stated in said count are not sufficient to constitute the crime of obtaining money by false pretenses, this does not entitle him to the writ. He must be content with the ordinary remedies, including his right of appeal.

The petition is denied.

We concur: HOUSER, J.; YORK, J.

87 Cal. App. 172

WYLIE v. FIRST NAT. BANK OF SANTA BARBARA.

FIRST NAT. BANK OF SANTA BARBARA v. WYLIE et al.

(Civ. 5517.)

District Court of Appeal, First District, Division 1, California. Nov. 29, 1927.

As Corrected Feb. 2, 1928.

Escrows §9—Plaintiff not complying with agreement to convey land free of incumbrance was not entitled to delivery of C.'s deed placed in escrow.

Where plaintiff owed \$2,500 on land contract and executed deed to C. purporting to convey part of land without reference to any incumbrance, and thus failed to comply with his agreement with C. to convey land free of incumbrance, plaintiff was not entitled to delivery of C.'s deed for other land in exchange, placed in escrow, even if there was agreement between C. and R., purchaser of another part of plaintiff's land, that C. should pay part of \$2,500, and R. should pay part, where R. did not pay any of it.

Appeal from Superior Court, Santa Barbara County; S. E. Crow, Judge.

Action by Joseph R. Wylie against the First National Bank of Santa Barbara, in which defendant filed cross-complaint making Otto B. Colley and wife, and others, cross-defendants. From the judgment, cross-defendants named appeal. Reversed with directions.

George Appell, of Los Angeles, and E. V. Van Bever, of Santa Barbara, for appellants. Fred A. Shaeffer, of Santa Maria, for respondent.

STROTHER, Justice pro tem. This is an action in the nature of replevin to recover from the defendant bank two deeds alleged to have been deposited in escrow with it to be delivered to the plaintiff at such time as the bank should receive from plaintiff deeds executed by him conveying severally to the grantors in the deeds so deposited with the bank tracts of land described in the complaint. The complaint alleges that plaintiff deposited with defendant the deeds, duly executed and acknowledged by him, his demand for the deeds deposited in escrow, the refusal of the bank to deliver them, and prays judgment enforcing their delivery. The defendant answered denying the allegations of the complaint upon information and belief, and filed a cross-complaint making the plaintiff and the grantors, and their wives, in the deeds deposited in escrow with it, cross-defendants, disclaiming any interest in the controversy or knowledge of the rights of the several parties, tendering all documents into court, and asking that it be dismissed and that the parties to the deeds be required to set forth and litigate their controversies between themselves. To this cross-complaint the plaintiff made no answer, but the cross-defendants Oliver C. Ricketts and Ada L. Ricketts, his wife, and Otto B. Colley and Catherina Colley, his wife, grantors respectively in the escrow deeds, answered jointly. Upon the trial the defendant bank was dismissed from the action, and the answers to the cross-complaint were apparently considered as answers to the plaintiff's complaint. Judgment was rendered in favor of plaintiff, directing the clerk to deliver to him the deeds executed by Ricketts and wife and Colley and wife, respectively. No order was made in the decree as to the disposition of Wylie's deeds to these parties. From this judgment only the defendants Colley and wife appeal, and the evidence and proceedings at the trial are incorporated in a bill of exceptions.

The evidence discloses that on March 27, 1922, plaintiff and Colley entered into an agreement in writing by which plaintiff agreed to sell and convey to Colley, and Colley agreed to buy, a tract of 70 acres of land in San Luis Obispo county "free and clear of all incumbrance" and to "give deed and title to the same." Colley agreed "to give in exchange for the above-described property of the first part property located at 1809 Orange avenue free and clear of all incumbrances" and to "give deed and title for same." The two parcels of land which plaintiff agreed to sell and convey to Ricketts and Colley, respectively, are parts of a tract which plaintiff had contracted to purchase from Los Ber-

ros Land & Water Company, on which there was an unpaid balance owing from plaintiff to the company, the title to which stood in the latter. The contract for title to Ricketts was by its terms made subject to the contract with the company; that with Colley made no reference to it except the following:

"This agreement is subject to the approval of the Los Berros Land & Water Company for the transfer of the contract given to Joseph R. Wylie July 30, 1921."

On April 4, 1922, Ricketts and wife and Colley and wife executed deeds to the plaintiff and his wife as joint tenants of the lots of land agreed by them respectively to be conveyed. On the same day by mutual understanding the deeds were deposited by A. L. Page, who had negotiated the transactions as plaintiff's agent, with the bank, with written instructions to "deliver these deeds to the grantee upon the receipt from him of two deeds conveying property in San Luis Obispo county described in an agreement which you now hold in escrow made July 13, 1921, between Los Berros Land & Water Company and J. R. Wylie." On April 25, 1922, Los Berros Land & Water Company executed a deed conveying to plaintiff a tract of land including that agreed to be sold by him to Ricketts and Colley, and deposited the deed with the bank with instructions to deliver it to Wylie upon payment to its account of \$2,500, balance of the purchase price due from Wylie. This was not paid and the deed never delivered. On May 15, 1922, Ricketts and Colley each severally gave to the bank written notice of rescission, and each notified the bank not to deliver the deed executed by him to Wylie. On May 18, 1922, Wylie and his wife executed to Ricketts an assignment of his contract of purchase with Los Berros Land & Water Company. It does not appear from the evidence what was done with this assignment. On May 19, 1923, about a year after the latest of the above-recited transactions, Wylie and his wife executed deeds to Ricketts and Colley respectively of the lands to be conveyed to them. The deed to Ricketts recited that it was made subject to the contract with Los Berros Land & Water Company; that to Colley purported to convey title without reference to any incumbrance.

Oral evidence was introduced tending to show that after the contracts of March 27 were entered into between the several parties negotiations were begun between Wylie and Ricketts and Colley for a division between the latter of the payment of the \$2,500 owing to the land and water company, but there was no pleading or proof that Colley entered into any written agreement with Wylie changing the terms of the original contract. There is no evidence in the record to show that there was any understanding by any of the parties that Colley was to assume any of the indebtedness to the land and water

company, until after his contract was entered into. If there had been, it was of course concluded by the contracts. The subsequent actions of Wylie in signing and acknowledging an assignment of the land and water company contract to Ricketts and executing his deed to Ricketts subject to that contract, and his deed to Colley without any reference to it, indicate that there was no such understanding or agreement.

It would appear from the evidence that there may have been some subsequent agreement between Ricketts and Colley that the latter should pay some part of the \$2,500, but Ricketts did not pay or offer to pay any part of it. Certainly the plaintiff could not evade performance of his obligation to convey to Colley a title free and clear of incumbrance and throw the burden upon Colley of forcing Ricketts to clear the title, and yet this is the position in which the judgment of the trial court leaves the appellant.

The plaintiff, having failed to comply with his agreement to convey to Colley the land free and clear of all incumbrance, was not entitled to the delivery of the deed.

The judgment of the trial court is reversed, with directions to revise its findings as to the appellants Colley, in accordance with the foregoing, and to enter judgment in their favor.

We concur: TYLER, P. J.; CASHIN, J.

ATLANTIC FISH CO. v. DOLLAR S. S. LINE. (Civ. 5854.)★

District Court of Appeal, First District, Division 2, California. Nov. 4, 1927.

Rehearing Denied Dec. 5, 1927. Hearing Granted by Supreme Court Jan. 3, 1928.

1. Novation ⇐12—Freight solicitor's statement that shipment would come under refrigeration held not novation of bill of lading reciting shipment was by cool stowage.

Where bill of lading for shipment of dried fish by vessel recited that shipment was to be carried by "cool stowage, not refrigeration," evidence that vessel's freight solicitor subsequently stated in conversation with shipper that it would come under refrigeration held not to show novation.

2. Shipping ⇐108—Conversation as to shipping fish under refrigeration held not to constitute oral contract superseding bill of lading to ship by cool stowage.

Where bill of lading for shipment of dried fish recited that shipment was to be by cool stowage, statement of vessel's freight solicitor to shipper that shipment would come under refrigeration held not to constitute oral contract superseding bill of lading, where bill of lading was not mentioned and alleged oral agreement was not executed.

3. Carriers ⇐52(1), 53—"Bill of lading" is receipt and contract of carriage between parties.

A bill of lading is a receipt and also a contract of carriage between parties.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Bill of Lading.]

4. Carriers ⇐53—Bill of lading as contract of carriage can be altered only by contract in writing or executed oral agreement (Civ. Code, § 1698).

As a contract of carriage between parties, a bill of lading can, under Civ. Code, § 1698, only be altered by a contract in writing or an executed oral agreement.

5. New trial ⇐137—Combining notice of intention to move for new trial and notice of motion for new trial held not error.

Notice by defendant that it intends to and will on named day move that new trial be granted, being a combination of notice of intention to move for new trial and notice of motion for new trial, held not erroneous practice.

6. New trial ⇐163(1)—Order granting motion for new trial for "insufficient evidence" held not at variance with statute authorizing new trial for "insufficiency of evidence" (Code Civ. Proc. § 656, subd. 6).

Order granting motion for new trial on ground of insufficient evidence held not to be at variance with Code Civ. Proc. § 656, subd. 6, authorizing new trial for insufficiency of evidence to justify verdict.

Appeal from Superior Court, City and County of San Francisco; J. T. B. Warne, Judge.

Action by the Atlantic Fish Company, a copartnership composed of H. M. Colety and others, against the Dollar Steamship Line. Verdict for plaintiff. From order granting defendant's motion for a new trial, plaintiff appeals. Affirmed.

Milton L. Schmitt, of San Francisco, for appellant.

Nathan H. Frank and Irving H. Frank, both of San Francisco, for respondent.

STURTEVANT, J. The plaintiff brought an action against the defendant to recover damages for detriment caused to a shipment of dried fish. The defendant answered and a trial was had before the court sitting with a jury. The jury returned a verdict in favor of the plaintiff. The defendant made a motion for a new trial. The motion was granted, and the plaintiff has appealed.

By written correspondence the Atlantic Fish Company bought from the Gorton-Pew Fisheries Company a quantity of salt fish. The fish were packed at Gloucester, Mass. By the terms of the contract of purchase the fish were to be sent to Boston, Mass. At that port they were to be reshipped under refrigeration.

eration to the purchaser at San Francisco on the President Hayes, one of the defendant's vessels which touches at Boston and New York. On August 13, 1924, the day before the President Hayes left Boston, the seller advised the purchaser that the refrigeration department of the President Hayes was broken down, and that it could not carry the goods in refrigeration, and the seller asked for further instructions. On the same day the seller received a reply to "authorize Hayes shipment to come through under ventilation." Thereupon the goods were shipped on that steamer. A bill of lading was issued which recited, among other things, "cool stowage, not refrigeration." When the bill of lading was delivered to the shipper no objection was made by it. The shipper sent the bill of lading to the plaintiff, and when it received the document no objection was made.

The telegram dated August 12, 1924, authorizing the shipment "under ventilation," was sent by Mr. Colety, Jr., one of the members of the plaintiff copartnership. Mr. Colety, Sr., was out of town and returned August 14, 1924. On the next day about 9 a. m. he called at defendant's office in San Francisco and talked to Mr. Herman, a person who solicits freight. The record is silent as to whether he has any other authority. Mr. Colety exhibited to Mr. Herman the telegram received by the plaintiff from the shipper and stated that the shipment must come under refrigeration. Mr. Herman left the room and returned, saying it would come under refrigeration. Neither in that conversation, nor in any other conversation, nor in any other manner, was any attempt made to have the bill of lading recalled and an amended bill of lading issued, nor to have the shipment stopped at New York and reshipped. No new consideration passed.

No claim is made that the goods were not in fact carried under "ventilation" or "cool stowage." The plaintiff's sole claim is that they were not carried under "refrigeration."

[1] The plaintiff claims the facts show a novation. The claim is not supported by the facts. Assuming that Mr. Herman was thereunto duly authorized to issue, amend, or alter bills of lading (facts nowhere contained in the record), the utmost that the plaintiff could assert is that the clause, "cool stowage—not refrigeration," was, by Mr. Herman, changed to "refrigeration," and otherwise that the bill of lading remained wholly unaltered.

[2] Again, the plaintiff claims that the oral conversation between Mr. Colety, Sr., and Mr. Herman constituted an oral contract which superseded the bill of lading. It did not. All of the evidence received at the trial tending to show the oral contract did not constitute a contract of carriage. The parties to that conversation did not agree on and determine (1) what goods were to be carried; (2) what

place they were to be received and to what place they were to be carried; (3) what was to be the cost of the transportation; or (4) what was to be the manner of transportation except that it was to be in refrigeration. No one of these factors can be ascertained except by an examination of the bill of lading which was then outstanding and which was not even mentioned in the conversation. In this same connection the plaintiff speaks of an executed oral agreement. It is perfectly clear that, under the facts, there was no execution whatever on either side of the alleged oral agreement. The very nature of the plaintiff's claim is that the defendant did not execute what the plaintiff says the defendant promised to do. By the terms of the oral agreement, it is not claimed the plaintiff promised to do anything, and it is not alleged that it did anything. There was not, therefore, an executed oral agreement on the part of either of the parties.

[3, 4] It is settled law that a bill of lading is (1) a receipt, and (2) it is the contract of carriage between the parties. 10 C. J. 192, § 251. As the contract of carriage between the parties, the bill of lading could be altered only by a contract in writing or an executed oral agreement. Civ. Code, § 1698. This fundamental rule has been held applicable to the alteration of bills of lading. 10 C. J. 198, § 260. The evidence introduced at the trial showed no cause of action against the defendant. The trial court did not err in granting a new trial and the order should be affirmed if there is no other infirmity.

[5] The jury returned its verdict on September 15, 1926. The judgment was entered September 16, 1926. On the fifth day thereafter the defendant served and filed a notice that it "intends to and will, on Friday, the 24th day of September, 1926," move that a new trial be granted. In other words, it combined its notice of intention to move for a new trial and its notice of motion for a new trial. The practice was not erroneous, and such speed is to be commended. The contention of the plaintiff that, because the paper was a notice of motion, it was not therefore a notice of intention is without merit.

[6] The second ground of the motion for a new trial was "insufficiency of the evidence to justify the verdict." That is the language of the statute. Code Civ. Proc. § 656, subd. 6. The order ruling on the motion was worded as follows:

"Motion for new trial granted on ground of insufficient evidence."

The plaintiff contends the ground stated in the order is not contained in the statute. We think it is. The variance is so slight as to lead to no confusion.

The order appealed from is affirmed.

We concur: KOFORD, P. J.; NOURSE, J.

86 Cal. App. 585

Ex parte VENABLE. (Cr. 999.)

District Court of Appeal, Third District, California. Nov. 4, 1927.

1. Habeas corpus $\S$ 92(1)—Commitment under which petitioner was held when writ was issued, having become functus officio, will not be further considered.

Where commitment, under which petitioner for habeas corpus was held at time writ was issued, had become functus officio, it will not be further considered on hearing of such petition.

2. Habeas corpus $\S$ 29—Petitioner for habeas corpus on ground of unreasonable delay in criminal prosecution held not entitled to release unless judgment was void.

Petitioner for habeas corpus to secure release on ground of unreasonable delay in criminal prosecution held not entitled to release unless judgment of conviction therein was void, since fact that defendant had not been given a speedy trial does not affect jurisdiction of court.

3. Habeas corpus $\S$ 30(1)—Denial of motion to dismiss prosecution is not ground for petitioner's release on habeas corpus.

Denial of motion to dismiss criminal prosecution held not to constitute ground for release on petition for habeas corpus from imprisonment whether or not such denial constituted ground for reversal of judgment on appeal therefrom.

4. Criminal law $\S$ 576(2)—Epidemic of infantile paralysis held "good cause" for continuing criminal prosecution beyond 60-day period.

Prevalence of an epidemic of infantile paralysis in town wherein court was held, which prevented calling of juries during such period, and which commenced within period of 60 days after first trial on charge of possessing intoxicating liquor resulting in disagreement of jury, held to constitute "good cause" for continuing trial beyond 60-day period.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Good Cause.]

5. Habeas corpus $\S$ 85(1)—Habeas corpus will be denied if reasonable deduction from evidence supports trial court's action in denying motion to dismiss.

Writ of habeas corpus will be denied if, on the conceded facts in evidence, a reasonable deduction would support action of trial court in denying motion for dismissal.

6. Criminal law $\S$ 576(2)—Trial on October 14, continued by agreement from October 6, held not unreasonable delay after cessation of epidemic in middle of September, warranting discharge on habeas corpus.

Where after termination of epidemic of infantile paralysis about the middle of September, prosecution on charge of unlawful possession of intoxicating liquor was set for trial on October 6, and continued to October 14, by agreement of counsel, there was no unreasonable delay in bringing case to trial after cessa-

tion of epidemic, warranting discharge on habeas corpus.

Original application by James Venable for a writ of habeas corpus, prayed to be directed to the sheriff of Glenn county. Writ discharged, and petitioner remanded.

H. W. McGowan, of Willows, for petitioner.
Guy L. Louderback, Dist. Atty., of Willows, for respondent.

PER CURIAM. July 7, 1927, the petitioner was tried in the justice's court on a charge of the unlawful possession of intoxicating liquor. The trial resulted in a disagreement of the jury. On the 30th of that month he was released on bail. October 3d his sureties surrendered him into custody. On the same day he moved the justice's court to dismiss the action on the ground that he had not been given a speedy trial. October 10th, on his application therefor, the Supreme Court issued a writ of habeas corpus, returnable before this court October 24th. On application of petitioner the matter was continued to November 3d. October 14th the petitioner was again placed on trial and was convicted of the offense charged. He was thereupon sentenced to pay a fine of \$225, or, in default of payment thereof, to be imprisoned in the county jail until satisfaction of the fine at the rate of one day for each dollar of the fine. He has not paid the fine and is now imprisoned in the county jail under the judgment of conviction.

[1] It is clear that the commitment under which the petitioner was held at the time the writ herein was issued has become functus officio, and it need not be further considered.

[2, 3] The petitioner is not entitled to his release by this proceeding unless the judgment of conviction is void. The fact that a defendant has not been given a speedy trial does not affect the jurisdiction of the court. *People v. Hawkins*, 127 Cal. 372, 374, 59 P. 697. Whether the denial of the motion to dismiss the action constitutes ground for reversal of the judgment on appeal therefrom is not a question before the court in this proceeding. It is sufficient to say that such denial is not a ground for petitioner's release on habeas corpus from imprisonment under the judgment. *In re Todd*, 44 Cal. App. 496, 499, 186 P. 790.

[4-6] The return shows and the petitioner admits that from the first to the middle of September an epidemic of infantile praralysis was prevalent in the town wherein the sessions of the justice's court were held, and that for that reason no juries were called during that period. In the case of *In re Begerow*, 133 Cal. 349, 352, 65 P. 828, 56 L. R. A. 513, 85 Am. St. Rep. 178, relied on by petitioner, it is said:

"It is sufficient for the defendant, in order to make out his case upon a motion for a dismissal in the trial court, to show that he has been detained without a trial for more than 60 days. Upon such showing the court should dismiss the case, unless good cause for detaining the defendant and for continuing the prosecution is shown on behalf of the people."

It cannot be said that the prevalence of the epidemic, which commenced within the period of 60 days after the first trial, did not constitute good cause for continuing the trial to a day beyond the 60-day period. The writ will be denied if, "on the conceded facts in evidence a reasonable deduction therefrom would support the action of the trial court in denying the motion." 8 Cal. Jur. 209; *Matter of Ford*, 160 Cal. 334, 349, 116 P. 757, 763 (35 L. R. A. [N. S.] 882, Ann. Cas. 1912D, 1267). The case was set to be tried October 6th, and was on that day continued, by agreement of counsel, to October 14th, on which day it was tried. It cannot be held, therefore, that there was an unreasonable delay in bringing the case to trial after the cessation of the epidemic.

The writ is discharged, and the petitioner is remanded to the custody of the sheriff.

86 Cal. App. 532

BROWN v. HOWARD et al. (Civ. 4978.)

District Court of Appeal, Second District,
Division 1, California. Nov. 2, 1927.

1. Judgment $\S$ 401—Defendant, from whom money was collected under execution on judgment obtained against several defendants, held, under stipulation, entitled to reimbursement from all sums collected in action.

Where, after plaintiff had obtained money on levy on property of one of defendants, under execution pursuant to judgment obtained against several defendants, stipulation was entered into vacating judgment and providing for reimbursing defendant from sums levied and collected, held, that said defendant was entitled to be reimbursed from all sums levied and collected in action, and not merely from that obtained from other defendants in the future.

2. Evidence $\S$ 471(9)—Question for explanation of reason for entering stipulation held properly excluded as calling for conclusion.

Though, in case of ambiguity, parol evidence of circumstances surrounding execution of stipulation is admissible to show intent of parties, such circumstances cannot be shown by asking one signing stipulation to explain reasons for entering into it, since question would call for a conclusion of the witness.

3. Attorney and client $\S$ 26—Attorney holding money collected on levy under execution held liable only for amount held by him when judgment was set aside.

Attorney collecting money pursuant to levy under execution, on subsequent setting aside of judgment, was liable only for such sum remaining in his hands at time judgment was set aside.

Appeal from Superior Court, Los Angeles County; F. C. Valentine, Judge.

Action for money had and received by Lillian Brown against Leota Howard and others. Judgment for plaintiff, and defendants appeal. Modified, and affirmed as modified.

Harry Lyons, of Los Angeles, for appellants.

Harry K. Smith, of Los Angeles, for respondent.

McLUCAS, Justice pro tem. This is an action for money had and received. Defendants appeal from a judgment rendered for plaintiff.

In the year 1922 an action was commenced by Leota Howard, one of the defendants herein, to foreclose a chattel mortgage, in which action the plaintiff and respondent was one of the parties defendant. Judgment was rendered against the plaintiff herein as defendant in that action. Execution was issued thereon, and under the said execution the sheriff of Los Angeles county levied upon the property of the plaintiff herein, and collected the sum of \$907, which sum, on December 20, 1922, was turned over to Harry Lyons as attorney for the plaintiff in said action. Lyons testified that all of said money was immediately paid by him to Leota Howard, one of the defendants herein, except a sum not exceeding \$100, which Lyons retained as his attorney's fee. On January 5, 1923, upon stipulation of counsel in open court, it was ordered that the judgment in said cause be set aside, and plaintiff therein given leave to file a supplemental complaint in said action. On January 6, 1923, pursuant to the foregoing order, the court ordered the sheriff to release all property, money, or securities of any kind belonging to Lillian Brown and in the hands of any bank or trustee, which was levied upon by virtue of the writ of execution issued in said matter. On June 30, 1923, Harry Lyons, as attorney for plaintiff, and Harry K. Smith, as attorney for defendant, Lillian Brown, in said action, entered into a stipulation "that the complaint against Lillian Brown be dismissed, and that the said Leota Howard reimburse the said Lillian Brown in the sum of \$900, and no interest from sums levied and collected in the within entitled action; that everything which is above the sum of \$1,600, and any moneys collected by the plaintiff against the property of any of the defendants, except Lillian Brown, in excess of the said sum of \$1,600, be immediately turned over to the said Lillian Brown until the sum of \$900, and no interest will be repaid to said Lillian Brown. That the attorney for the plaintiff file a dismissal against Lillian Brown, and that said Lillian Brown waiving any and all claims against Leota Howard in the within entitled action; except

the sum of \$900 to be paid as above provided." The defendant and appellant subsequently paid to the plaintiff herein the sum of \$118. In the present action the appellant Harry Lyons filed an answer denying the allegations of the complaint, and Leota Howard, defendant and appellant, in addition to her denial, pleaded specially the said stipulation as a defense.

[1, 2] It is urged by appellants that under the terms of the stipulation the plaintiff and respondent herein was not entitled to any moneys excepting from the funds to be levied against, and collected from, the other defendants in the future. Appellants' position is, in our opinion, untenable. When the judgment was vacated the defendants herein held in trust for the use of the plaintiff all the money which had been turned over to them by the sheriff by virtue of the execution issued under said judgment so vacated and set aside. This money was a sum which had been levied and collected in said action, and it was stipulated that the plaintiff be reimbursed "from sums levied and collected" in the said action. The additional clauses in said stipulation merely provided a further source from which plaintiff might be reimbursed. Plaintiff was not limited to this further source for her reimbursement, but it was expressly stipulated that plaintiff be reimbursed from all sums levied and collected in the action. The stipulation is sufficiently clear and definite to support the finding that, by the terms of said stipulation, it was intended that the money collected by the defendants from the funds of plaintiff should be repaid to plaintiff, and that the parties so agreed. True, if there be any ambiguity in the stipulation, parol evidence of the facts and circumstances surrounding the execution of the instrument would be admissible to show the intent of the parties in signing the stipulation, but such surrounding facts and circumstances could not be shown by the question addressed to opposing counsel who signed the stipulation asking him to explain the reasons for entering into the stipulation. We see no error in the ruling of the trial court sustaining an objection to the foregoing question as being incompetent, irrelevant, and immaterial, since the question called for a conclusion of the witness.

[3] The evidence is undisputed that all the money collected under the execution against the respondent herein, excepting a sum not exceeding \$100, was turned over by the defendant Harry Lyons to his codefendant immediately after the same was collected, and before the judgment under which the execution was issued was set aside. Presumptively that judgment was regular and valid on its face, and the execution was likewise valid. Consequently the money collected under the

said execution came into the hands of defendant Harry Lyons lawfully. It was not until the judgment in said action had been set aside that plaintiff became entitled to the return of said money and that defendants could be said to hold said money for the use and benefit of plaintiff. Bank of United States v. Bank of Washington, 6 Pet. 19, 8 L. Ed. 299. Consequently the liability of defendant Lyons cannot exceed the sum of \$100 which was remaining in his hands at the time said judgment was set aside. *Rickert v. Pollock*, 46 Misc. Rep. 275, 92 N. Y. S. 89.

The judgment is ordered affirmed, except that the judgment against defendant Harry Lyons shall be modified so that the judgment against said defendant shall be in the sum of \$100 only.

We concur: HOUSER, Acting P. J.; YORK, J.

86 Cal. App. 577
PEASLEY et al. v. PRODUCERS' MARKET
CO., Inc., et al. (Civ. 4497.)

District Court of Appeal, Second District, Division 2, California. Nov. 4, 1927.

1. Corporations $\S$ 383—"Corporation" can act only through its officers.

"Corporation" is artificial person without either mental or moral powers and can act only through its officers.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Corporation.]

2. Corporations $\S$ 459—Lease and note for rents held invalid where president and secretary executed them without corporate seal and without authority of directors required by by-laws and corporation received no consideration and did not take possession.

Lease of real property and note for rentals accruing thereunder held invalid, where president and secretary of corporation executed them without affixing seal of corporation and without securing authority of board of directors or executive committee as required by the by-laws, and corporation received no consideration and did not enter into possession under the lease.

Appeal from Superior Court, Los Angeles County; Pat R. Parker, Judge.

Action to recover rentals due under a lease and sums due under a promissory note brought by Ella W. Peasley and husband against the Producers' Market Company, Inc., and another. From a judgment in favor of defendants, plaintiffs appeal. Affirmed.

Daly, Daly & Todd, of Long Beach, for appellants.

Herbert Moore, of Long Beach, for respondents.

PEAIRS, Justice pro tem. In this case the appeal is from a judgment in favor of the defendants in an action brought by the plaintiffs for the collection of certain payments on a lease and the note for \$1,200, given for the last six months' rental under said lease, which lease purported to rent lots 13 and 15 of block 91, Long Beach township, county of Los Angeles, state of California, for a period of four years and four months, at a total rental of \$9,800, and was signed, "Producers' Market Company, a corporation, per T. W. Burnam," without seal. The date of both note and lease was the 10th day of November, 1921. Lease rentals were payable at the rate of \$150 a month on the 1st day of each month for the first year, beginning December 1, 1921, and at the rate of \$200 per month on the 1st day of each month thereafter during the term of the lease. Plaintiffs prayed for judgment for \$1,200 and interest at 8 per cent. and a further sum of \$120 attorneys' fees and an additional sum of \$600 for four months' accrued rentals. This action was filed on March 31, 1922. The note was signed, "Producers' Market Company, per T. W. Burnam." The Producers' Market Company, Incorporated, and T. W. Burnam, defendants, failed to answer, and a default judgment was taken in accordance with the prayer of the complaint, which default judgment was later set aside and vacated by stipulation of counsel. The answer of the defendants was that the lease and note were signed, "Producers' Market Company, per T. W. Burnam," but for no consideration and without any authority on the part of the said T. W. Burnam, and further alleged that on or about the 6th day of February, 1922, the said plaintiffs were notified by the Producers' Market Company that said note was executed without authority and written notice given to the plaintiffs in the following language:

"Long Beach, Cal. Feb. 6, 1922.

"Samuel C. Peasley and Ella W. Peasley, 419 East 5th Street, Long Beach, Cal.—Dear Sir and Madam: You will take notice that that certain lease entered into by yourselves as lessors on November 10th, 1921, whereby certain premises described as follows: Lots thirteen (13) and fifteen (15), in block ninety-one (91), of Long Beach township, in the city of Long Beach, county of Los Angeles, state of California, as per map recorded in Book 19, page 91 et seq., Miscellaneous Records of Los Angeles County, was leased to the Producers' Market Co., a corporation, for a term of four (4) years and four (4) months, commencing on December 1st, 1921, and ending on March 31, 1926, at an aggregate rental of nine thousand eight hundred dollars (\$9,800), was done without the authority and consent of the board of directors of said Producers' Market Co., a corporation. You will further take notice that at a meeting of the board of directors of said Producers' Market Co., a corporation, held on February 6, 1922, in the city of Long Beach, California, a resolution was duly passed by said board of directors dis-

affirming the action of the president in signing said above-mentioned lease, and that said lease was declared to be null and void and not binding on said Producers' Market Co., a corporation, and that notice in writing of such action by the board of directors be given you. You are, therefore, notified that the Producers' Market Co., a corporation, disclaims any and all interest in and to said lease, and likewise refuses to be bound by any of the terms, conditions and covenants contained therein. Dated this 6th day of February, 1922. Producers' Market Co., a corporation, By T. W. Burnam, President. [Seal.]

"Attest: Y. Mizuno, Treasurer T. B."

No money was ever paid on account of the note nor on account of the lease except \$150, paid by T. W. Burnam, which, it is alleged, was by check of the Producers' Market Company, signed by T. W. Burnam personally, whether in his official capacity or not is not disclosed by the transcript.

The lots 13 and 15, described in the lease, are stated to be directly across the alley from lots 14 and 16 occupied by the Producers' Market Company.

There seems to be no dispute in the evidence nor between counsel about the location of the two properties, nor as to the fact that T. W. Burnam signed the name "Producers' Market Company, per T. W. Burnam," to both the note and the lease, and that at the time of signing was president of the Producers' Market Company.

The evidence shows that Mrs. Peasley, plaintiff, asked Burnam if it was all right for him to sign it and make it and have another signature, and he answered that he was secretary and president and main stockholder, and what he said went. This shows knowledge of irregularity.

From the minutes of the Producers' Market Company of February 6, 1922, and from all the evidence in the transcript it would appear that there was never any formal authorization to said T. W. Burnam to enter into a lease or to sign a note, and that when the matter was presented to the company at their meeting on the 6th day of February, 1922, it was voted to reject the lease signed by said T. W. Burnam, therefore the decision in this case rests almost entirely upon the question of the implied or ostensible authority of the said T. W. Burnam to act as agent for the Producers' Market Company by virtue of his position as president and secretary of said company.

From the reporter's transcript of the testimony given in this case the only evidence that authority was given T. W. Burnam to obtain a lease, was an agreement under date of August 15, 1921, between two of the Japanese who were directors of the company with said T. W. Burnam, which designates, among other things, that the said Burnam was to take steps to organize the Producers' Market Company, and further to obtain a lease to lots 14

and 16 in block 91 for five years for the sum of \$1,200, which is equivalent to about \$20 per month for the two lots. The evidence, however, shows that all that was done was done in the name of T. W. Burnam and that the Japanese refused to enter into the contract on the building, which was afterwards constructed, and that that was done in the name of T. W. Burnam.

The evidence further shows that of the five directors of the Producers' Market Company, four were Japanese. It further shows that on the 10th day of November, 1921, the assets of the Producers' Market Company were only what had been realized on the 15 shares of stock subscribed upon incorporation, and that what they then had on hand was about \$100. It further shows that the Producers' Market Company never had a lease and did not at the time of this action hold a lease to the property occupied by them, as it stood in the name of T. W. Burnam at that time. The evidence does not show that any of the Japanese directors had knowledge of the lease obtained from the plaintiff until about the 6th day of February, 1922, at which time they rejected the same. The evidence does show that there was some talk about leasing said lots 13 and 15 at a rental not exceeding \$50 per month, which it would appear was about 2½ times the local rate of rental for such property as agreed to by the Japanese directors in the event of rental of lots 14 and 16 in said block 91. It is further well to note that at the time of the lease by the said Burnam from the plaintiffs, there was no building nor business conducted on lots 14 and 16, and that had the plaintiffs known all that there was to know, as shown by the evidence, there would have been no authorization either by act or consent or waiver on the part of the Japanese directors for leasing, signing notes, or making agreements of any kind without their action as a board, other than in the regular buying and selling of produce. The mere fact that certain checks of the company were used by T. W. Burnam and signed by him as president and secretary, and especially the one which was given as a first payment of rental under the lease from the plaintiffs, would, if carefully examined, have shown that they were irregularly used and not in accordance with the by-laws of the company or the ordinary usages and customs of business. The evidence which shows that the plaintiffs received \$150 on account of rental does not show that this was known to the Japanese directors or any one but Mr. Burnam, connected with the Producers' Market Company. It further shows no consideration received by the Producers' Market Company whatever, nor does it show that plaintiffs saw either Mr. Burnam or any of the Japanese directors or any of the customers or employees of the Producers' Market Company upon the said lots 13 and 15.

Their only testimony being that they had seen Japs there whom they did not know, and that there had been some market trucks on said lots and some rubbish burned there by Japanese, but the evidence neither shows that the trucks belonged to the Producers' Market Company nor to any of their employees nor that even the burning of rubbish was by any one authorized by the Producers' Market Company. Neither is there anything in the evidence to show that if all the acts of the company during the period of 87 days from the time the lease was entered into with Mr. Burnam and the rejection of the lease and notice by the Producers' Market Company had been known to the plaintiffs in this action that it would have in any manner warranted them in believing that T. W. Burnam had authority to sign either notes or a lease or that any one on behalf of the Producers' Market Company had taken any possession of said lots 13 and 15, nor in any manner shown any knowledge of the lease of said property on the part of the company other than the said T. W. Burnam.

A portion of the by-laws of the Producers' Market Company appears as follows:

"The president shall be the chief executive officer, head of the company, and shall have general control and management of its business and affairs, subject to the control of the board of directors and executive committee; he shall sign all certificates of stock and all conveyances of real property executed in its behalf for the company and all contracts and documents required by the board of directors or necessary to carry on the business of the company. * * * The treasurer shall safely keep all moneys of the company which may come into his hands from time to time and pay out the same upon check or draft of the president, countersigned by the treasurer or otherwise signed in pursuance of the order of the board of directors; keep accurate books of account of the transactions of his office, and generally perform all other duties pertaining to his office, or which may be required of him by the board of directors; he shall countersign all documents requiring the signature of the president as hereinbefore provided."

These by-laws might, upon a first reading, indicate also authority to the president to sign certain documents, but if read carefully it will be noted that while the president is given general control of the business it is subject to the control of the board of directors and the executive committee, and neither the lease nor the note were ever approved by the board of directors or any executive committee. It is further to be noted that the treasurer of the company has charge of all moneys and may pay the same upon check or draft of the president, countersigned by the treasurer or otherwise signed in pursuance of the order of the board of directors, but so far as the evidence shows neither the treasurer nor the other members of the board of directors ever acted with the said T. W. Burnam in the matter of signing either the lease, the note,

or the check of the company with which Burnam paid the first month's rental.

The law in this respect is best shown by the following citations: In the case of *Northwestern Packing Co. v. Whitney*, 5 Cal. App. 109, 89 P. 982, it is said:

"Where a corporation is sought to be charged for a breach of an agreement which has not been performed, and there is no question as to estoppel or ratification, the by-laws of the corporation are admissible in evidence for the purpose of showing that the contract was not executed as the by-laws provide."

In the case of *Crowley v. Genesee Mining Co.*, 55 Cal. 273, 275, it is also said:

"The common-law rule, that a corporation has no capacity to act, or to make a contract, except under its common seal, has been long since exploded in this country. * * * In the United States, nothing more is requisite than to show the authority of the agent to contract. That authority may be conferred by the corporation at a regular meeting of the directors, or by their separate assent, or by any other mode of their doing such acts."

In the case of *Read v. Buffum*, 79 Cal. 81, 21 P. 555, 556, 12 Am. St. Rep. 131, it is said:

"In order to maintain his action, it was necessary for the plaintiff to allege an assignment to him by the California Powder Works of the claim sued on. And the denial of that allegation by the defendant cast the burden of proving it upon the plaintiff. This he attempted and failed to do. The secretary of the company, who executed the assignment on which plaintiff relies, is not shown to have had any power to make it. The ratification of the board of directors was not given until after the commencement of the action,—too late to avail the plaintiff anything, as he could not recover for a cause of action accruing after he commenced his action."

Also in the case of *Fudickar v. East River Irr. Dist.*, 109 Cal. 29, 41 P. 1024, the following language is found:

"Being real property the interest sued for could be conveyed only by deed; and, to support the deed of a corporation (when, as in this case, it does not bear the corporate seal) it is incumbent on the party relying on it to show affirmatively that it was executed by authority of a resolution of the board of directors, entered on the records of the corporation, or that it was ratified by such a resolution."

In the case of *Fontana v. Pacific Can Co.*, 129 Cal. 54, 61 P. 581, we find the following statement:

"Plaintiffs do not claim that there was any evidence, and there was none, showing that the directors of the corporation had, by resolution or by any other action, official or otherwise, authorized the president and secretary to make the contract; there is no evidence that either of these officers was clothed with general or special powers to make such a contract, or had any powers from which it might be inferred that they or either of them could make such a contract; there was no corporate seal attached;

there is no evidence or claim of subsequent ratification by the directors of the corporation. The *Pixley Case* is not authority for the broad proposition that the partial execution of a contract by a corporation raises the presumption of authority to make it. The presumption in that case arose from the established acts of the directors of the corporation, as well as from the part execution of the contract. In the case here there is no evidence that the directors ever knew of the contract, much less authorized it by their conduct or acts. * * * It is affirmatively shown that the contract bears no seal of the corporation, and its absence is not accounted for in any way. * * * Besides, whatever presumption arose that the seal was attached was overcome by the admission that in fact no seal was attached."

The foregoing citation practically fits the facts of this case.

Other cases cited in the briefs of counsel in this case are based upon actions in which the evidence shows ratification, as appears in *Western Lithograph Co. v. Vanomar*, 185 Cal. 366, 369, 197 P. 103, or, presumptive authority, as is brought out in the case of *Grummet v. Fresno Glazed Cement Pipe Co.*, 181 Cal. 510, 185 P. 388, where the action of the president warranted a presumption of authority but the granting of a non-suit was not warranted without further hearing, or include matters not involved here.

[1] It has been stated in various ways that a corporation is an artificial person without either mental or moral powers and cannot act except through its officers, and that it can only act in accordance with their by-laws by affixing the mark of its artificial body—its seal—by the act of an officer or a person duly authorized by resolution passed by at least the majority of its directors or in accordance with the signatures of a majority thereof, although the said corporation may be bound by acts or usual methods of business indulged in by its officers or agents, which, although irregular, are either through negligence or otherwise apparently acquiesced in by the directors of said corporation. It therefore behooved the plaintiffs in this case, as well as in all other dealings with corporate bodies, to give careful attention to the formalities of the execution of the lease, in conjunction with which the note was given, and if they relied upon implied or ostensible authority, everything calculated to put them upon their guard should also have been carefully observed.

[2] After considering the above citations, we would again call attention to the fact that the lease and note in question herein were signed by the president without seal and without any formal authorization from the board of directors and that no knowledge of any authorization for such acts on the part of the said T. W. Burnam were shown to have been had by the plaintiffs, nor was there any evidence to show that any such authorization

had ever been given the said T. W. Burnam by the board of directors, and particularly that no consideration was received by the corporation nor any possession entered into under the lease in question. Therefore, we feel that the decision of the court in favor of the defendant was fully warranted by the evidence in the case.

Judgment affirmed.

We concur: WORKS, P. J.; CRAIG, J.

86 Cal. App. 572

P. W. WOOD, Inc., v. BLALACK. (Civ. 6032.)

District Court of Appeal, First District, Division 1, California. Nov. 4, 1927.

1. Principal and agent ⇨22(1)—Declarations of one claiming to be agent held inadmissible to prove agency.

Declarations of one claiming to be an agent, not made under oath or in presence of principal and not communicated to or acquiesced in by him, are inadmissible to prove fact of agency.

2. Principal and agent ⇨147(2)—One dealing with another on mere statement that he is agent of third person has risk of showing agency.

Person dealing with another upon his mere statement that he is agent of third person takes upon himself the risk of showing that such agency existed, and if, instead of satisfying himself by independent investigation, he accepts such statement and is deceived, he is victim of his own credulity.

3. Appeal and error ⇨1050(1)—Admitting testimony that person claimed to be agent of another held harmless, in view of other evidence.

In action to foreclose a mechanic's lien, admission of testimony of statement of one claiming to be agent for owner held harmless, in view of defendant's testimony that there was no agency and testimony of claimed agent to effect that he made no such statement.

4. Mechanics' liens ⇨63—Judgment establishing lien for improvement ordered by tenant cannot be sustained without proof of agency or conduct estopping owner to deny validity (Mechanic's Lien Law [Code Civ. Proc. § 1183]).

Under Mechanic's Lien Law (Code Civ. Proc. § 1183), judgment establishing lien against apartment house for repairs ordered by tenant cannot be sustained, in absence of proof of actual agency of tenant or that real owner had by his conduct so far concurred in such improvement as to be estopped to deny validity of lien.

5. Mechanics' liens ⇨78—Owner having no knowledge of work ordered by tenant held not liable under lien law for failure to post nonresponsibility notice (Mechanic's Lien Law [Code Civ. Proc. §§ 1183, 1192]).

Where owner of apartment house had no knowledge that work ordered by tenant was

being done and was in no position to disclaim responsibility as provided by Mechanic's Lien Law (Code Civ. Proc. § 1192), liability was not created under section 1183 for failure to post nonresponsibility notice.

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by P. W. Wood, Inc., against P. E. Blalack. Judgment for plaintiff, and defendant appeals. Reversed.

Morrison, Hohfeld, Foerster, Shuman & Clark, of San Francisco (H. A. Judy, of San Francisco, of counsel), for appellant.

Laurenz J. Krueger, of San Francisco, for respondent.

TYLER, P. J. Action to foreclose a mechanic's lien. Plaintiff, the lien claimant, alleged that it had furnished to defendant as owner, at his special instance and request, certain labor and materials in the improvement and repair of an apartment house known as the "Inverness Apartments," at No. 1405 Van Ness avenue, San Francisco, and alleged further that the defendant had agreed to pay a stipulated sum for such improvements. By his answer, defendant admitted ownership of the premises, but denied that he had ordered any repairs to be done or that he had agreed to pay for the same. As a separate defense, he alleged that at all the times referred to in plaintiff's complaint, the premises known as the "Inverness Apartments" were in the exclusive possession of one Fred. W. Hollman, Inc., a corporation, and Thomas J. Pearce, as lessees, under a written lease from him as owner and lessor, and that any work done by plaintiff and any materials furnished were rendered and furnished without his knowledge. It appeared in evidence at the trial that the labor and materials for which suit was brought were rendered and furnished by plaintiff in the repair of a boiler, a part of the heating system of the building. Some years prior to this repair defendant had leased the apartment house for a term of years, some ten of which were yet to run at the time in question, to one Thomas J. Pearce and to F. W. Hollman, Inc. This lease was in writing, and it specifically provided that the lessees should keep the house in good repair at their own expense, without any charge to the owner. At the time of the making of the lease, the house was in good condition, as was the boiler. Just prior to the repairs in question a nightman employed by the tenants had permitted the water to run out of the boiler, with the result that two sections, front and rear, had burned out. The injury to the boiler occurred at night, and, because of the cold weather, immediate repair was necessary. Pearce procured the necessary parts

from a wholesaler, the Stulsaft Company, and a representative of that company telephoned from the Inverness Apartments to Mr. Wood, president of plaintiff company, requesting that the repairs be made. Mr. Wood proceeded to the premises and conferred with Mr. Pearce, one of the lessees, with reference to the work. He made inquiry concerning the ownership of the building, and asked Pearce what authority he had to order the work done. He informed Pearce that it was an expensive job and that it would cost approximately \$300. He was told by Pearce to go ahead with the work and not to worry about the charge. The work was performed, and plaintiff rendered its bill to "Mr. Pearce, Manager, Inverness Apartments." No bill was ever rendered to Mr. Blalack, the owner, defendant herein, nor did defendant ever know or hear of the repairs being made, until some three weeks thereafter, at which time Pearce informed him that he could not pay the monthly rent on account of the expense of the repairs. No claim was made at the trial that defendant ever directly ordered the work to be performed, nor was there any competent proof of the existence of an agency, but, on the contrary, the evidence shows that none ever did exist. It was proved that defendant had paid a repair bill to the sidewalk elevator amounting to the sum of \$20 some two years prior to the work in question. It was also shown that defendant had paid for electrical improvements in the apartment house which were in their nature permanent and which he had especially contracted with the tenants to do. Aside from this evidence, which does not show an ostensible agency, there is no evidence in the record upon which an agency by estoppel could arise, and, indeed, if we understand the position of respondent, no such claim is made, his contention being that the findings show that plaintiff furnished the labor at the special instance and request of Pearce, who at the time was acting as the agent of defendant under his authority. But these findings are not supported by the evidence. For the purpose of proving that an actual agency did in fact exist, plaintiff offered and there was received in evidence, over the objection of defendant, testimony to show that Pearce had told Wood that he was the agent of defendant and to go on and do the work and there would be no question about the pay. This evidence was improperly admitted.

[1-3] The declarations of one claiming to be an agent, not made under oath or in the presence of the principal, and not communicated to, or acquiesced in by him, are inadmissible to prove the fact of agency. One who deals with another, upon his mere statement that he is the agent of a third person, takes upon himself the risk of being able to show that such agency existed. If, instead

of satisfying himself by independent investigation, he accepts such statement and is deceived, he is the victim of his own credulity. *Pease v. Fink*, 3 Cal. App. 371, 85 P. 657. The admission of this testimony, however, was harmless, for defendant denied Pearce was his agent and Pearce testified that he had made no such statement, and the findings of the court upon this subject were to the effect that Pearce was in the exclusive possession of the premises at the time the repairs were made as one of the cotenants of defendant under a written lease, by the express terms of which Pearce had no authority from defendant to make repairs on his behalf, or to incur any expense for labor or materials on the building or in the improvement thereof; that defendant was ignorant of the fact that labor and material had been furnished until some three weeks thereafter. It is manifest from this finding of fact upon the question of agency that the further finding to the effect that plaintiff furnished labor and materials for the repairs in question at the special instance and request of Pearce, while acting as the agent of and under the authorization of Blalack, the owner, is based upon an erroneous construction of the Mechanic's Lien Law (Code Civ. Proc. §§ 1180 et seq., as amended). Section 1183 thereof provides, in substance, that a materialman shall have a lien whether the labor and material are supplied at the instance of the owner, or of any other person acting by his authority or under him, as contractor or otherwise; that every contractor, subcontractor, architect, builder, or other person having charge of the construction, alteration, addition to, or repair, either in whole or any part of a building, shall be held to be the agent of the owner for the purpose of the enforcement of a lien. It is well established in this state that the fee in leased premises may not be impressed with a mechanic's lien for repairs made by a tenant, where the owner has no knowledge that the work is being done.

[4, 5] In the absence, therefore, of proof of actual agency, or that the real owner of the premises had by his conduct so far concurred in such improvement as to be estopped to deny the validity of the lien, no lien can exist. *McGinn v. Pritchard*, 32 Cal. App. 75, 161 P. 1171; *Moses v. Pacific Building Co.*, 58 Cal. App. 90, 207 P. 946. It being expressly found that defendant had no knowledge that the work was being done, and that no agency existed, a lien could not be created under the statute, for there was no one acting under the authority of the owner who could bind him. This being so, the judgment establishing a lien cannot be sustained. *Lorenz v. Rousseau* (Cal. App.) 258 P. 690. We are cited by respondent to the case of *Donohue v. Trinity Min'g Co.*, 113 Cal. 119, 45 P. 259, as holding a contrary view. In that case there was evidence sufficient to support

a finding of agency. No useful purpose would be subserved by a review of the facts. Nor is there any merit in the claim that defendant, not having posted a nonresponsibility notice, a liability was created under the act invoked. Defendant, having no knowledge that the work was being done, was in no position to disclaim responsibility as provided by section 1192 of the Code of Civil Procedure. *Moses v. Pacific Bldg. Co.*, 58 Cal. App. 90, 207 P. 946.

For the reason given, the judgment is reversed.

We concur: KNIGHT, J.; CASHIN, J.

87 Cal. App. 165

GROVE v. CHARLES W. BARRETT CO.
et al. (Civ. 5469.)★

District Court of Appeal, First District, Division 1, California. Nov. 29, 1927.

Rehearing Denied Dec. 29, 1927. Hearing Denied by Supreme Court Jan. 26, 1928.

1. Corporations ⇐88—Money paid by stockholder on subscription agreement held recoverable on common count for money had and received.

Where promoter agreed in stock subscription that for each share subscribed to in advance subscriber would receive two shares, and following organization application was made to commissioner of corporations for permit to issue stock in accordance with agreement, which was refused, and stockholder brought an action for money had and received, recovery under common count was proper.

2. Money received ⇐6(4)—Recovery under common count is proper, where money is paid in consideration of unperformed agreement.

Common count will always lie for money paid to one in consideration of his agreement to deliver or do something which he is either unwilling or unable to deliver or do.

3. Corporations ⇐98—Subscribers and secretary of corporation were not estopped, by failing to object to proposal to change stock issue, to refuse stock tendered.

Where board of directors authorized asking for permit to issue one share of stock for each share subscribed instead of two as agreed in subscription, and permit was issued, certificates of stock prepared, signed by secretary, and subscribers did not object but later refused to receive stock, subscribers and secretary were not estopped to refuse stock when tendered, since corporation was not prejudiced nor were circumstances sufficient to justify agent of corporation in believing subscribers would accept change in terms.

4. Husband and wife ⇐230—Want of capacity of married woman to sue on assigned subscriptions, where husband was assignor, must be specially pleaded to be available as defense.

Where one of plaintiff's assignors in action on stock subscription agreements was her hus-

band, contention that claims became community property subject to sole dominion of husband and that he only could maintain action *held* without merit, since plaintiff's capacity to sue was not issue of pleading, and, being a dilatory plea not affecting liability of defendant, must be specially made to be available.

Appeal from Superior Court, City and County of San Francisco; J. J. Trabucco, Judge.

Action by Lora V. Grove against the Charles W. Barrett Company and another for the recovery of money paid. Judgment for plaintiff, and defendants appeal. Affirmed.

J. W. O'Neill, of Oakland, and Frank McGowan, of Eureka, for appellants.

H. M. Anthony, of San Francisco, for respondent.

STROTHER, Justice pro tem. Plaintiff in this action had judgment against the defendants for the recovery of moneys paid by her and her assignors on account of subscriptions made for stock of the defendant corporation. From this judgment defendants appeal.

It was specifically provided in the subscription agreements, entered into between the several subscribers and the defendant Marchus, that the subscribers should receive in consideration of their advance subscriptions for the stock two shares for the par value of one. The payments were made to Marchus, one of the promoters of the company, as "interim trustee," the interim being the time between the subscription and the incorporation and organization of the defendant Charles W. Barrett Company. Following the organization of the defendant company, application was made to the commissioner of corporations for a permit to issue stock to the subscribers in accordance with the agreements with them, but it was refused. Thereafter the action of the commissioner of corporations was explained to the subscribers, and they were asked to accept one share of stock instead of two for the par value of one, but none of them either agreed to or refused to consent to the change. A meeting of the board of directors of the corporation was then held, and an amended application was authorized, asking for a permit to issue one share of stock for each amount of par subscribed. Plaintiff's husband, one of her assignors, was a member of and secretary of the board and voted for the amendment. A permit was issued by the commissioner in accordance with the amended application, certificates for the stock were prepared and signed by Grove as secretary, and tendered to the subscribers, who refused to receive them. They assigned their claims to the plaintiff, and this action was brought.

The complaint sets out each of the claims in several counts, some for money had and received, and some alleging the facts of the transaction.

Numerous assignments of error are made by appellants in a bill of exceptions both as to the findings of the court and its conclusions therefrom. They are all, however, directed to a few propositions of law which are contended for by appellants.

[1] It is contended that the court erred in finding upon the common counts for money had and received. Appellants say:

"In this case the contracts do not call for the direct payment of money, and appellants contend that under these circumstances and in the absence of the characteristic last-mentioned plaintiff cannot maintain an action for money had and received."

It is needless to say that this is not a correct statement of the law, else the common counts would never lie. Appellants are relying upon a misapprehension of the meaning of the language of the court in cases cited by them. In *Willett & Burr v. Alpert*, 181 Cal. 659, 185 P. 979, the court say:

"It is well-nigh elementary that a common count will not lie to recover damages for the breach of an unexecuted contract where the obligation breached is something other than the payment of money," and "damages are sought because of the failure of defendant to do that something else."

[2] In this case plaintiff is not asking for damages for breach of the contract, but for the return of the money. The common count will always lie for money paid to one in consideration of his agreement to deliver or do something which he is either unwilling or unable to deliver or to do.

Appellants also argue that such contracts are made in view of the Corporate Securities Act (St. 1917, p. 673), and that the subscribers are tacitly agreeing to accept whatever the commissioner of corporations should see fit to grant. It might more plausibly be argued that the effect of the act would be to make such contracts as those under consideration void from the beginning, in which case the action would certainly lie.

[3] It is contended that the subscribers, having failed to object to the proposal to change the terms of the stock issue, will not be permitted to refuse the stock tendered to them. This is a matter of estoppel which, if relied upon should have been specially pleaded, but there was not sufficient evidence to support such a plea. It did not appear that the corporation was induced thereby to change its position in any way to its detriment or did anything that it could have done otherwise, nor were the circumstances sufficient to justify the corporation's agents in believing that the subscribers would accept

the change in terms. This applies also to the contention that Grove is estopped.

[4] Appellants make the point that as it appeared from the evidence that Grove, one of plaintiff's assignors, was plaintiff's husband, the claims became subject to the sole dominion of the husband as community property, and he only could maintain an action for recovery on them.

No issue was made by the pleadings as to plaintiff's capacity to sue. Such a plea, being dilatory in its nature and not affecting the liability of the party defendant, is not favored and must be specially made to be available. *Tingley v. Times-Mirror Co.*, 151 Cal. 1, 89 P. 1097.

The judgment is affirmed.

We concur: TYLER, P. J.; CASHIN, J.

87 Cal. App. 145

PEOPLE v. MURRAY. (Cr. 1528.)

District Court of Appeal, Second District,
Division 2, California. Nov. 25,
1927.

1. Criminal law §301—Withdrawal of not guilty plea held properly denied to file motion to set aside whole information.

Where defendant was charged before committing magistrate with having procured money under false pretenses, and subsequently an information was filed against him, which charged him with that offense and two others, refusal of leave to withdraw plea of not guilty, for purpose of moving to set aside information, held not an abuse of discretion, as it would have been idle, since motion to set aside an information under such circumstances must be directed to defective counts of information, and not whole information.

2. False pretenses §49(1)—Evidence held to show corroborating circumstances, in prosecution for obtaining property under false pretenses (Pen. Code, § 1110).

In prosecution for obtaining property by false pretenses, evidence held to show corroborating circumstances satisfying requirements of Pen. Code, § 1110, providing that conviction may be had, if false pretense is shown by one witness and corroborating circumstances.

3. Witnesses §372(2)—Ruling out questions on cross-examination of complaining witness, tending to show civil action as ground of bias affecting credibility, held not error.

In prosecution for obtaining property under false pretenses, where complaining witness was cross-examined as to commencement of civil suit against defendant to show witness' hostility, and thus affect her credibility, ruling out questions when objected to held not error, since testimony of complaining witness showed claims on which civil action might be brought, and fact of commencement of action would have added nothing for purpose of showing bias.

4. False pretenses §49(2)—Evidence held sufficient to show value of share of stock in prosecution for obtaining property under false pretenses.

In prosecution for obtaining property under false pretenses, where defendant contended that value of shares of stock which he induced complaining witness to take was not shown by prosecution, evidence held sufficient to show value.

Appeal from Superior Court, San Bernardino County; Charles L. Allison, Judge.

Franklin A. Murray was convicted of obtaining property by false pretenses, and he appeals. Affirmed.

Raymond E. Hodge and A. S. Maloney, both of San Bernardino, for appellant.

U. S. Webb, Atty. Gen., and Charles A. Wetmore, Deputy Atty. Gen., for the People.

WORKS, P. J. Defendant was convicted of the crime of obtaining property by false pretenses. He appeals from the judgment of conviction and from an order of the trial court denying his motion for a new trial.

[1] Pursuant to the preliminary examination, which resulted in the filing of information against appellant, the committing magistrate held him to answer on a charge of procuring money under false pretenses. The information which was filed thereafter charged him with that offense and with two others, the pleading consisting of three counts. At the trial, under a claim that they had first been informed of the contents of the information immediately before the hearing commenced, the counsel for appellant asked leave to withdraw a plea of not guilty, which had theretofore been entered, for the purpose of moving to set aside the information. The request was refused, and it is contended that the court abused its discretion in not granting it. The courts of review of the state have decided in many cases, among which is *People v. Nogiri*, 142 Cal. 596, 76 P. 490, that a district attorney has no power to file an information charging an offense different from that for which a defendant is held to answer by a committing magistrate. Without deciding whether the present case is within the rule thus declared, or whether the request of appellant for leave to withdraw his plea came too late, we think the refusal of the trial court to grant the request was proper. As stated by counsel to the court, appellant desired an opportunity to "move to set aside this information entirely on the ground" stated in the decisions to which we have referred. It was said at another time that a withdrawal of the plea was desired "for the purpose of making a motion to set aside the information" on that ground. It will be observed that appellant indicated no desire to move to set aside the counts of the information other than the false pretenses count, which latter

was in accord with the order of the magistrate. In a case in which, under circumstances similar to those here presented, a motion was actually made to set aside an entire information, the court said: "To be effective the motion should, in our judgment, have been directed to the second count alone, and not to the entire information" (*People v. Danford*, 14 Cal. App. 442, 112 P. 474), the second count being the one that pleaded a charge upon which defendant had not been held by the committing magistrate. In a later case of the same nature it was contended that under the provisions of the Code a motion to set aside less than an entire information would not lie, and the court said in disposing of the point: "We find no valid reason why an order to set aside a separate count of the information may not be made." *People v. Hudson*, 35 Cal. App. 234, 169 P. 719.

As the motion suggested by appellant here could not have been granted, it would have been idle for the trial court to grant leave to withdraw the plea. It was therefore proper for the court to refuse the leave. *People v. Staples*, 149 Cal. 405, 86 P. 886.

[2] It is provided by section 1110 of the Penal Code that under such a charge as that of which appellant was found guilty here "the defendant cannot be convicted if the false pretense was expressed in language unaccompanied by a false token or writing, * * * or unless the pretense is proven by the testimony of two witnesses, or that of one witness and corroborating circumstances." In the present instance the false pretenses were proven by the testimony of but one witness, and appellant contends that neither the corroborating circumstances nor the giving of the false token mentioned in the statute was shown by the prosecution.

The property which appellant was charged with procuring was acquired by him under false pretenses as to the assets and financial worth and standing of a certain corporation, his representations being made for the purpose of inducing the complaining witness, a woman, to purchase shares of the capital stock of the organization. At the time of the making of the misrepresentations he gave to her an envelope with a list of names written upon it. One of these names was that of A. E. Hanna. The complaining witness testified that, at the time the list was passed to her by appellant, he told her that Hanna was a stockholder in the company, that he was a retired surgeon, and that he made his headquarters at a certain club in Los Angeles. At the trial Dr. E. A. Hanna—the difference in the initials is to be observed—was called as a witness by the prosecution. He testified that he was a physician; that he resided at the club above mentioned, and had lived there for three years, that he had heard of the corporation concerning which appellant made

the false representations to the complaining witness, but that he had never been a stockholder of it.

The difference between the name upon the list given the complaining witness by appellant and the name of the witness called by the prosecution—a difference between A. E. and E. A.—might possibly give us concern in a solution of the question now about to be determined, if it were not for the testimony of the appellant himself. He said, in response to a question whether he represented to the complaining witness that E. A. Hanna—the name of the witness called by the prosecution—was a stockholder in the corporation:

"I didn't tell her that E. A. Hanna was a stockholder in our company. I told her that there was an E. A. Hanna that had bought some stock in our company."

It is contended by respondent that the testimony of Dr. Hanna tended to show that the envelope upon which was written the name A. E. Hanna, among others, was a false token, as that term is employed in the statute. We doubt, although it is unnecessary for us to decide, whether the envelope was susceptible of that designation, for there was nothing on it with which the testimony of Dr. Hanna was at variance. He merely disputed something that appellant had said, according to the complaining witness, about the person whose name was on the envelope, granting that A. E. Hanna and E. A. Hanna were the same, a fact which the jury justly might have inferred from the testimony of the complaining witness and of appellant, taken together. We do think, however, that the envelope, the testimony of the complaining witness, of Dr. Hanna, and of appellant, all considered together, show sufficiently a corroborating circumstance within the statute. "The corroborating circumstances, required by the rule, may be proved by circumstantial evidence; and the entire conduct of the defendant and declarations made by him may be looked to to furnish the corroborative evidence contemplated by law." 12 Cal. Jur. 475, § 23, and cases cited. See, also, cases cited Cal. Jur. Suppl. 1926, p. 803. The corroborating circumstances here shown were slight, but we think they were sufficient to satisfy the statute.

[3] On the cross-examination of the complaining witness it was sought to elicit from her answers showing that she had commenced a civil action against appellant for the purpose of recovering the property of which he had defrauded her. The questions put to her were asked in order to show her hostility to appellant, and thus to affect her credibility as a witness. Upon objection, the questions were ruled out. The testimony of the complaining witness tended to show that she had claims against appellant upon which she might have maintained a civil action, and we think the mere fact that she had commenced

such an action would have added nothing, for the purpose of showing her bias, to the fact that such a claim existed, and to the further fact that she was at the time actually testifying in a criminal case against appellant as the complaining witness, concerning the identical transactions out of which the claim arose. In our view there was no error in the rulings.

[4] It was charged in the information that appellant represented to the complaining witness that the shares of stock which he induced her to take were worth a certain sum of money, but it was alleged that they were not worth that sum, and that they were in fact valueless. It is contended by appellant that the prosecution produced no evidence tending to show the value of the shares at the time the representations were made, but we think the contention cannot be upheld. Appellant's story about the stock of the corporation, told to the complaining witness, was most glowing. According to her, he said, among other things, that during the calendar year preceding the one in which he made his misrepresentations the corporation had paid to its stockholders dividends aggregating 42 per cent. In contrast to these attractive tales, it was shown at the trial that an individual who had installed an electric motor for the concern, at about the time appellant made his representations to the complaining witness, had been compelled to take a promissory note for the motor, and that he had been unable to collect it. The amount of the note was but \$150, and the holder had been able to realize but \$47 upon it, the amount having been paid by appellant. A motion to strike the testimony of the witness who covered these events was made, but it was not granted as to these particular matters, although granted in part. Another witness testified that during a period commencing three months before appellant's misrepresentations were made, and ending apparently after they were made, the plant of the corporation was never "commercially operated." Yet another witness, who became secretary of the corporation less than two months after the misrepresentations were made, and continued in the office for a period of four months, or until three weeks before the trial of appellant commenced, testified that he never knew that the corporation had any books; that he never saw any. He had been subpoenaed to bring all the books of the concern into court, and, when asked why he had not complied with the mandate, his only answer was: "I never had any books to bring." We think all this testimony was sufficient to show to the jury that the stock was worth much less than the amount stated in the information.

Other points are made by appellant, but they are not argued, and we are therefore not required to decide them. It is contended that the district attorney was guilty of misconduct during the trial, but the point is so obviously

without merit that we think it unworthy of further consideration.

Judgment and order affirmed.

We concur: CRAIG, J.; THOMPSON, J.



87 Cal. App. 117

COMMERCIAL ACCEPTANCE TRUST v. BAILEY. (Civ. 5477.)

District Court of Appeal, Second District, Division 2, California. Nov. 23, 1927.

1. Appeal and error ☞1011(1)—Trial court's findings on conflicting testimony are binding on reviewing court.

Findings of the trial court, where testimony was conflicting, are binding on the reviewing court.

2. Sales ☞459—Dealer's trust receipt and time draft for automobile given to acceptance corporation, held, when construed together, equivalent to conditional sales contract.

Where an automobile dealer obtained an automobile from an acceptance corporation for the purpose of selling it, and gave to the acceptance corporation a deed of trust therefor, and executed a time draft to the acceptance corporation, *held*, that the trust receipt and the draft should be construed together, and considered in the nature of a conditional sales contract.

3. Sales ☞473(1)—Dealer, having permission to sell automobile, which was obtained from acceptance corporation by giving trust receipt and time draft, could transfer good title to bona fide purchaser (Civ. Code, § 1142).

Where a dealer gave an acceptance corporation a trust receipt, and executed a time draft for an automobile to be sold by the dealer in regular course of business, such dealer could, under Civ. Code, § 1142, transfer to a buyer in good faith and in the ordinary course of business a good title to the automobile.

4. Sales ☞473(1)—Dealer possessing automobile for sale, on which acceptance corporation held deed of trust, and transferring same to salesman to pay commissions due, conferred good title, in absence of fraud; "transferred in the ordinary course of business" (Civ. Code, § 1142).

Salesman, having claim against dealer for commissions on cars sold by him to whom dealer transferred automobile, on which acceptance corporation held deed of trust, authorizing dealer to sell automobile and turn proceeds over to acceptance corporation, *held* to acquire good title to automobile under Civ. Code, § 1142, as against acceptance corporation, in absence of fraud; transfer to salesman being within phrase "transferred in the ordinary course of business" within the statute.

Appeal from Superior Court, Los Angeles County; L. T. Price, Judge.

Action by the Commercial Acceptance Trust, a corporation, against Joe Bailey. Judgment for defendant, and plaintiff appeals. Affirmed.

John H. Miller, of San Francisco, for appellant.

John L. Richardson and T. E. Parke, both of Los Angeles, for respondent.

STEPHENS, Justice pro tem. Defendant, the respondent herein, sold automobiles on commission for Schmidt & Mead Auto & Tractor Company, a corporation, of Edwardsville, Ill., and on the date of the transaction herein involved had owing to him on such account the sum of \$1,400. An automobile was delivered to defendant by said corporation, and the defendant drove it to Los Angeles, where plaintiff, the appellant herein, demanded possession of it, and, upon defendant's refusal to deliver, took possession thereof through an action in claim and delivery. No redelivery bond was given. Schmidt & Mead Auto & Tractor Company (for brevity hereinafter called Schmidt & Mead) did not own the automobile, but held it under a so-called "trust receipt" signed by them and a so-called "time draft" drawn upon them. The "trust receipt" acknowledged Commercial Acceptance Trust, plaintiff herein, as the owner of the automobile, and prescribed the terms under which Schmidt & Mead held it for sale. Among other provisions of the receipt was the permission of the owner that Schmidt & Mead could exhibit and sell the automobile for not less than \$831, and the requirement that, upon such sale, the proceeds were to be kept separate from other funds, and to be paid over immediately to owner. Up to sale thereof the automobile was to be returned to owners unused upon demand. The "time draft" was an accepted draft from the owner of the automobile (plaintiff and appellant herein) upon Schmidt & Mead "as security for acceptor's obligations under negotiable trust receipt."

The trial court found that the automobile did not belong to plaintiff on the date of the institution of the claim and delivery action, and that defendant, upon receiving the car from Schmidt & Mead, did not take it wrongfully or without right or title, and ordered it redelivered to him.

[1] Plaintiff contends that no consideration ever passed from defendant to any one for the automobile, but this point cannot here be considered, for defendant testified at the trial that Schmidt & Mead owed him \$1,400 on account of commissions earned, and that the transaction of delivering the automobile to defendant was upon the basis of crediting \$820 on this account. This is corroborated by another witness, Ernest Del-tour. Plaintiff contends that this testimony

is negated by the testimony of defendant that he later filed a claim in a subsequent bankruptcy proceeding of Schmidt & Mead's for \$1,400, less \$320, but that, in truth and in fact, he filed his claim for the full \$1,400. However, that may be, the whole circumstance does not rise above an ordinary conflict of testimony, and, of course, the trial court's decision ends the argument.

Plaintiff also contends that defendant was aware that Schmidt & Mead did sell most of their cars subject to an outstanding lien, and intimated that he took the automobile in question, not as an innocent purchaser, but aware that there was a limitation upon the right of Schmidt & Mead to transfer it; but there is substantial testimony on this point against plaintiff's contention, and, if the point is material to the decision, must have been determined adversely to the contention by the trial court when the case was decided for defendant and against plaintiff, and therefore cannot be considered by us.

[2, 3] We are in agreement with plaintiff that the two documents, the trust receipt and the time draft, should be construed together and considered in the nature of a conditional sales contract, and that the possessor of personal property which is held under a conditional sale contract cannot ordinarily convey title thereto. But the right to display the same for sale and to sell injects another material element into the problem. "The consent of the owner to a disposition of his property may be inferred from act, as well as given in direct terms. It may be inferred when he gives such evidence of authority of disposal as usually accompanies such authority, according to the custom of the trade and the general understanding of business men. The delivery of goods to a merchant engaged in the sale of similar articles is such evidence of authority to sell the same as to protect the purchaser from the possessor. The possession, under such circumstances, is evidence, not that the possessor is the owner, but that he has authority from the owner to sell." *Wright v. Solomon*, 19 Cal. 64, 79 Am. Dec. 196. "Where the possession of personal property, together with a power to dispose thereof, is transferred by its owner to another person, an executed sale by the latter, while in possession, to a buyer in good faith and in the ordinary course of business, for value, transfers to such buyer the title of the former owner, though he may be entitled to rescind, and does rescind the transfer made by him." Section 1142, Civ. Code.

[4] Under the doctrine just quoted from *Wright v. Solomon* and from the Civil Code, the transfer of title to the automobile was perfect, if the circumstances of the credit on the antecedent debt is within the meaning of the phrase in the Code section, "trans-

ferred in the ordinary course of business." An antecedent debt is a valuable consideration for the purchase of personal property held by a consignee of such property with the power of sale. *Anglo-California Trust Co. v. Pacific Acceptance Corporation*, 70 Cal. App. 41, 232 P. 489. Defendant could have purchased the automobile for cash without question of its legality, and, in the absence of fraud, he had as good a right to purchase and pay for it through the cancellation of a debt owing to him.

Judgment affirmed.

We concur: WORKS, P. J.; CRAIG, J.

86 Cal. App. 135

STANDARD BOND & MORTGAGE CO. v. BOYD et ux. (Civ. 4673.)

District Court of Appeal, Second District, Division 2, California. Nov. 2, 1927.

1. Appeal and error §1008(1)—Whether defrauded party rescinded promptly, within statute, held question for trial court (Civ. Code, § 1691).

Whether defrauded party in exchange of lands rescinded promptly, as required by Civ. Code, § 1691, on discovering facts entitling him to rescind is a question primarily for trial court.

2. Exchange of property §3(1)—Plaintiff investigating value of land received in exchange and not prevented from making full investigation, could not rescind for defendant's fraud.

Where plaintiff instituted independent investigation as to value of land received in exchange, had recourse to proper means of obtaining information, and was not prevented from making full investigation by defendant, it could not complain of its own lack of diligence and seek rescission for defendant's alleged fraud in misrepresenting value.

3. Appeal and error §1011(1)—Finding of trial judge on conflicting evidence that plaintiff made independent investigation of value of land exchanged, will not be disturbed.

In suit to rescind exchange of lands, finding of trial judge on conflicting evidence that plaintiff made independent investigation to discover value of land, will not be disturbed.

Appeal from Superior Court, Los Angeles County; Carlos S. Hardy, Judge.

Action by the Standard Bond & Mortgage Company against William T. Boyd and wife. From a judgment for defendants, plaintiff appeals. Affirmed.

C. E. McDowell, of Los Angeles, for appellant.

Ray Meacham, of Long Beach, for respondents.

PEAIRS, Justice pro tem. This is an appeal on the part of the plaintiff, *Standard*

Bond & Mortgage Company, from a judgment in favor of the defendants William T. Boyd and Carrie M. Boyd, his wife, in an action arising out of an attempted rescission of an agreement of exchange between the said parties of property in Long Beach, Cal., originally owned by the plaintiff, for a quarter section of land in Waterloo township, Jackson county, Mich., formerly belonging to the defendants.

It appears from the evidence: That on or about the 10th day of October, 1920, one Jackson and his wife sold to one Grames and wife a certain 160-acre farm in Waterloo township, Jackson county, Mich., for \$9,500, payable \$3,211.09 at date of agreement, \$200 on or before December 1, 1921, \$500 each year thereafter until paid, with interest at 6 per cent. That there was an incumbrance of \$2,500, which was assumed by the purchaser. That this contract was assigned by the Jacksons to William T. Boyd, one of the defendants. That about February 1, 1921, the defendants, in response to an advertisement for exchange of local property for eastern property, went to the office of Hargrave & Whiteley, agents for the Standard Bond & Mortgage Company. That the defendants, through Mrs. Boyd, stated that they wished to exchange an equity in Michigan property for Long Beach property and stated the terms of their contract, describing the property as rolling, tillable, and mostly under cultivation in potatoes or corn or small grain. That it had the necessary buildings upon it, and that a man lived upon the property and made his living. That the property was worth about \$9,500. And that after looking at various properties at Long Beach the defendants agreed to exchange their equity for a property in Long Beach owned by the plaintiff, the property of the plaintiff being valued at \$6,500, with a mortgage thereon for \$2,500, the defendants to give a second mortgage for \$200 for the difference in equities, and on the said 1st day of February, William T. Boyd gave a note to Hargrave & Whiteley for \$200, which reads as follows:

"200.00. Long Beach, Cal., 2-1-21. Thirty days after date without grace, we promise to pay to the order of Hargrave & Whiteley two hundred and no/100 dollars for value received, with interest from date at the rate of 8 per cent. per annum until paid. Principal and interest payable in United States gold coin at Nat. Bk, Long Beach, and in case suit is instituted to collect this note or any portion thereof, we promise to pay such additional sum as the court may adjudge reasonable as attorney's fees in said suit."

In explanation of the lack of signature on this note defendant Boyd made the following statement:

"I tore the signature off so it couldn't be used when I subsequently paid the note."

That defendant's offer above referred to was refused by the plaintiff, but plaintiff offered to take the contract from defendants as collateral, which offer the defendants refused. That after meetings and discussions between Mr. Hargrave and Captain Spicer, secretary and manager for the plaintiff, a letter was sent by Hargrave & Whiteley on February 16, 1921, to the plaintiff, which reads as follows:

"Standard Bond & Mortgage Company, H. W. Hellman Building, Los Angeles, California—Gentlemen: I talked to Mr. Boyd today in regard to the sale of 2374 Pasadena avenue. He is willing to assign contract on his farm back east for \$3,800, and to make it safer will agree to give us a second mortgage or trust deed on place payable at the rate of \$20 per month, 6 per cent. interest, and every payment he makes will be credited on contract which he is turning in, until the amount of \$500 has been paid and that amount will be credited to him on the \$3,800 contract he is turning in. He says this property will easily bring \$9,000 on a forced sale. If the \$3,800 contract is not paid out, he is to guarantee the \$3,800 or lose the \$500. Will you kindly send us deed to him as per escrow instructions, also second mortgage or trust deed or second mortgage payable at the rate of \$20 per month and interest. Yours truly, Hargrave & Whiteley, by B. P. H."

The transcript further shows that on March 7, 1921, the following letter was sent to plaintiff by Hargrave & Whiteley:

"March 7, 1921. Standard Bond & Mortgage Company, H. W. Hellman Building, Los Angeles, California—Gentlemen: We are inclosing herewith grant deed from W. T. Boyd and wife to you on the S. E. quarter section 5, township 2 south of Range 2 east, Jackson county, Mich. Also we are inclosing herewith deed of trust to you on 2374 Pasadena avenue of this city. We are also inclosing Boyd's papers on the property in Michigan. Will you kindly send us statement of amounts due you from Boyd such as cost of search of title on his property in Jackson, Mich., etc. Will you also kindly write the W. B. Webb Company, Webb Block, Jackson, Mich., and they will give you much valuable information on property back there, and they are the people that can discount the contract. Yours very truly, Hargrave & Whiteley, by B. P. H."

Letter was sent by W. B. Webb Company, which reads, in part, as follows:

"March 30, 1921. Standard Bond & Mortgage Co., 801 H. W. Hellman Building, Los Angeles, Cal.—Gentlemen: Your letter of March 10, in regard to the George Jackson and Edna L. Jackson property in Waterloo township, received. On taking the deed to the courthouse, we find that they cannot record it because there are taxes in the amount of \$149.97 that must be paid before the deed can be recorded. There is interest due on the \$500 mortgage, due in 1920, which is \$17.50 and there will be due April 14, interest on the \$2,000 mortgage, which is \$60. Will you kindly make two checks, one payable to the county treasurer for \$149.97, and another to the register of deeds for \$.90 for recording the deed. Will you please give me the amount

of the contract between Geo. Jackson and Ralph Grames and wife, and the terms. The title of the property is good, and I am taking the insurance policy to the agent to protect your interest as they may appear. We are inclosing the old policy, which has expired and are having it renewed, this just covers the buildings, no personal property. You will kindly mail us a check for \$2.70 payable to the Farmers' Mutual Insurance Company. Attorney's fees will be \$10. Very truly yours, W. B. Webb Company, Cory J. Spencer, Sec'y and Treas."

The pleadings and evidence further show that there was a slight alteration of the suggested contract in the letter of February 16th, mentioned above, so that instead of a note for \$500 under the second mortgage to the plaintiff, the defendants signed a note for \$489.42 on March 3, 1921, showing that a very careful calculation had been entered into at the time of the agreement of exchange.

The letter of March 30, 1921, shows that the plaintiff had written to W. B. Webb Company on March 10, 1921, concerning the recordation of the Boyd deed and other matters, and were thus in communication with one of the sources of information given them by the defendants, and that the plaintiff knew at that time that their deed had been delivered to the defendants. In response to the letter from W. B. Webb Company, who were incidentally holders of the first mortgage on the Waterloo property, plaintiff sent money to pay back taxes, interest, and recorder's fees. Further, the letter of February 16, 1921, in that regard says that:

"If the \$3,800 contract is not paid out, he, Boyd, is to guarantee the \$3,800 or lose the \$500. * * *

According to the pleadings, at the time the action was brought defendants had paid \$430 on the second mortgage or trust deed given plaintiff. From March 30, 1921, to January 30, 1922, various letters were apparently sent to Webb & Company, in Michigan. On February 13, 1922, the following telegram was received by plaintiff from El. L. Doer:

"Jackson, Mich., 1922, Feb. 13, P. M. 12. Standard Bond & Mortgage Company, Los Angeles, California. Grames still on farm crops failure practically no fences buildings poor land in poor condition soil light or low and wet farm on state road thirty dollars per acre full valuation. El. L. Doer, Appraiser, Jackson City Bank."

The plaintiffs claim misrepresentation and fraud on the part of defendants as grounds for rescission. Notice of rescission, it is alleged, was served on or about February 9, 1922, which was nearly one year after contract was entered into on March 3, 1921.

[1] The law governing cases of this class is probably best shown by quoting from various decisions in this state, and elsewhere,

and as stated in a citation from the case of *French v. Freeman*, 191 Cal. 589, 217 P. 515, 519:

"Section 1691 of the Civil Code requires the party entitled to rescind 'to rescind promptly, upon discovering the facts which entitle him to rescind.' Whether or not the defrauded party has rescinded 'promptly' will depend upon all the circumstances of the particular case, and is, of course, a question primarily for the trial court."

In *Hackleman v. Lyman*, 50 Cal. App. 326, 195 P. 263, 264, it is also said:

"If, after a representation of fact, however positive, the party to whom it was made institutes an inquiry for himself, has recourse to the proper means of obtaining information, and actually learns the real facts, he cannot claim to have relied upon the misrepresentation and to have been misled by it. Such claim would simply be untrue. The same result must plainly follow when, after the representation, the party receiving it has given to him sufficient opportunity of examining into the real facts, when his attention is directed to the sources of information, and he commences, or purports or professes to commence, an investigation. The plainest motives of expediency and of justice require that he should be charged with all the knowledge which he might have obtained had he pursued the inquiry to the end with diligence and completeness. He cannot claim that he did not learn the truth, and that he was misled.' * * * 'If a purchaser, choosing to judge for himself, does not avail himself of the knowledge or means of knowledge open to him or his advisors he cannot be heard to say he was deceived by the vendor's misrepresentations.'"

In the case of *Wyrick v. Campbell*, 67 Okl. 240, 17th P. 267, it is said:

"Where the purchaser undertakes to make investigations of his own, and the vendor does nothing to prevent his investigation from being as full as he chooses to make it, the purchaser cannot afterwards allege that the vendor made misrepresentations.' * * * The law does not deny its aid in such cases because it looks upon a want of candor and sincerity with indulgence, but because it will not encourage that indolence and inattention which are no less pernicious to the interest of society, and will not relieve those who suffer damage by reason of their own negligence or folly."

[2] From the evidence quoted above, and in the light of the law cited, it is unnecessary to consider other contentions of the case as it appears, as stated in finding No. 3 of the trial court:

"That said plaintiff instituted and conducted an independent investigation as to the value of said contract of purchase and sale and the possibilities of converting the same into cash, had recourse to the proper means of obtaining such information, and that neither said defendants, or either of them, did any act or caused any act to be done to prevent or hinder said investigation of plaintiff or to prevent said investigation of plaintiff from being as full as plaintiff chose to make it."

And further, that for the same reason specifications of insufficiency of evidence to warrant portions of finding V of the trial court are immaterial, and that plaintiff, having made an independent investigation, cannot complain of its own lack of diligence.

[3] There being a material conflict in the evidence in addition to those portions discussed above, the judgment of the trial court will not be disturbed.

Judgment affirmed.

We concur: WORKS, P. J.; THOMPSON, J.

86 Cal. App. 507

CURTIS et al. v. NYE & NISSEN.
(Civ. 6008.)★

District Court of Appeal, First District, Division 1, California. Nov. 2, 1927.

Rehearing Denied Dec. 1, 1927. Hearing Denied by Supreme Court Dec. 29, 1927.

1. Parties ⚡51(4)—Amendment adding party to complete cause of action is proper where there is no attempt to state new cause of action.

Court has power to allow amendment to complaint by adding party plaintiff, and where there is no attempt to state new cause of action in amended complaint but merely addition of party to make original cause of action complete, amendment, adding party is proper; great liberality being indulged in to obtain justice.

2. Parties ⚡51(4)—Amendment to complaint by payee on drafts making corporation party plaintiff held proper, where defendant amended answer to show drafts grew out of contract with corporation.

In action by payee against maker on draft, payment of which had been stopped by maker, plaintiff was properly permitted to amend complaint to make corporation of same name a party plaintiff, where maker was allowed to amend answer to show that drafts grew out of contract executed between maker and corporation, and where issues were not changed and maker was not taken by surprise nor prejudiced.

3. Parties ⚡51(1)—Court must order bringing in of parties whose presence is necessary to complete determination of controversy.

When complete determination of controversy cannot be had without presence of other parties, court must order such parties to be brought in.

4. Bills and notes ⚡456—Payee of drafts sued on held proper party plaintiff, though not necessary party, under amended complaint making corporation, with whom maker contracted, party plaintiff.

In action by payee against maker on drafts, payment of which had been stopped by maker, payee was proper party plaintiff, though not necessary party plaintiff, in complaint as amended bringing in corporation of same name as party plaintiff, after maker amended answer to

show that drafts grew out of contract executed with corporation.

5. Appeal and error ⚡1036(1)—Amendment adding as plaintiff to complaint on draft corporation with which defendant contracted, if error, was not prejudicial where corporation alone recovered.

In action by payee against maker on draft, payment of which had been stopped by maker, allowance of amendment to complaint by adding corporation as party plaintiff, after maker amended answer to show that draft grew out of contract with corporation, if error, was not prejudicial where verdict was in favor of corporation and not payee.

6. Judgment ⚡235—In action at law it is not necessary that both plaintiffs recover, or none (Code Civ. Proc. § 578).

Under Code Civ. Proc. § 578, where two or more persons join as plaintiffs in action at law, it is not necessary that both must recover, or none.

7. Sales ⚡364(1)—Charge that value of property, in estimating damages to buyer deprived of possession, is price at nearest market within reasonable time after breach held proper (Civ. Code, §§ 3354, 3358).

In action on drafts executed for goods sold and delivered to defendant, instruction that value of property, in estimating damages to buyer deprived of possession, is price at nearest open market within reasonable time after breach was proper, under Civ. Code, §§ 3354, 3358.

8. Judgment ⚡235—Instruction to find for corporation and not payee if drafts sued on were for corporation's benefit, and refusal to instruct that neither can recover if both cannot recover, held proper (Code Civ. Proc. § 578).

In action on drafts by payee, in which corporation of same name was made party plaintiff, instruction that if drafts were for use of corporation judgment should be for corporation and payee would not be entitled to judgment, and refusal to instruct that unless both plaintiffs can recover neither can recover was proper, under Code Civ. Proc. § 578, providing that judgment may be given for or against one or more of several plaintiffs.

9. Sales ⚡99, 364(1)—Instruction that seller could rescind contract if buyer refused to pay for shipment when due, and that buyer was liable on drafts given for adequate consideration, held proper.

In action on drafts executed by defendant under contract for sale of eggs, instruction that if defendant without fault of plaintiff refused to pay for shipment when due then plaintiff was entitled to rescind contract, and that if drafts were given for adequate consideration defendant was liable to plaintiff, held proper.

10. Trial ⚡199—Requested instructions submitting to jury questions of law held properly refused.

In action on drafts, requested instructions submitting questions of law to jury whether in-

struments in evidence were bill of exchange, drafts, or checks were properly refused.

Appeal from Superior Court, Sonoma County; R. L. Thompson, Judge.

Action by E. A. Curtis and another against Nye & Nissen, a corporation. Judgment for plaintiffs, and defendant appeals. Affirmed.

Edw. R. Solinsky, of San Francisco, and Frank J. Burke, of Petaluma, for appellant.

Emmett I. Donohue, of Challis, Idaho, and G. P. Hall, of Petaluma, for respondents.

CAMPBELL, Justice pro tem. This is an appeal from a judgment on the verdict of the jury in favor of respondent E. A. Curtis Company and from the order denying a new trial.

The action was commenced on July 25, 1923, by the filing of a complaint by E. A. Curtis, an individual, against defendant, wherein three alleged causes of action were set forth, based upon written instruments or drafts executed by defendant payable to the order of E. A. Curtis at Bank of Italy, San Francisco, and payment of which instruments or drafts was stopped. On August 29, 1923, defendant filed an answer admitting all the allegations of the complaint, but setting up a separate defense based upon the claim that the drafts were given for certain merchandise from E. A. Curtis, which it was alleged was not of the kind and character described in the agreement. The agreement, however, was in fact entered into between appellant and E. A. Curtis Company, a corporation, and not with E. A. Curtis in his individual capacity.

The case was regularly set, and on the day it was called for trial counsel for defendant asked permission of the court to file an amended answer, stating the action was being prosecuted by E. A. Curtis, as an individual, against defendant, and that defendant had filed its answer admitting all of the material allegations of the complaint and admitting the indebtedness as alleged therein to plaintiff; that as a matter of fact the admissions in the answer were of such a nature as to permit plaintiff to recover judgment without being required to offer any testimony whatever in support of the allegations of the complaint. Counsel further stated to the court that E. A. Curtis as an individual had never had any dealings whatsoever with reference to the matters alleged in the complaint, and that the claims were upon claims and causes of action in favor of E. A. Curtis, a corporation; that if the action should proceed upon the pleadings on file that E. A. Curtis, the individual, would obtain judgment against defendant and that such judgment would not pay or satisfy the claims of the real party in interest, E. A. Curtis Company, a corporation; that the instruments sued upon were intended for, accepted by, and were for, goods sold and delivered by E. A. Curtis, the corporation; and that through inadvertence,

mistake, excusable neglect, and the similarity of names, defendant answered the complaint under the misapprehension that the action was being prosecuted by the corporation.

Defendant insisted that E. A. Curtis Company, a corporation, should be made a party to the suit in order to protect defendant in its rights under the contract, as the contract was entered into by defendant with the corporation.

The court permitted defendant to amend its answer and set up its alleged defense that plaintiff corporation failed to perform the conditions of its contract with defendant and deliver eggs in accordance with its terms and for which such instruments or drafts payable to E. A. Curtis were given, and permitted plaintiff to amend the complaint by making E. A. Curtis Company, a corporation, a party plaintiff. The defendant's counsel objected to the court permitting this latter amendment and refused to consent to the amendment by plaintiff. On this question the remarks of the trial court addressed to counsel for defendant are pertinent:

"The Court: They could do it with your consent, couldn't they? It is a funny situation. One party wants to stand on the record just as it is, and you are coming and saying 'I made a mistake and I want to amend so as to get justice.' And they say, 'If you want to amend, we want to amend.' Then you say, you are not willing for the other side to amend, but that you want to amend.

"Mr. Solinsky: No, that is hardly the situation, your honor.

"The Court: They want to stand on the record technically, and you want it released until you can get in, then you want to stand technically on it."

Upon the showing and representations made by counsel for defendant to obtain leave to file an amended answer, the court permitted such filing, but in granting defendant the privilege sought so that the case might be tried on its merits permitted plaintiff also to amend by adding E. A. Curtis Company, a corporation, as a party plaintiff, which defendant claimed was necessary to a proper determination of the questions involved, but which defendant urges the court could not permit, but that E. A. Curtis Company was required to bring a new action. In other words, defendant conceded that under the original action as called for trial plaintiff was entitled to judgment; that such judgment would work an injustice as defendant could not have the issues involved under the contract adjudicated; that it was necessary and justice required that E. A. Curtis Company, the corporation, be made a party plaintiff, but not in the present case in which defendant desired to amend its answer; that the action should be dismissed and a new action commenced by E. A. Curtis Company setting up the same cause of action, changing only the name of the party plaintiff.

Defendant demurred to the amended complaint in which E. A. Curtis Company was added as a party plaintiff, the principal point in the demurrer and the only one urged being that there is a misjoinder of parties plaintiff. The demurrer was overruled, defendant answered, and the case was set for trial on a subsequent date and tried with a jury, which returned a verdict in favor of plaintiff E. A. Curtis Company.

Appellant urges as grounds for a reversal of the judgment: (1) The court erred in granting the motion of plaintiff E. A. Curtis to amend the original complaint in this action by adding as an additional party plaintiff thereto E. A. Curtis, the corporation. (2) (a) The court erred in overruling the demurrer of defendant to plaintiff's amended complaint; (b) the court erred in denying defendant's motion for a nonsuit; (c) the court erred in denying the motion of defendant for directed verdict. (3) The court erred in giving the following instructions to the jury, all of which instructions were proposed by plaintiffs, to wit, instructions numbered 24, 26, 27, 28, and 30. (4) The court erred in refusing and failing to instruct the jury as proposed by defendant in its proposed instructions as follows: Proposed instructions numbered 4, 7, and 8. (5) The court erred in denying defendant's motion for a new trial. (6) The verdict was and is against law. (7) The evidence was insufficient to justify the verdict.

All of the assignments of error, excepting those which have to do with the giving and refusing to give instructions and the claim that the evidence was insufficient to justify the verdict, turn on the question of the right of the court to permit plaintiff E. A. Curtis to amend his complaint by adding "E. A. Curtis Company, a corporation," as a party plaintiff after allowing defendant to amend its answer showing that the drafts given E. A. Curtis and payable to him in fact grew out of a contract executed by E. A. Curtis Company, a corporation, and appellant, and if the court's action in permitting such amendment was proper—unless the court erred in its instructions to the jury or the evidence is insufficient to justify the verdict—the appeal must be determined adversely to appellant's contention.

In *Gray v. Alderson's Adm'r*, 123 S. W. 317, in an action on certain notes, which defendant pleaded that plaintiff in his individual capacity was not the owner of, the question upon a similar state of facts as here presented is passed upon. In that case the Supreme Court of Kentucky uses this language:

"Nor is there any merit in the contention of appellant that the court erred in permitting the amended petition to be filed, wherein plaintiff discloses the true ownership of the notes. It has been so frequently held that a trial judge is authorized, at any time before trial, and even during the progress thereof, to permit amendments to be filed, in furtherance of justice, that a cita-

tion of authorities upon this point is deemed unnecessary. Certainly that rule has not been violated in this case. The defendant himself pleaded that plaintiff, C. L. Alderson, was not the owner of the notes sued on, and in response to that plea the plaintiff sets up the fact that by mistake of the draughtsman the suit had been prepared and thus far prosecuted in his own name, rather than in his name as administrator of his deceased wife. *This pleading in no wise changed the cause of action. It was still an effort to collect the same notes set up and described in the original petition, and to subject the same land therein described in satisfaction of this debt.* [Italics ours.] The trial judge not only did right to permit this amendment to be filed, but it would have been error for him to have refused to do so."

In this state it has been the rule since the early case of *Polk & Hensley v. Coffin & Swain*, 9 Cal. 58, that the court has power to allow an amendment to a complaint by adding a party plaintiff. In that case Mr. Chief Justice Terry delivering the opinion of the court and referring to an amendment adding a party plaintiff, said:

"It is always in the power of the court to allow an amendment to a complaint, so it does not affect the substantial rights of the parties; and, except there is evidence of a gross abuse of discretion in the exercise of this power, it is no ground for the reversal of the judgment."

This case has not been overruled, but, on the contrary, the principle therein enunciated has been followed. *Rabe v. Western Union Tel. Co.*, 198 Cal. 290, 244 P. 1077.

[1-3] In the present case defendant suffered no prejudice by bringing in E. A. Curtis Company as a party plaintiff, no issue being changed thereby. Where there is no attempt to state a new cause of action in an amended complaint, but merely the addition of a party to make the original cause of action complete, the amendment is proper. *Ruiz v. Santa Barbara Gas, etc., Co.*, 164 Cal. 188, 128 P. 330. The facts set forth in the amended answer which defendant asked leave to file made it necessary to a complete determination of the issues raised by such answer to add E. A. Curtis Company as a party plaintiff. Great liberality is indulged in such cases to the end that justice will be subserved. When a complete determination of the controversy cannot be had without the presence of other parties, the court must then order them to be brought in. *Rabe v. Western Union Tel. Co.*, supra. Again, defendant was not taken by surprise nor prejudiced by the amendment complained of, as the case was originally called for trial on October 1, 1923, on the original complaint and answer, and after the amendments were permitted the case was set for trial at a subsequent date and was not actually tried until October 14, 1924, a year later. What defendant desired was that the issues existing between the corporation and itself be litigated, and that was precisely what occurred.

Appellant has cited us to *Thompson et al. v. Turner et al.*, 173 Ind. 593, 89 N. E. 314, Ann. Cas. 1912A, 740, as holding that it is a well-settled rule "that a complaint in the name of more than one person must show a good cause of action in all who join, or it will be good as to none."

[4-6] Here, however, while plaintiff E. A. Curtis was not a necessary party plaintiff in the complaint as amended, he was, in view of the fact that the drafts were made payable to him individually, a proper party plaintiff. Again, plaintiff came into court confessing that through the error of counsel for defendant who drew the answer it must suffer judgment to go against it for the amount prayed for unless it be permitted to file an amended answer, which permission was given. If the evidence did not show the right of E. A. Curtis to any judgment, defendant could have moved for a nonsuit as far as he was concerned. This for some reason it did not choose to do, and the verdict rendered was in favor of plaintiff E. A. Curtis Company and not E. A. Curtis. Should we concede appellant's objection to be sound, no miscarriage of justice has resulted and appellant was not prejudiced by reason thereof. "Judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants; and it may, when the justice of the case requires it, determine the ultimate rights of the parties on each side, as between themselves." Code Civ. Proc. § 578. Where two or more persons join as plaintiffs in an action at law, it is not the law that both must recover, or none. *Cullen v. Foster*, 39 Cal. App. 625, 179 P. 695.

Appellant has cited us to a number of authorities, including several California cases, in support of its contention. In those cases, however, the facts are not analogous to those presented here.

[7] Appellant urges that the court erred in giving certain instructions requested by plaintiff; that instruction No. 24 was improper; and that instruction No. 26 was the only instruction that should have been given upon the question of the measure of damage. Instruction No. 24 complained of reads as follows:

"In estimating the damages, to a buyer or owner thereof, deprived of its possession, the value of the property is deemed to be the price at which he might have bought an equivalent thing in the open market nearest to the place where the property ought to have been put into

his possession, and at such time after the breach of duty upon which his right to damages is founded as would suffice with reasonable diligence for him to make such purchase."

We see no error in this instruction. It finds support in the Civil Code, §§ 3354 and 3358, as, also, in *Cal. Sugar & W. P. Agcy. v. Penoyar*, 167 Cal. 274, 139 P. 671, and *Fairchild v. Southern Refining Co.*, 158 Cal. 264, 110 P. 951.

[8] Instruction numbered 27, requested by plaintiff, which instructed the jury that, if it found the instruments were for the use and benefit of E. A. Curtis Company and E. A. Curtis individually had no interest in them, then any judgment found against defendant should be in favor of E. A. Curtis Company and E. A. Curtis individually would not be entitled to judgment in his favor, is objected to by appellant, as also does it complain of the refusal of the court to give its proposed instruction numbered 4 to the contrary—that is, that unless both plaintiffs can recover neither can recover. The action of the trial court in giving instruction numbered 27 and refusing to give instruction numbered 4 was proper. Code Civ. Proc. § 578; *Cullen v. Foster*, supra.

[9] We find no error in the giving of instructions numbered 28 and 30. These instructions are to the effect that if defendant without fault or breach of the contract by plaintiff refused to pay for any shipment of eggs as and when such payments were due and payable, then plaintiff E. A. Curtis Company was entitled to rescind its contract, and that if the three instruments were given for adequate consideration to E. A. Curtis Company by defendant, then defendant was liable to E. A. Curtis Company. *Jensen v. Goss*, 39 Cal. App. 427, 179 P. 225.

[10] Instructions numbered 7 and 8, proposed by defendant, were properly refused as they submitted questions of law to the jury; that is, as to whether the instruments in evidence were bills of exchange, drafts, or checks.

In our opinion, the objection that the evidence is insufficient to justify the verdict is without merit.

This disposes of all errors assigned, and from what has been said it follows that the judgment and order should be affirmed, and it is accordingly so ordered.

We concur: TYLER, P. J.; CASHIN, J.

86 Cal. App. 516

GALT et al. v. MURPHY et al. (Civ. 6020.)★

District Court of Appeal, First District, Division 1, California. Nov. 2, 1927.

Rehearing Denied Nov. 30, 1927. Hearing Denied by Supreme Court Dec. 29, 1927.

1. Landlord and tenant ⇨48(1)—Nonsuit in action for breach of contract of lease as to defendant shown merely to be a dummy was properly granted.

In action for breach of contract of lease nonsuit was properly granted as to defendant who was shown merely to be a dummy in the transaction, not having taken part in any of the negotiations other than signing documents, and whose exact status plaintiffs knew.

2. Landlord and tenant ⇨48(1)—Nonsuit in action for breach of lease as to defendant not shown to have received anything of value or to have entered into any agreements was properly granted.

In action for breach of contract of lease nonsuit was properly granted as to defendant who was not shown to have had any joint interest with other defendants or to have entered into any agreements with either plaintiffs or other defendants and who never received anything of value or signed any agreement.

3. Landlord and tenant ⇨40—Contract of lease and agreements as to deposit of security and installation of elevators and furnishings must be read together (Civ. Code, § 1642).

Under Civ. Code, § 1642, contract of lease of apartment and agreement as to installation of elevators and purchase of furnishings executed as part of same transaction and further necessary agreement as to deposit of security are to be taken together.

4. Partnership ⇨139—Agreement signed by one of partners, relating to return of deposit for lease, held binding on the other.

Signing by one of lessees of agreement for return of deposit was binding on the other, where partnership relation existed between lessees.

5. Landlord and tenant ⇨24(1)—Agreement between parties to lease, making lease subject to acquisition of title by lessor, held based on sufficient consideration.

Substitution of security for chattel mortgage on furnishings, and increasing burden of construction on lessors, held sufficient consideration for agreement between parties to lease that, if lessor was unable to obtain title, deal was ended on return of lessees' deposit.

6. Landlord and tenant ⇨48(1)—Rule as to impossibility of performance held inapplicable in suit by lessees for breach of contract of lease.

Where agreement between parties to lease provided for its termination and return of lessees' deposit on lessor's inability to obtain title, and lessees accepted return of deposit, rule as to impossibility of performance was inapplicable, in suit by lessees for breach of contract of lease.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by Maude L. Galt and another against Leland S. Murphy and others. From an order granting defendant's motion for nonsuit and from judgment in favor of defendants, plaintiffs appeal. Affirmed.

Raymond Perry, of San Francisco, for appellants.

J. L. Smith, of San Francisco, for respondent Paddon.

Robert B. Gaylord, of San Francisco, for respondents Murphy and Clarke.

PARKER, Justice pro tem. This is an appeal from an order granting defendants' motion for a nonsuit and judgment therein entered in favor of defendants and against plaintiffs.

The action was brought to recover damages suffered by plaintiffs through defendants' breach of their contract of lease, to wit, failure to give possession.

The defendants answered jointly, though at the trial and on the appeal defendant Paddon appears through separate counsel.

The facts as appearing here and in the court below follow: In December of 1922, or thereabouts, one Thomas L. Ricks, an agent or representative of a real estate firm, called upon Leland S. Murphy, defendant, in search of an apartment house that he might lease for a client. Murphy advised him that he had just such a place as was desired, and thereupon gave to Ricks a statement covering said house, showing what the house could be made to yield, and also the amount of rent demanded. Ricks in due time communicated these facts to the plaintiffs, in whose interests, it seems, he was endeavoring to find a suitable location. After negotiations and investigation on January 26, 1923, a lease of the premises was prepared and executed by defendant Verne Clarke, as lessor, and plaintiffs Maude L. Galt and Joseph C. Bianchi as lessees. The term of the lease was for a period of five years commencing on March 1, 1923, with rent reserved at the rate of \$770 per month. This lease further provided that the lessees should execute and deliver to lessor a chattel mortgage upon the furniture as security for the payment of the rent.

On the same date, and as a part of the same transaction, another agreement was entered into between the parties concerning certain improvements to be made in the premises and the sale of furnishings therein. By this latter agreement it was stipulated that the lessor should install elevators and hardwood floors and wall beds, the work to be started within ten days, and prosecuted with reasonable diligence. The lessees in this instrument agreed to purchase for the stipu-

lated price of \$1,500 the furnishings of the premises therein at the time, consisting of linoleums, etc. The tenants agreed to deposit with the landlord the sum of \$5,000 as an evidence of good faith and as security for the performance on the part of the tenants of all the provisions of the lease. From this amount the first month's rent of \$770 was to be deducted and paid when due, and also the sum of \$1,500 covering the price of furnishings. The balance of \$2,730 was to be retained by landlord as security for performance of lease until the tenants gave the landlord a chattel mortgage as security in lieu thereof, such chattel mortgage to be a first lien on complete and adequate furnishings for, and installed in, not less than 55 rooms, and such furnishings to be owned absolutely by tenants free from lien. When the mortgage, as specified, should be executed and delivered, then the moneys held as security should be returned to tenants.

There arose some discussion as to the form of this deposit of \$5,000. The tenants represented that in the place of cash they could deposit Liberty bonds to the amount required. This was acceptable to all, with the exception that it was stipulated that \$1,000 cash should be deposited to provide for the payment of the rent when due, and that an additional \$100 in bonds should be deposited to compensate depreciation in face value of the bonds offered. Accordingly, on January 29th there was deposited the sum of \$1,000 in cash and Liberty bonds in the amount of \$4,100.

At the time of the deposit a receipt was given to the tenants, and this receipt was embodied in an instrument containing a clause as follows:

"It is understood and agreed by both parties that this lease is given subject to Verne Clarke acquiring title and to her being able to install an elevator as per terms of the agreement, and Verne Clarke agrees to return the security not later than two weeks from date providing she is not able to give this lease, and Maude L. Galt and Joseph C. Bianchi agree to accept same and not to hold her responsible in any way."

This last instrument, dated January 29, 1923, was signed by Verne Clarke and Joseph C. Bianchi.

Throughout the entire transaction all writings, including lease agreement and receipt acknowledgment, were signed by Verne Clarke as lessor. The names of defendants Murphy and Paddon at no time or place appeared in the instruments.

[1] The evidence disclosed that, at the time of the negotiations and throughout, the defendant Verne Clarke held merely a deposit receipt indicating some payment on the purchase price of the premises involved. This is all of the title held by her or any of the parties defendant. The evidence further shows that in the entire transaction the defendant Verne Clarke had no real interest nor any in-

terest, even of the slightest. Verne Clarke was a stenographer and bookkeeper employed by one Wood, with which latter Mr. Murphy, defendant herein, shared an office. In her own language she was simply a "dummy" in the transaction. The money she paid on the purchase was not her money, and she did not know who advanced it. Her entire connection with the affair was to permit the use of her name in the instruments referred to. She took no part in the negotiations other than to sign the various documents when asked, and plaintiffs knew her exact status. She was not an agent for the other defendants. She was as though nonexistent; as she states, a "dummy." This is the contention of the appellants here and the theory upon which they present their appeal. Accepting this without further discussion, it is apparent that as to her the nonsuit was properly granted.

[2] As to the defendant Paddon, the evidence was not sufficient to connect him in any way with the transaction. It was not shown that he and defendant Murphy had any other joint interests or ever represented themselves as being associated. The "dummy" never acted for him at any time, and no relationship or privity is shown between Paddon and the defendant Clarke. Paddon never received any money or other thing of value, nor did he ever enter into any agreement, oral or otherwise, with the plaintiffs or either of them or either of the defendants. All that plaintiffs offer as against Paddon is the testimony of Ricks that Murphy told him there was another man associated with him in the deal, and that on two occasions during negotiations Paddon was present, though there is no evidence of his participation therein other than it appeared that once or twice Murphy asked his opinion generally, and Paddon expressed his ideas, answering Murphy. The plaintiff Galt testified that she never saw Paddon at all, and the coplaintiff Bianchi was not called. At the time when the agent for plaintiffs took Murphy and Paddon out to view the furniture upon which chattel mortgage was to be given, Paddon remained outside in the car.

Without further dilating upon, or analyzing, the testimony offered as against Paddon, it is apparent that the order of nonsuit as to him was properly granted. If under this evidence he could be forced to a defense, it would be needless in the future to specify the parties defendant in any action. It would suffice to merely file a complaint and then go out on the byways and usher in the first man met and compel him to show that he has no interest or liability in the proceeding.

This leaves the issue here as between plaintiffs and the defendant L. S. Murphy.

In support of the order appealed from, it is contended that, in order to hold Murphy, there must be evidence of some written au-

thorization to Verne Clarke in order that the relationship of principal and agent may be created or inferred. We are not disposed to enter into a discussion of this point, for the reason that its determination is unnecessary to this opinion. We have accepted appellant's theory of the situation, from the evidence adduced, that the acts of Clarke were the acts of Murphy, described at the time by all parties to the transaction as the real actor and party in interest. We will therefore for the purpose herein take up the case from appellants' standpoint upon the assumption that throughout the entire negotiations and transactions the acts of defendant Clarke "dummy" were the acts of defendant Murphy. It is the evidence of plaintiffs that they knew Clarke was the dummy and a mere name, as it were, for Murphy.

[3] The Civil Code of this state, section 1642, reads as follows:

"Several contracts relating to the same matters, between the same parties, and made as parts of substantially one transaction, are to be taken together."

In the case at bar plaintiffs testify that, at the very time of negotiating the lease, and as a part of the transaction, and before its execution by defendant, the parties made the agreement looking to the installation of elevators and the purchase of furnishings, and that thereby the security was essential to justify these alterations; that the deposit of security was a part of said transaction; and that a change in the terms of the lease followed the deposit. All of these instruments were executed within a period of three days, and at a date more than a month in advance of the period from which the term of the lease was to commence. All were between the same parties, and each had reference to the same subject-matter. Prior to the deposit, the lease was of no effect, and the defendants, in the absence of the deposit, were in nowise bound to further proceed. The agreement of January 29, 1923, contained the provision hereinbefore quoted. This was plain and unambiguous, and stated that the lease was dependent upon title vesting in lessor and her ability to install the elevator, and that lessor agrees to return the deposit not later than two weeks from date, if not able to give lease, and plaintiffs agree to accept return of deposit and not hold lessor responsible in any way.

The facts are that on or about February 15, 1923, defendant informed plaintiffs of his inability to proceed, and offered return of deposit, which plaintiffs refused to accept. Later, on April 9, 1923, plaintiffs demanded

return of the deposit, and it was so returned on April 10, 1923.

[4] Appellant points out that the agreement of January 29, 1923, referring to return of deposit, was signed by Bianchi alone, and not by plaintiff Galt, and therefore not binding on her. The plaintiff Galt testified that Bianchi was her partner, authorized by her to make the deposit; that he was a party to the lease jointly with her. It needs no citation of authority on the point that, as a partner, in matters concerning the partnership, one partner may bind the partnership. The testimony of plaintiff Galt is:

"The money and bonds were Bianchi's, not mine. We were partners. I never saw the receipt, not until two or three months after. Mr. Bianchi never told me anything about it. He was my partner. I did request the return of the bonds and cash when I saw I could not get possession, and the bonds and cash were returned to me and Mr. Bianchi by Mr. Perry (Mr. Perry is the attorney for plaintiffs). I have received back the bonds and cash at my request."

The present action was commenced shortly thereafter.

[5] Appellants contend that there was no consideration for the agreement of January 29th, and, further, that it is incumbent on defendants to show impossibility of performance thereunder.

In answer to the first objection, the agreement is taken as part of the original transaction, and would find ample consideration therein to support it. Aside from this, the new agreement of security in lieu of the chattel mortgage and the increased burden of construction would likewise be sufficient consideration to support the written agreement.

[6] We do not think the cases cited on impossibility of performance apply here. In the instant case the agreement was that, if lessor got no title, and consequently was not able to give the lease, the deal ended upon return of the deposit. There is no showing that the lessor ever got the title or was able to give the lease, but there is the showing that plaintiffs took the benefit of the provision, and secured a return of their deposit. The plaintiffs agreed in these words as to return of deposit: "To accept the same, and not hold lessor responsible in any way." They did accept the same after their demand for it, and the judgment of the trial court fulfills for them the remaining part of the obligation; namely, not to hold lessor responsible in any way.

Judgment affirmed.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

87 Cal. App. 87

McNEELY v. CONNELL et al. ★
(Civ. 4603.)

District Court of Appeal, Second District, Division 2, California. Nov. 22, 1927.

Hearing Denied by Supreme Court Jan. 19, 1928.

1. Appeal and error ⇨ 1195(3) — Appellate court decision does not become "law of case" as to questions of fact.

The doctrine of the law of the case has reference only to principles of law announced by the appellate court as those to be applied to a retrial of fact, and does not embrace questions of fact themselves.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Law of the Case.]

2. Appeal and error ⇨ 1178(6) — Limiting new trial to contributory negligence issue after appellate court decided order granting new trial was general held error, since decision became law of case.

Limiting new trial to trial of issue of contributory negligence on remand, after District Court of Appeal had determined that trial court's order granting new trial "on the ground of plaintiff's contributory negligence" was, in effect, a general order granting a new trial for insufficient evidence, *held* error, since such decision required new trial of whole case and became the law of the case.

Appeal from Superior Court, Los Angeles County; J. P. Wood, Judge.

Action by Robert McNeely against Michael J. Connell and James Hill. Judgment for plaintiff, and defendant Hill appeals. Reversed, with directions.

Geo. F. McCulloch and Emmet H. Wilson, both of Los Angeles, for appellant.

W. A. Alderson and K. A. Miller, both of Los Angeles, for respondent.

PEAIRS, Justice pro tem. This is an appeal brought in an action for personal injuries after three jury trials, in which the final judgment was rendered against the defendant Hill, now appellant. The acts complained of occurred in April 1917. The complaint was filed in June 1917, later default entered and vacated, and the case was first tried before a jury in July 1918, with a verdict against both defendants for \$2,400. Motion for a new trial was granted by the court, and the case was tried a second time on December 11, 1918, in which judgment was rendered against defendant Hill, appellant herein, in the sum of \$2,500. Motion for a new trial was granted in January, 1919, in these words:

"It is now ordered that said motion be granted on the ground alone of plaintiff's contributory negligence."

Plaintiff appealed from the last-mentioned order in April, 1921, and the order was affirmed

by the District Court of Appeal in 52 Cal. App. 184, 198 P. 427. The case was again called for trial in June, 1922, wherein, on motion of counsel for plaintiff that the evidence be restricted to the one issue of contributory negligence alone, which motion was denied by the judge, the said case was withdrawn from the calendar. On September 22 plaintiff made application for modification of the former order of the superior court, which was granted by adding the words, "and as to all other grounds and issues the said motion be and is hereby denied." The cause came on again for trial in April, 1923, at which time the court restricted the issues to be tried to the sole and single one of the alleged contributory negligence of the plaintiff, and that as to all other issues the verdict of the jury on the former trial shall be conclusive. The court placed the burden of proof on the defendant. The jury returned a verdict as follows:

"We, the jury, in the above-entitled action find for the plaintiff and find plaintiff was not guilty of contributory negligence."

Thereafter the judgment was rendered in favor of the plaintiff and against the defendant Hill for the sum of \$2,500. From this judgment the defendant moved for a new trial, which motion was on the 21st day of June, 1923, denied.

The appellant, defendant Hill, claims that the decision of the District Court of Appeal rendered in the above-entitled action on April 7, 1921, is the law of the case; that the trial court had no power to limit the trial to one issue; that the trial court erred in ruling as to evidence and in the refusal of and in the giving of certain instructions. The language of the appellate court in this action as reported in 52 Cal. App. 187, 198 P. 429 is as follows:

"Conceding that there was some evidence tending to exonerate the plaintiff from the charge of negligence, it results that the evidence upon that point was conflicting to such a degree that on appeal the decision of the lower court, either in granting or in refusing a new trial, should not be reversed. Where the evidence is thus conflicting, a motion for a new trial on the ground of the insufficiency of the evidence to justify the verdict is addressed to the sound legal discretion of the trial court. With its decision thereof interference is unwarranted unless there clearly appears an abuse of such discretion. We cannot say that the court was not reasonably justified in granting the motion in this case. Finally, it is suggested by appellant that if this action is to be tried a third time, the trial should be limited to the single issue of plaintiff's contributory negligence. It has long been settled that a court of appeal, in reversing and remanding a cause, may direct on what issues it shall be retried. *Robinson v. Muir*, 151 Cal. 118, 125, 90 P. 521. In this instance, however, since the order is to be affirmed, we deem it inappropriate to interfere with its terms

as entered by the court below. The order is affirmed."

The order affirmed included the words "on the ground alone of plaintiff's contributory negligence," and in the final trial the issue was so limited and the jury found for plaintiff and that he was not guilty of contributory negligence. The court entered judgment in conformity with the judgment in the second jury trial.

[1] In regard to the law of the case, it is only necessary to cite the case of *Wallace v. Sisson*, 114 Cal. 42, 45 P. 1000, wherein it is said:

"An unbroken line of decisions, commencing with *Dewey v. Gray*, 2 Cal. 374, has established the rule in this state that a decision of this court upon any question of law in a case appealed to it from an inferior court becomes thereby the law of that case, and is thereafter in all subsequent stages of the case binding, not only upon the inferior court, but also upon this court, if again brought before it. It has never been held, however, that the decisions of this court upon a question of fact is subject to this rule. On the contrary, it has been frequently said that the rule is limited to questions of law, and is not applicable to questions of fact. In *Sneed v. Osborn*, 25 Cal. 629, it was said: 'It is upon questions of law that the decision of the appellate court becomes the law of the case, and not upon questions of fact.' * * * In *Benson v. Shotwell*, 103 Cal. 163 [37 P. 147] the court said: 'The facts disclosed by the record upon this appeal are in substance the same as those which were before the court on the former appeal; and the propositions of law there decided are, therefore, the law of this case, and we are not at liberty to reconsider them. It is true that nothing that was said in that opinion as to the facts could bind the court upon the second trial, nor be conclusive now, since the rule of the law of the case has no application to questions of fact.' And in *People v. Hamilton*, 103 Cal. 496 [37 P. 630], the court said: 'This rule does not apply * * * to questions of fact.' In *Mattingly v. Pennie*, 105 Cal. 514 [39 P. 200] 45 Am. St. Rep. 87, the court said: 'It is settled beyond controversy that a decision of this court on appeal as to a question of fact does not become the law of the case.'"

In *Moore v. Trott*, 162 Cal. 268, 122 P. 462, it is said:

"So well settled is the proposition that the doctrine of the law of the case, generally speaking, is applied only to the principles of law laid down by the court as applicable to a retrial of fact, that it does not embrace the facts themselves, and does not even embrace points of law not presented and determined, that no quotation from the authorities is necessary. * * *"

And in the case of *Cowell v. Snyder*, 171 Cal. 291, 152 P. 920, it is also said:

"The doctrine of 'the law of the case,' generally speaking, has reference only to the principles of law announced by the court as those to be applied to a retrial of fact. It does not embrace the facts themselves nor include points of law not presented and determined. *Moore v. Trott*, 162 Cal. 273 (122 P. 462), and cases cited."

[2] In view of the California decisions cited it must be conceded that to whatever extent the law of this case was settled by the decision of the Court of Appeal in 52 Cal. App. 184, 198 P. 427, it does not determine any of the facts, but we believe does determine the meaning of the order of the trial court granting a new trial to be a general order.

Calling attention to particular portions of that opinion, we quote:

"It may further be suggested that if this limitation of the reasons for the order be excluded, there still remains a general order granting the motion, and respondent would be entitled to the benefit thereof if the facts contained in the record would authorize the motion to be granted upon any ground upon which he relied in presenting his motion. However, it is our opinion that the motion was granted upon the ground of insufficiency of the evidence to justify the verdict, and for the particular reason above stated. * * * Conceding that there was some evidence tending to exonerate the plaintiff from the charge of negligence, it results that the evidence upon that point was conflicting to such a degree that on appeal the decision of the lower court, either in granting or in refusing a new trial, should not be reversed. Where the evidence is thus conflicting, a motion for a new trial on the ground of the insufficiency of the evidence to justify the verdict is addressed to the sound legal discretion of the trial court."

Prior to July 3, 1919, the appellate court had the right to consider that a new trial was granted on the ground of the insufficiency of the evidence, if that ground was mentioned in the motion, whether the order mentioned the grounds or not, and this order was made in January, 1919, and thus while contributory negligence is mentioned, although not a ground of new trial, the court at that time had the right to say, and did say, that it was granted on the ground of the insufficiency of the evidence, and that the order was general.

Judgment reversed, with directions to the trial court to proceed in accordance with the views expressed in this opinion.

We concur: WORKS, P. J.; THOMPSON, J.

88 Cal App. 542

PEOPLE v. KERRICK et al. (Cr. 1534.)

District Court of Appeal, Second District, Division 2, California. Nov. 2, 1927.

1. Criminal law ⇨703—Motion for advisory verdict of not guilty cannot be granted at conclusion of prosecution's opening statement (Pen. Code, § 1118).

Under Pen. Code, § 1118, motion for advisory verdict of not guilty may be granted only after evidence of either side is closed, and cannot be granted at conclusion of prosecution's opening statement.

2. Homicide ⇨304—Instruction authorizing acquittal if homicide by shooting was accidental, regardless of other circumstances, was properly refused (Pen. Code, §§ 195-197).

Requested instruction, in homicide prosecution, which would authorize jury to acquit if shooting were accidental, regardless of any other circumstances, was properly refused, since in view of Pen. Code, §§ 195-197, an accidental shooting is not always excusable or justifiable.

3. Homicide ⇨289—Instruction authorizing conviction for homicide if, while defendants were engaged in unlawful act, deceased was killed by one of them, regardless of relation of homicide to unlawful act, held erroneous.

Instruction, in homicide prosecution, stating in effect that all defendants should be found guilty if they were engaged in doing some unlawful act and while thus engaged deceased was killed by one of them, regardless of whether homicide was so related to unlawful act in which they were engaged that death might have been natural and probable consequence of act, held error.

4. Homicide ⇨289—Instruction authorizing conviction for homicide if, while defendants were assembled to engage in unlawful act, one member killed deceased, regardless of their participation in design and intent of one who killed deceased, held error.

Instruction, in homicide prosecution, authorizing conviction if defendants had assembled for purpose of engaging in an unlawful act which would not in its probable consequence tend to destroy life, and one member of party departed from original purpose of gathering and killed deceased, regardless of their participation in design and intent of one who committed offense, held error.

5. Unlawful assembly ⇨1—That parties assembling did not intend to do lawful act in unlawful manner does not prevent assembly from being unlawful (Pen. Code, § 407).

In view of Pen. Code, § 407, fact that when two or more persons assembled there was no intent to do a lawful act in an unlawful manner, that is, in a violent, boisterous, and tumultuous manner, does not prevent such assembly from being unlawful.

6. Unlawful assembly ⇨1—Purpose or intent to do lawful act in unlawful manner may be formed either before or during assembly.

The purpose or intent rendering an assembly unlawful may be formed either before or

at the time of assembling, or it may be formed with the agreement of mutual assistance after assembling, and it is immaterial at what time intent to do lawful act in an unlawful manner is formed, whether prior to or during assembly.

7. Unlawful assembly ⇨1—Not every meeting where violent, boisterous, and tumultuous conduct occurs is unlawful assembly (Pen. Code, § 407).

Notwithstanding Pen. Code, § 407, not every meeting where violent, boisterous, and tumultuous conduct occurs may be denominated an unlawful assembly.

8. Unlawful assembly ⇨1—Statute prohibiting unlawful assemblies was intended to prevent disturbances of public peace by persons assembled under such circumstances as to excite terror and alarm in neighborhood (Pen. Code, § 407).

Pen. Code, § 407, prohibiting unlawful assembly, was intended to prevent any disturbance of public peace by persons having no avowed or legal object, assembled under such circumstances, and deporting themselves as to produce danger to public peace and tranquillity, and which excites terror, alarm, and consternation in a neighborhood.

Appeal from Superior Court, Los Angeles County; Carlos S. Hardy, Judge.

Sarah Kerrick and others were convicted of manslaughter, and they appeal. Reversed.

Welburn Mayock, of Los Angeles, and Clarence M. Booth, of San Francisco, for appellants Kerrick.

Stanley Visel and F. M. Andreani, both of Los Angeles, for appellants Hunt, Isabel, Burns and Davis.

U. S. Webb, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for the People.

THOMPSON, J. The defendants and appellants were charged by indictment with the crime of murder. They were tried jointly and verdicts of manslaughter were returned against each of them. Motions for a new trial were filed on behalf of Sarah Kerrick and also on behalf of Joe Hunt and Iris Burns and lastly on behalf of Henry Isabel and Anita Davis. Each of these motions was denied, and the defendants prosecute their appeals from the orders mentioned and from the judgments upon the verdicts.

The Attorney General, with commendable sincerity, evidencing an appreciation on the part of that office that public officers charged with the administration of the law are or should be interested solely in promoting the cause of justice, closes his brief for the people with this language:

"We have discussed all points raised by appellants; and that due to the errors which we believe to exist in the record we do not ask for an affirmance."

With this confession of error before us it will be sufficient if we set forth only enough of the facts to make clear the errors complained of and statements of the law applicable thereto to clarify the situation on retrial. On the evening of June 26, 1927, the deceased, Tom Kerrick, and his wife, appellant Sarah Kerrick, and Joe Hunt, together with Iris Burns, who at the suggestion of deceased had been invited as a companion for Hunt, and after the purchase of a quantity of intoxicating liquors drove to Lankershim, where they persuaded Henry Isabel and his wife to join the party. During the succeeding drive Joe Hunt's revolver dropped to the floor of the car and was picked up by the appellant Sarah Kerrick. She says that when they arrived home she took the gun out of her hand bag and put it upon the mantel and does not remember of picking it up again, although she does remember of having it when her husband chased her into the kitchen just before he was killed, and that she "must have picked it up on the mantel as" she "passed." Before their arrival home most of the party were well intoxicated—and the drinking continued. Joe Hunt went to sleep on the kitchen floor and Iris Burns became nauseated. She finally lay down on the couch in the living room. Sarah Kerrick and Anita Davis went to the home of one of the neighbors in an unsuccessful attempt to recruit new members of the party, and as they returned found Henry Isabel on the couch with Iris Burns in an unduly intimate position. An altercation ensued concerning the details of which the witnesses differ. According to Sarah Kerrick it was more or less of a general mêlée, during which Kerrick was shot. She says: "During the time we were struggling over this gun was when the shot was fired." Anita Davis, after testifying to the quarrel, says that she thought the fight was over and that all of them except Tom Kerrick went into the kitchen to have some coffee; that when deceased came in he was offered coffee by Mrs. Kerrick, which he refused, but he did say that he would drink with Iris Burns; that Sarah Kerrick put her hand down to her side and—

"She pulled her hand up on her lap. I saw the gun and I grabbed her arm, hooking my arm through hers and jerked her back, at the same time the gun went off. I can't say if the gun had gone off before that, but I know it went off then. She just went limp. She just gave in entirely. Then I glanced up right quick and Tom wheeled around with his back to us; he had been facing us. The blood was running down the side of his mouth and he staggered into the living room."

This last testimony is the only testimony which might be construed as showing directly that the appellant Sarah Kerrick did the shooting, although it is open to the construction that the gun was discharged by reason

of the tussle between the appellants Sarah Kerrick and Anita Davis. This much is clear, that the party was hilarious and that a quarrel took place, during which Tom Kerrick was killed.

[1] The appellant Sarah Kerrick made a motion for an advisory verdict of not guilty at the conclusion of the prosecution's opening statement, on the ground that proof of all the facts mentioned by the district attorney would not be sufficient to convict. Suffice it to say that there is no provision in our law for such a motion at that juncture. Section 1118 of the Penal Code provides that a motion of like character may be granted "after the evidence on either side is closed." But we know of nothing which would justify the court in granting such a motion prior to the introduction of the state's evidence.

[2] The next assignment by appellant Sarah Kerrick is untenable. She complains of the refusal of the court to give the following instruction:

"The jury are instructed that if the shooting in this case was accidental it becomes, of course, your duty to render a verdict of not guilty as to all defendants, and in considering whether the shooting was accidental or otherwise, it is your duty to resolve all doubts upon that question in favor of the defendants and against the prosecution, keeping in mind at all times that the defendants and each of them are presumed to be innocent of the crime charged in the indictment and all other crimes and offenses."

This instruction would authorize the jury to acquit if the homicide were accidental, regardless of any other circumstances, but an accidental shooting is not always excusable or justifiable. Sections 195-197 of the Penal Code; *People v. Hubbard*, 64 Cal. App. 27, 220 P. 315, and cases there cited.

The court instructed the jury as follows:

"(15) You are instructed that a homicide committed by accident and misfortune, even in the heat of passion, or upon sudden and sufficient provocation, or upon sudden combat, is not excusable when the person, or persons, committing the homicide was, or were, at the time violating some law, or using any dangerous weapons in the commission of the homicide. And if you should find from the evidence in this case beyond a reasonable doubt that Tom Kerrick was killed by a gunshot wound fired by some person in the heat of passion, or upon some sudden and sufficient provocation, or in a sudden combat, it is not an excusable homicide, and it would be your duty to return a verdict of guilty, if at the time you were satisfied beyond a reasonable doubt that the persons committing the homicide were violating some law and that said homicide was not in the necessary self-defense of habitation, property, or person.

"(16) You are instructed that whenever two or more persons assemble together to do an unlawful act and separate without doing or advancing toward it, or do a lawful act in a violent, boisterous, and tumultuous manner, such assembly is an unlawful assembly, and if the jury are satisfied to a moral certainty and be-

yond a reasonable doubt that the defendants were assembled together in the home of Tom Kerrick for the purpose of a party and by the use of intoxicating liquors or otherwise, said party was carried on in a violent, boisterous, and tumultuous manner, and that some one member of the party shot and killed Tom Kerrick while said party was so conducted in such violent, boisterous, and tumultuous manner, then you should return a verdict of guilty against all the defendants so engaged in such violent, boisterous, and tumultuous manner in conducting such party.

"(17) You are instructed that when two or more persons assembled and acting together make any attempt or advance toward the commission of an act which would be a riot if actually committed, such assembly is a riot. And you are further instructed that any use of force or violence, disturbing the public peace, or any threat to use such force or violence if accompanied by immediate power of execution by two or more persons so assembled and so acting together and without authority of law is a riot, and if you are satisfied to a moral certainty and beyond a reasonable doubt that at the time charged in this indictment the defendants were engaged in disturbing the public peace, and that Tom Kerrick was killed accidentally by one of said defendants without malice aforethought, you should return a verdict of manslaughter as charged in this indictment against all the defendants so acting during the time of such riot if you find there was a riot."

"(20) You are instructed that a person must be presumed to do that which he voluntarily and willfully does in fact do, and must also be presumed to intend all the natural, probable, and usual consequences of his own voluntary acts. Therefore you are instructed that whenever two or more persons assemble together to do an unlawful act and separate without doing or advancing toward it, or do a lawful act in a violent, boisterous, and tumultuous manner, such assembly is an unlawful assembly. And if the jury are satisfied to a moral certainty and beyond a reasonable doubt that the defendants, or some of them, were assembled together in the home of Tom Kerrick for the purpose of doing an unlawful act or for doing a lawful act in a violent, boisterous, and tumultuous manner, and that some one member of the party shot and killed Tom Kerrick while the members were so assembled, and not in the necessary self-defense of habitation, property, or person, then you should return a verdict of guilty against all the defendants so engaged. If you find that said shot was fired accidentally, under such circumstances as described above, but without malice, your verdict should be guilty of manslaughter, and if you are satisfied that said shot was fired intentionally, then your verdict will be that of murder of the first or second degree."

[3] All of the appellants attack these instructions on two grounds: First, that they ignore the element of causal relation between the doing of the unlawful act and the homicide; and, second, that the instructions would make all guilty if they were participating in an unlawful act, regardless of their knowledge or participation in the design of the actor. These contentions must be upheld.

By the instruction the jury were told that all the defendants should be found guilty if they were engaged in doing some unlawful act, and during the time they were so engaged Tom Kerrick was shot and killed by one of them, regardless of whether the homicide was so related to the unlawful act in which they were engaged that it may be said that death was a natural and probable consequence of the act. Injustice is not law, and yet a moment's reflection demonstrates that such a rule would operate most illogically and unjustly. We cannot ignore the element of causation in the unlawful act necessary to connect it with the offense. In our ordinary phraseology we refer to the result of this element by saying it must be the probable consequence naturally flowing from the commission of the unlawful act. In 13 R. C. L., p. 845, we read the rule as follows:

"It may be stated generally that a homicide is committed in the perpetration of another crime, when the accused, intending to commit some crime other than homicide, is engaged in the performance of any one of the acts which such intent requires for its full execution, and while so engaged, and within the *res gestæ* of the intended crime, and in consequence thereof, the killing results. It must appear that there was such actual legal relation between the killing and the crime committed or attempted, that the killing can be said to have occurred as a part of the perpetration of the crime, or in furtherance of an attempt or purpose to commit it."

See *Jackson v. State*, 101 Ohio St. 152, 127 N. E. 870; *Commonwealth v. Couch* (Ky.) 106 S. W. 830.

[4] The second attack of appellants must be upheld. Under the instructions as given, if the defendants had assembled together for the purpose of engaging in an unlawful act which would not in its probable consequence tend to destroy life, and one member of the party departed from the original purpose of the gathering and shot and took the life of Kerrick, all might be convicted, regardless of their participation in the design and intent of the one who committed the offense. In 29 C. J. 1149, the rule is stated, in discussing the offense of manslaughter where one unintentionally kills another in doing an unlawful act, as follows:

"But the death must be due to the unlawful act of defendant and not to the intervening act of negligence of a third person; or to an independent intervening cause in which defendant did not participate and which he could not foresee, and the death must have been the natural and probable consequence of the unlawful act, and the act the proximate cause."

Again at page 1070 of the same volume, it is said:

"In order to render one responsible as a principal in the second degree or as an accessory before the fact in the commission of a homicide, it is essential that he share in the criminal in-

tent of the direct actor. Thus, although one may have had some difficulty or altercation with the deceased, he is not responsible for a homicide committed at or about the same time by a third person, acting independently, if he did not share in the design of such third person. The fact that the altercation brought on the fatal encounter is immaterial. The same is true of the fact that one was the aggressor in the difficulty, or that the third person interfered to aid him. It is not enough that the acts of one tended to aid or encourage the principal in the first degree, they must have been done for that purpose. * * * If two or more are acting independently, and the actual perpetrator of the homicide cannot be identified, all must be acquitted, although it is certain that one of them was guilty. * * * While it is essential in order to render one guilty as a principal in the second degree or as an accessory before the fact that he share in the criminal intent of the principal in the first degree, it is not necessary that his participation in the homicide should have been by preconcert with the actual perpetrator, nor need he have originated the criminal design. A common design need not have existed for any particular length of time before the commission of the homicide. It is sufficient if there was a community of purpose between accused and the direct actor at the time the homicide was committed."

In the case of *People v. Kauffman*, 152 Cal. 331, 92 P. 861, the court quotes with approval a statement found in 8 Cyc. 641, as follows:

"Nevertheless the act must be the ordinary and probable effect of the wrongful act specifically agreed on, so that the connection between them may be reasonably apparent, and not a fresh and independent product of the mind of one of the confederates outside of, or foreign to, the common design. Even if the common design is unlawful, and if one member of the party departs from the original design, as agreed upon by all of the members, and does an act which was not only not contemplated by those who entered into the common purpose, but was not in furtherance thereof, and not the natural or legitimate consequence of anything connected therewith, the person guilty of such act, if it was itself unlawful, would alone be responsible therefor."

And to the same effect in *Butler v. People*, 125 Ill. 641, 18 N. E. 338, 1 L. R. A. 211, 8 Am. St. Rep. 423, it is said:

"No person can be held responsible for a homicide unless the act was either actually or constructively committed by him; and, in order to be his act, it must be committed by his hand, or by some one acting in concert with him, or in furtherance of a common design or purpose. Where the criminal liability arises from the act of another, it must appear that the act was done in furtherance of the common design, or in prosecution of the common purpose for which the parties were assembled or combined together, otherwise a person might be convicted of a crime to the commission of which he never assented, which could not be done upon any principle of justice."

There can be no doubt but that such is the rule of law applicable to the situation here.

[5, 6] The appellants also assail two of the instructions heretofore quoted (No. 16 and No. 20) on the ground that they do not correctly define an unlawful assembly. It should be noted first that both of the instructions use the words of section 407 of the Penal Code. The appellant Sarah Kerrick contends that if when two or more persons assemble there is no intent to do a lawful act in an unlawful manner, that is to say, in a violent, boisterous, and tumultuous manner, there is no offense. We cannot agree with this assertion. The section of the Code to which we have referred seems merely to be a reaffirmation of the common law. In American and English Encyclopedia of Law (2d Ed.) p. 344, we read that—

"It is not always necessary that a specific intent of any sort should exist in the minds of the persons assembled in order to constitute the offense, because it is well settled that an assembly of persons attended by circumstances reasonably calculated to excite alarm is an unlawful assembly, regardless of the matter of intent."

The text is supported by authorities from which we select the following:

"There seem to be two modes in which an assembly of persons may become unlawful, so as to be a subject of indictment; one, by the purpose for which it meets, and the other, without regard to its purpose, by the numbers and demeanor of those present at it." *Slater v. Wood*, 22 N. Y. Super. Ct. 15.

And in another standard encyclopedia we read that the purpose or intent "may be formed either before or at the time of assembling, or it may be formed with the agreement of mutual assistance after the assembling." This latter manner of expressing it would seem to clarify the situation. It is immaterial at what time the intent to do the lawful act in an unlawful manner is formed—whether prior to or during the assembly. As stated in Wharton's Cr. Law, § 1856:

"A lawful assembly becomes unlawful whenever the members agree to resort to violent and tumultuous measures to achieve even a lawful end."

[7, 8] The other appellants attack these two instructions upon the ground that they do not define unlawful assembly in such a manner as to give the jury a clear concept of the nature of the offense of unlawful assembly, and with this criticism we are bound to agree. Not every meeting where violent, boisterous and tumultuous conduct occurs may be denominated an unlawful assembly, even though that be the wording of the statute. It is particularly dangerous in a country where meetings are constantly held for every conceivable purpose, many of them accompanied with much noise and excitement,

to lay down such a doctrine. At this time of the year in our country in almost every hamlet, and certainly in every city of any size, contests between the youth of schools and colleges are being staged which could not be characterized as anything other than violent, boisterous and tumultuous. Yet the communities are not alarmed and the public peace is not endangered. No one would for a moment characterize high school or college football games as unlawful assemblies. The statute was intended to prevent "any tumultuous disturbance of the public peace by" two or more persons "having no avowed, ostensible legal or constitutional object assembled under such circumstances and deporting themselves as to produce danger to the public peace and tranquillity, and which excites terror, alarm and consternation in the neighborhood." In re Charge to Grand Jury, 4 Pa. L. J. 29. The jury should consider, as we read again in Wharton's Cr. Law, § 1851, "In determining the question of terror * * * whether rational and firm men, in charge of families, would have, under the circumstances, cause for anxiety; and in testing this it is necessary to take into account the hour at which the parties meet, the language used by them, and the acts done."

We have examined the other specifications of error and find nothing which in the event of a retrial requires comment.

The judgments and orders are reversed.

We concur: WORKS, P. J.; CRAIG, J.

87 Cal. App. 121

McCAULEY v. EYRAUD. (Civ. 3369.)

District Court of Appeal, Third District, California. Nov. 23, 1927.

1. Partnership ☞61—No time being fixed for continuance, relationship was partnership at will, and could be dissolved by either partner at any time (Civ. Code, §§ 2449, 2450, subd. 2).

Where no time was fixed for continuance of a partnership to conduct a laundry, partnership was at will, and, under Civ. Code, §§ 2449, 2450, subd. 2, could be dissolved by either party at any time.

2. Judgment ☞146—Refusal to vacate default dissolving partnership at will, held not abuse of discretion, where matters in answer could be urged on accounting (Civ. Code Proc. § 473).

In suit to dissolve partnership at will and for an accounting, refusal to vacate default judgment for plaintiff because of defendant's mistake, inadvertence, and excusable neglect, basing motion on proposed answer of defendant, held, in view of Const. art. 6, § 4½, not abuse of discretion, under Civ. Code Proc. § 473,

where, under complaint, plaintiff was entitled to dissolution, and all matters referred to in answer could be presented to commissioner taking accounting and urged when trial court passed on commissioner's report.

Appeal from Superior Court, Los Angeles County; F. C. Valentine, Judge.

Action by Mrs. J. A. McCauley against Albert Eyraud. From an order granting motion to vacate and set aside an order granting motion to vacate default judgment and reviving default, defendant appeals. Affirmed.

J. B. Joujon-Roche and Martin E. Geibel, both of Los Angeles, for appellant.

E. D. Martindale, of Los Angeles, for respondent.

PLUMMER, J. Action by plaintiff for dissolution of partnership and accounting.

The record shows the following: Summons served on the defendant June 4, 1924. Default of the defendant in failing to answer the summons and complaint served in this action entered June 16, 1924. Default judgment dissolving partnership and appointment of commissioner to take an accounting entered June 24, 1924. Accounting before the commissioner appointed by the court had on July 22, 1924, both parties appearing by attorneys. Report of commissioner returned to the court July 24, 1924. Objections to commissioner's report filed by defendant July 31, 1924. Notice that application would be made to the court on the 28th day of August, 1924, to set commissioner's report for hearing served July 23, 1924, and filed August 25, 1924. Notice of motion for order setting aside default and vacating decree and judgment served July 26, 1924, filed on August 28, 1924. August 15, 1924, minute order entered denying motion to vacate default and set aside decree and judgment. October 14, 1924, notice of motion for rehearing of defendant's motion to set aside default served and filed. October 21, 1924, minute order entered in rehearing of motion to set aside default, granting motion upon condition that defendant pay to plaintiff \$75, if trial results adversely to defendant. On the 21st day of November, 1924, plaintiff served, and on the 26th day of November, 1924, filed, notice of motion to set aside and vacate the order of the court made on the 21st day of October, 1924, vacating and setting aside judgment entered by default, etc. On December 22, 1924, minute order entered granting the motion to vacate and set aside the order granting the motion to vacate the default judgment and reviving and restoring the default judgment. The appeal is prosecuted by the defendant from this last order.

[1] The complaint sets forth that on or about the 4th day of February, 1924, the

plaintiff and the defendant entered into a contract of partnership in writing, whereby the parties agreed to conduct a laundry located at 1963 Weber avenue, Willowbrook, Cal.; that thereafter the defendant wrongfully excluded the plaintiff from participation in said partnership, and also refused to allow the plaintiff to examine the books and accounts of said partnership, and was retaining for himself all of the proceeds thereof. Dissolution of the partnership is prayed for, and also that a commissioner be appointed to take an accounting. Annexed to the complaint is a copy of the written agreement of partnership, from which it appears that the defendant conveyed to the plaintiff one-half interest in the partnership business herein stated for the sum of \$300. The written agreement shows that the partnership is what is known as a "partnership at will"; no time being fixed for the continuance thereof. The proposed answer filed by the defendant in connection with his motion to set aside the default herein referred to admits the partnership, but denies that he wrongfully excluded the plaintiff from participation therein. Thus it appears at the very beginning of the consideration of this cause that only the accounts of the partnership were actually involved by the complaint filed in the action and the answer sought to be filed. Being a "partnership at will," the right of dissolution might be exercised by either party at any time, and the question whether the defendant did or did not wrongfully exclude the plaintiff from participation therein is an entirely immaterial question. In the case of *Peardon et al. v. White*, 65 Cal. App. 463, 224 P. 263, in considering dissolution of partnerships at will, this court has held that a complaint alleging formation of a partnership, agreement to advance money, purposes for which it is to be organized, and concluding with a prayer for dissolution and accounting, showed a "partnership at will," which could be dissolved at any time, in view of Civil Code, §§ 2449, 2450, subd. 2. To the same effect is case of *Shuk-en v. Cohen*, 179 Cal. 279, 176 P. 447, where it is held that, under a "partnership at will," a partner may retire and have an accounting, or that dissolution may be had by mutual agreement. See, also, 20 Cal. Jur. 799, § 98. The record shows that the defendant appeared at the hearing had before the commissioner appointed to take an accounting; that the accounting consisted in an examination of the books of the partnership; that the commissioner reported to the court the result of the accounting, and that the defendant filed his objections thereto; that application was made for the setting of the time by the court to consider the report of the commissioner. The record is absolutely silent as to the action of the court in relation to the account filed by the commissioner. Whether the report of the commissioner was affirmed, modified, amend-

ed, or rejected does not appear from the transcript, and the appeal herein does not present any questions in relation thereto, and it cannot be determined from the transcript before us whether the appellant suffered any prejudice by reason of the action of the court in relation to any matters pertaining to the accounting. One of the briefs filed by counsel contains a statement that commissioner's report was approved, but the record contains nothing of the kind. The certificate to the transcript, certified to by the clerk, omits any mention of such order in the transcript, but does set out specifically every other paper, order, or matter of record in the proceeding. The transcript is certified to by the judge of the court as being correct.

[2] We are thus brought to a consideration of the notice of defendant's motion to vacate the default judgment entered herein. We are dealing with the first motion. The motion sets forth that it will be made upon the ground that the default and the judgment thereon were taken through mistake, inadvertence, and excusable neglect of the defendant; that the motion would be made and based upon the proposed answer of the defendant, accompanying the notice, affidavits filed therewith and the pleadings and files and records of said cause. The affidavit of the defendant sets forth that, at the time of the service of summons upon him, he did not speak the English language very well, nor did he understand the English language very well; that he had been in this country only about 15 years, and was not familiar with legal proceedings. Other reasons are set forth, such as that the defendant was unable to bear the expense of an appeal, and therefore his motion to vacate the default should be granted in the interests of justice. The defendant's wife also made an affidavit to the effect that all the matters set forth in the proposed answer were true. Counter affidavits were filed by the plaintiff to the effect that the defendant had stated, when the papers were served upon him, that he had a lawyer who would look after the matter, and also to the effect that the plaintiff had \$4,000 worth of property. Additional affidavits filed by the defendant showed that there was a mortgage of some \$2,000 on the property referred to. It is sufficient to say that all the matters, so far as material to anything which the trial court should consider upon an application to set aside the default, were controverted by affidavits filed by the plaintiff. At the time of the hearing before the court of the defendant's motion to set aside the default, the record shows that the defendant had had full opportunity to be present, and was represented by counsel in the taking of the account by the commissioner; that the defendant's objections to the account were before the court for future consideration; that the opening of the default would not

tender to the court any questions for determination that could not be considered by the court as the cause then stood, with the objections of the defendant to the commissioner's account then before it. It is true the commissioner's report as contained in the transcript would indicate that the commissioner found that there was due from the defendant, instead of from the partnership, the \$300 which the plaintiff had invested therein, and the accumulated profits of \$78.25, but, as hereinbefore stated, there is no showing that this error of the commissioner was not corrected by the court, assuming, without any record thereof, that the trial court finally passed upon the commissioner's report. Whether, upon the record presented to us, the strict letter of section 4½ of article 6 of the state Constitution, wherein it provides that no judgment shall be set aside or new trial granted for any error as to any matter of procedure, unless it appears that there has been a miscarriage of justice applies, need not be decided. It is sufficient to say, however, that the spirit of that section applies to this case. There is no showing whatever to any miscarriage of justice. As we have seen, being a "partnership at will," dissolution could be had at any time. If the action of either party resulted in damage to the other, a question of damages may be presented, which is not presented in this action. By reason of the pleadings herein filed by the plaintiff and the proposed answer filed by the defendant, so far as the dissolution of partnership is concerned, no other judgment could be entered herein, save and except that the court might find that the defendant had not excluded the plaintiff from participation. This, however, would not prevent the right of the plaintiff to obtain dissolution. The proposed answer does not set forth any damages that would be suffered by the defendant, but only presents matters which were proper to be presented to the commissioner taking the accounting and to be urged upon the attention of the trial court when passing upon the report of the commissioner. A very similar case is presented in *Williams v. Reed*, 43 Cal. App. 425, 185 P. 515, which was an action for dissolution of partnership and accounting. Default was entered there just as here. In considering the question of setting aside the default, the court in that case said, after referring to the conflicting affidavits:

"Thus, we see that a very sharp and decided conflict as to the questions presented was present. Under these conditions, we are powerless to interfere with the conclusion of the trial

court herein. The rule is, as it has been so frequently stated, both by the Supreme Court as well as by this court, that 'in the consideration of an appeal from an order made upon affidavits, etc., involving the decision of a question of fact, this court is bound by the same rule that controls it where oral testimony is presented for review. If there is any conflict in the affidavits, those in favor of the prevailing party must be taken as true, and the facts stated therein must be taken as established.' *Doak v. Bruson*, 152 Cal. 17, 91 P. 1001; *Hyde v. Boyle*, 105 Cal. 102, 38 P. 643; *Bernou v. Bernou*, 15 Cal. App. 341, 114 P. 1000."

And, further, in answer to the argument that the discretion of the trial court should be liberally exercised in passing upon motions under section 473, Civil Code of Procedure, the opinion in the *Reed Case* states:

"In this we agree. And the presumption is that, in the absence of satisfactory showing to the contrary, the lower court so exercise its discretion. In this case our attention has not been called to anything which would show an abuse of discretion by the trial court and since, as before stated, the deciding of the motion was a matter otherwise purely within the discretion of that court, we are now impotent to disturb the conclusion reached."

The final order of the court and the one appealed from shows that the court took into consideration all the facts set forth in the records to which we have referred, just as the trial court did upon the first motion to vacate the default. It is urged by the respondent that the trial court had no jurisdiction to entertain the motion for a rehearing of the first motion to set aside the default, on the ground that more than 60 days had elapsed before the motion for rehearing was made, and therefore that the order of the court denying the motion to vacate the default and entering of the default judgment had become final.

For the reasons which we have stated, there being no showing whatever of any prejudice suffered by the defendant, or any showing that the discretion of the court has been so abused as to justify interposition by an appellate court, it is unnecessary to pass upon the question of whether a trial court has or has not jurisdiction to rehear the motion to set aside a default, where the motion is not interposed until more than 60 days have elapsed after the entry of the order denying such motion.

No reason being made to appear for holding that the trial court abused its discretion herein, the order appealed from is affirmed.

We concur: FINCH, P. J.; HART, J.

87 Cal. App. 92

STARKWEATHER v. EDDY. (Civ. 3360.)★

District Court of Appeal, Third District,
California. Nov. 22, 1927.

Hearing Denied by Supreme Court Jan. 19, 1928.

1. Appeal and error ⇨1170(3)—Denial of motion to strike portions of complaint held not ground for reversal, where prejudice not shown (Const. art. 6, § 4½).

After trial was had fact that a pleading contained irrelevant, immaterial, redundant, or evidentiary matters was not, under Const. art. 6, § 4½, ground for reversal because of the trial court's denying a motion to strike out such portions of the pleading, where definite prejudice was not shown to have resulted from court's action.

2. Appeal and error ⇨1039(1)—Judgment will not be reversed for technical defects in pleadings, where substantial justice has been done.

Where substantial justice has been done, a judgment will not be reversed because of technical defects in the pleadings.

3. Pleading ⇨433(6)—Omission of material fact in complaint is cured by judgment, where no demurrer interposed.

The omission of a material fact in the complaint is cured by the judgment, where trial was had without the interposition of a demurrer.

4. Appeal and error ⇨1170(3)—Though complaint in action to recover money did not specifically allege fraud, judgment permitting recovery held not to require reversal, where no demurrer had been filed.

Where an action to recover money was apparently based on the idea that such money had been obtained from the plaintiff by the defendant through fraudulent acts, judgment for recovery held not to require reversal, under Const. art. 6, § 4½, even though complaint did not specifically allege fraud, since no demurrer had been filed, and the evidence showed elements of fraud.

5. Trial ⇨396(5)—Trial court should find on issue not made by pleadings but arising from evidence.

In an action for the recovery of money, where evidence of fraud in its procurement was introduced though the complaint contained no specific allegations of fraud, held, that the trial court could find on the question of fraud, even though it was not alleged, since evidence was introduced thereon.

6. Appeal and error ⇨171(3)—Where cause was tried on theory certain facts were in issue, after judgment cause will be considered as if pleadings correctly tendered such issue.

Where a cause was tried on the theory that certain facts were in issue, after judgment the cause will be considered as though such issues were correctly tendered by the pleadings.

Appeal from Superior Court, Los Angeles County; Ira F. Thompson, Judge.

Action by J. W. Starkweather against F. J. Eddy. Judgment for plaintiff, and defendant appeals. Affirmed.

F. E. Davis and L. E. Dadmun, both of Los Angeles, for appellant.

Thomas K. Case and G. M. Caldwell, both of Los Angeles, for respondent.

PLUMMER, J. Plaintiff had judgment in an action brought to recover the sum of \$1,250 and also to recover 50,000 shares of the capital stock of the Minarets Mining Company. From this judgment the defendant appeals.

The record shows that the Minarets Mining Company was, at the date of the trial, a corporation, and had been such since the 15th day of November, 1916; that the plaintiff was engaged in the prosecution of mining upon certain mining premises belonging to him; that during the year 1917 the plaintiff engaged in negotiations with the Minarets Mining Company for the transfer to said mining company of the mining premises belonging to the plaintiff, for and in consideration of the sum of \$5,000 in cash and 150,000 shares of the capital stock of the defendant corporation; that the defendant was the organizer and promoter of the defendant corporation and had received therefrom 100,000 shares thereof in his own name and 50,000 shares thereof in the name of his wife; that, in consideration of the transfer by the plaintiff to the corporation of the premises above mentioned, the defendant, as the promoter and organizer of said corporation, had promised and agreed that he would undertake to raise a working capital of \$10,000 for said corporation, and also the \$5,000 to be paid to the plaintiff, as above mentioned, as part of the consideration for the transfer by him of his property to said corporation; that the defendant stated and represented to the plaintiff that in order for him to succeed in raising such money it would be necessary to pay a commission, either of stock or cash, as might in particular cases be arranged with parties through whom cash subscriptions should be obtained, and that the commissions would be at the rate of 20 per cent., and that the defendant would pay the same out of his large holdings in the corporation that is, that a stock commission of 20 per cent. would be paid out of the 150,000 shares belonging to the defendant; that thereafter the defendant represented and stated to the plaintiff that it was impossible to carry out the undertaking in full, and that he would be unable to pay or provide the corporation the means of paying plaintiff the agreed cash consideration of \$5,000 for the transfer of plaintiff's property, in addition to the shares of stock to be issued to the plaintiff in said corporation, and that the defendant could not pay the cash commissions on stock sales,

whereupon the plaintiff agreed, at the defendant's instance and request, that one-half of all moneys received by him from said corporation as said purchase price of his property might be used by defendant for such purpose, should it be found necessary to so use it, and also that plaintiff, at defendant's special instance and request, on account of defendant's alleged inability to raise the money he had undertaken and agreed to do, agreed that the plaintiff would accept from the corporation \$2,500 in full satisfaction of its undertaking to pay him \$5,000 for the transfer of property herein referred to; that thereafter the defendant represented to the plaintiff that 150,000 shares of the treasury stock had been subscribed and paid for in accordance with the previous agreement between the defendant and the plaintiff, and that it was necessary for plaintiff to assign and set over, out of his stock holdings, shares necessary to pay such stock commissions of 20 per cent. thereon; that the plaintiff had no information or means of obtaining information as to what it had done, and implicitly trusted in the truth of defendant's statements, and, relying thereupon, acted upon them, and did transfer and set over to the defendant a certificate of stock for 50,000 shares of plaintiff's interest in said corporation.

The plaintiff further alleges that out of the \$2,500 received by the plaintiff from the corporation, upon the representations of the defendant that it was necessary for him to use the said sum of \$1,250 thereof in payment of commissions, he turned over to the defendant and paid to the defendant the sum of \$1,250. The plaintiff further sets forth that the defendant did not use such \$1,250 in the payment of commissions, as represented by him, but obtained and used the same for his own personal advantage and benefit. The complaint also further sets out that the defendant had not used the stock assigned to him for promotion purposes in payment of stock commissions for the sale of treasury stock, but had retained the same for his own use and benefit, and had transferred and used the 50,000 shares of the capital stock of said corporation, obtained from the plaintiff, in payment of claims upon the corporation, instead of using his own stock, as theretofore agreed upon. We have not followed the exact language of the complaint, but have summarized the matters in controversy. The action is to recover the money and also the stock.

[1, 2] No demurrer, either general or special, was filed by the defendant. An answer was filed, however, denying practically all of the allegations of the complaint. Upon the cause being called for trial, the defendant objected to the court receiving any evidence in support of the allegations of the complaint, on the ground that it does not

state facts sufficient to constitute a cause of action. The objection does not appear from the record to have been specifically made, but the remarks of the court indicate that it so understood the objection, and it will be so considered by us. The objection made in the trial court did not point out any reasons why the complaint failed to state facts sufficient to constitute a cause of action, and the specific reasons therefor appear to be first urged upon this appeal. The court having overruled the objection, the defendant then interposed a motion to strike out certain portions of the plaintiff's complaint. The motion to strike out was made upon the ground that the portions sought to be stricken out were either conclusions of law, or evidentiary, redundant, or immaterial matters. An examination of the complaint leads to the conclusion that some portions thereof are subject to the objections raised by the defendant's motion, but the denial thereof by the trial court does not raise any serious question upon this appeal. After a trial has been had where each party has had an opportunity to present evidence upon all the issues tendered by the pleadings, the mere fact that a pleading contains irrelevant or immaterial or redundant or evidentiary matters does not present a cause for a reversal by reason of the court denying a motion to strike out such portions of a pleading. Section 4½ of article 6 of the state Constitution covers just such questions. But outside of the state Constitution the following principles of law have been established by the decisions, to wit: Where substantial justice has been done, a judgment will not be reversed for technical defects in the pleadings. The overruling of a motion to strike out, where prejudice is not shown, does not present a ground for reversal. Defects in pleadings must operate to the prejudice of the opposite party; otherwise, denial of a motion to strike presents no cause for reversal. These statements are supported by the following authorities: *Petit v. Forsyth*, 15 Cal. App. 149, 113 P. 892; *Carrington v. Smithers*, 28 Cal. App. 460, 147 P. 225; *Parker v. Herndon*, 19 Cal. App. 451, 126 P. 183; *Montgomery Street Ry. Co. v. Mason*, 133 Ala. 508, 32 So. 261; *Sloane v. So. Cal. Ry. Co.*, 111 Cal. 668, 44 P. 320, 32 L. R. A. 193; *Higgins v. San Diego Savings Bank*, 129 Cal. 186, 61 P. 943.

[3, 4] Again, as stated in *Garten v. Trobridge*, 80 Kan. 720, 104 P. 1067, a trial having been had without the interposition of a demurrer, the omission of a material fact in the complaint is cured by the judgment. A somewhat similar question was presented to this court in the case of *Young v. Benton*, 21 Cal. App. 382, 131 P. 1051, where this court, speaking through Mr. Justice Burnett, said:

"There is thus some plausibility in the claim of uncertainty as to the theory upon which the complaint was framed, but it is entirely clear

that appellant was not misled nor prejudiced thereby; and if we assume that the ruling was erroneous as to the demurrer the case should not be reversed after a full trial upon its merits."

That was a case where a demurrer was interposed, calling attention to the alleged defects. In the case at bar no demurrer was interposed. A denial, as we have shown, of a motion to strike out surplusage or redundant matter, is not a ground for reversal, and if the complaint was technically deficient as to some of its allegations, where the cause has been tried upon its merits and no prejudice is shown, we must hold that no reasons are presented for reversal. As bearing upon the question of whether a reversal of a judgment should be had under such circumstances, the language of the Supreme Court in *Christerson v. French*, 180 Cal. 523, 182 P. 27, is pertinent. It was there said:

"It is well established that a judgment is not void if the court has jurisdiction of the parties and of the subject-matter, irrespective of whether or not the complaint states a cause of action, so long as it apprises the defendant of the nature of the plaintiff's demand."

After citing a large number of cases, the court further adds:

"We think the complaint herein sufficiently states a cause of action to inform the defendant of the nature of the claim against him and to give the court jurisdiction of the cause."

In the case at bar the complaint is sufficient to inform the defendant of the following claims: That the defendant had obtained from the plaintiff the sum of \$1,250 to be applied for a particular purpose; that the money was not applied for that purpose; that the defendant converted the money to his own uses and purposes; that the defendant obtained from the plaintiff a certificate for 50,000 shares of the capital stock of the Minarets Mining Company under the pretense that he had used all of his own stock, and required this stock from the plaintiff in order to enable the corporation to pay commissions for the sale of stock, and for which payment the defendant had agreed to use a like number of shares of his own stock; that the defendant had not used his own stock; and that he was obtaining the stock from the plaintiff in order that the defendant might retain and have the use and advantage, and retain the ownership of all of the stock theretofore issued to the defendant. The failure to comply with the representations made by the defendant, the converting of the \$1,250 to his own uses and purposes, instead of using the same for the purposes represented by him to the plaintiff, constituted a fraud, just as much as though specifically alleged in the complaint. The elements of a fraudulent transaction are shown by the circumstances, even though it be true

that the specific allegations do not sufficiently appear in the complaint, and that the complaint would have been subject to a special demurrer upon such grounds. That such is a settled rule of law in this state requires but one citation. In *Minor v. Baldrige*, 123 Cal. 187, 55 P. 783, it was held, quoting from the syllabus:

"The common counts in *assumpsit* may be used in this state, and in the absence of a special demurrer, the common counts for money had and received will lie to recover money obtained by false and fraudulent representations, and the proof may be made at the trial that it was so obtained, without any special pleading of the facts constituting the fraud, though such pleading must fail before a special demurrer."

This decision was rendered in 1893 prior to the adoption of the amendment to the state Constitution prohibiting reversal of judgments upon errors committed in ruling upon demurrers or motions which do not result in a miscarriage of justice. Again, the appellant states that:

"The trial court proceeded on the theory that the action was based upon fraud throughout the entire trial."

If this is true, it adds just one more reason why no reversal should be ordered herein on account of any defect in the pleadings relative to such allegations, because the defendant was at all times advised of the position of the court and of the issues he was expected to meet.

[5, 6] The appellant further urges that the findings of fact are not sustained by the pleadings or the evidence. The only assignment of error in this particular appears in appellant's brief in the following general language, without the citation of evidence one way or the other to sustain the contention. The assignment is as follows:

"The court also found that defendant, Eddy, had offered and agreed to pay out of his stock holdings, commissions on sale of stock, and for other purposes, long prior to securing from plaintiff the assignment of said certificate No. 53 for 50,000 shares. Again, appellant disagrees with the court in its findings, for in the opinion of appellant the evidence offered is insufficient to support such finding, and, if the evidence was sufficient to support such a finding, such a finding was and is outside of the issues."

Appellant has just stated the theory upon which the cause was tried. As shown by the case of *Taylor v. Taylor*, 192 Cal. 71, 218 P. 756, issues which arise from the evidence and which are not directly made by allegations in the pleadings should be found upon. Appellant is mistaken in urging this ground as a cause for reversal. It has been frequently held that, where a cause is tried upon the theory that certain facts are in issue, after judgment the cause will be considered as though such issues were correctly tendered by the pleadings. Again, in *Worth v. Worth*,

155 Cal. 599, 102 P. 663, the Supreme Court of this state has held:

"An objection that the evidence is not sufficient to warrant certain of the findings of facts cannot be considered on appeal, when the record on appeal utterly fails to make any attempt to show any specifications of any particulars wherein the evidence was insufficient."

While nothing is pointed out by the appellant to sustain his contention that the findings are not supported by the evidence, we have taken occasion to read all of the evidence set forth in the appendix to appellant's opening brief, and find therein sufficient testimony, if believed by the trial court, to sustain all of its material findings. There is sufficient testimony to show clearly, if believed by the trial court, that the defendant obtained from the plaintiff the sum of \$1,250 under the pretense that he was going to use it for a particular purpose, and converted the same to his own use, and that the same is true with regard to the 50,000 shares of stock. That the defendant upon the witness stand controverted all the testimony given by the plaintiff is immaterial upon this appeal. We may state, however, that the defendant's denial was not that he did not receive the money, but that it was advanced to him by the plaintiff as a loan, and that he paid it all back. The testimony as to the stock stands upon no more stable foundation so far as the defendant is concerned.

The judgment of the trial court is affirmed.

We concur: FINCH, P. J.; HART, J.

87 Cal. App. 82

SPAULDING v. O'CONNOR et al. ★
(Civ. 5971.)

District Court of Appeal, First District,
Division 2, California. Nov. 22, 1927.

Rehearing Denied Dec. 19, 1927. Hearing Denied by Supreme Court Jan. 19, 1928.

1. Appeal and error ¶1012(2)—It is enough for appellate court that there is evidence to support findings, irrespective of preponderance.

There being evidence to support findings, the appellate court will not disturb them, it not being its function to weigh the evidence to determine in whose favor it preponderates.

2. Auctions and auctioneers ¶9—Selling agent making false representations fraudulent in law as to size of land held liable to purchaser.

Defendants, who, as real estate agents and auctioneers in sale of land for another, made misrepresentations as to the size of the land, are liable to the purchaser damaged thereby, whether they made the representations carelessly or with deliberate intention, the law imputing to them a fraudulent intent.

Appeal from Superior Court, Los Angeles County; Walton J. Wood, Judge.

Action by Ona W. Spaulding, executrix of the estate of Herbert G. Spaulding, deceased, against C. H. O'Connor and another. Judgment for plaintiff, and defendants appeal. Affirmed.

Richard Kittrelle, of Los Angeles, for appellants.

Redwine & Redwine and H. G. Redwine, all of Los Angeles, for respondent.

KING, Presiding Justice pro tem. Plaintiff bought certain real estate at an auction sale conducted by defendants, who were real estate agents and auctioneers. He paid \$23,600. After the date of sale, the making of a deposit of \$1,000, and final payment and receipt of a deed, he discovered that the property was materially smaller in size than was represented by the defendants, brought the action against the defendants for damages without joining the former owners of the property, and recovered \$4,545.

Defendants appeal, claiming (1) that the evidence does not support the findings, and (2) that the judgment is against law.

The representations as to size of the property were made by a newspaper advertisement, by a map posted on the property at the time of the sale, and by one defendant orally at the time he was conducting the auction, but it nowhere appears that either defendant knowingly made a false statement of the size.

[1] As to the first claim of the appellants, it appears that complaint is made of paragraph 3 of the findings, where it is found that "plaintiff had no knowledge or information as to the name of the owner or owners of the property at the time he purchased same, * * * and the name of such owner or owners was not disclosed to him by said defendants, or either of them." And also of paragraph 4 of the findings, where "the court finds that the plaintiff did not discover that the property he purchased was 40 feet shorter than what it was actually represented to be until March 26, 1923, and after he had become the owner of said property."

As to this, it is only necessary to say that there is evidence to support these findings, and it is not the function of this court to weigh the evidence produced to determine in whose favor is the preponderance.

[2] The second specification of ground for a reversal—that the decision is against law—is based upon the argument that appellants were acting as the agents of a disclosed principal, and that, therefore, whatever damage plaintiff suffered was imputed to their principal only, and appellants were not liable for it. The trial court, however, after hearing the testimony, found that the name of the owner or owners was not disclosed to plaintiff, and therefore this argument fails.

In the case of Jewell v. Colonial Theatre Co., 12 Cal. App. 681, 108 P. 527, cited by appellant, the decision holds that:

"On its face the contract shows that Bacon was acting only as the agent."

And the case of *Senter v. Monroe*, 77 Cal. 347, 19 P. 580, also cited, was a case where the defendant signed a contract for sale of land as agent for the named owner when in fact he had no written authority.

Neither case is in point.

Stirnus v. Adams, 50 Cal. App. 730, 195 P. 955, is a case where the owner, Adams, and agent, Lyon, were joined as defendants when plaintiff sued for recovery of the money paid on purchase of an orchard, in which the trees were much older than represented and were diseased, infected, and run down, instead of being a first class orchard in the best of condition, as represented by the defendant Lyon, the agent.

The court there says:

"Defendant Lyon cannot escape liability on account of having acted as the agent of his co-defendant in inducing the plaintiff to enter into the contract of purchase, nor because he paid the money over to his principal. He knowingly participated in the transaction, held to have been fraudulent, and is equally responsible with his codefendant for the return of the money."

Story on Agency, § 311, lays down the rule applicable here as follows:

"In the next place as to the liability of agents to third persons for their own misfeasance and positive wrongs. In all such cases the agent is personally responsible whether he did the wrong intentionally or ignorantly, by the authority of his principal; for the principal could not confer on him any authority to commit a tort upon the rights or property of another."

When defendants, by newspaper advertisements, by the map posted on the premises at the time of sale, and by the oral statement of the auctioneer at the sale represented the lot as greater in size, and hence more valuable, than was actually the case, these statements were, or any one of them was, fraudulent, regardless of whether defendants themselves believed or did not believe the statements to be true.

If the fraudulent misrepresentations caused a damage to plaintiff, the maker of the representations is liable for this damage. "If a person, without knowledge of the existence of a fact, makes a positive representation that such fact exists, in order to induce another to act, the law imputes to him a fraudulent intent. * * * If an agent makes statements fraudulent in law, which cause injury to a person dealing with him, he is liable therefor." *Hamlin v. Abell*, 120 Mo. 188, 25 S. W. 516. "An officer of a corporation cannot escape liability for fraudulent misrepresentation on the ground that he was acting for the corporation." *Bank v. Byers*, 139 Mo.

627, 41 S. W. 325. "The actual perpetrator of a positive and obvious wrong can never exonerate himself from personal liability by showing that he was acting as the agent or servant of another, or even by his superior's command." *Bennett v. Ives*, 30 Conn. 329.

In *Lewis v. Hoeldtke* (Tex. Civ. App.) 76 S. W. 309, a Texas case, where the agent misrepresented the quantity of land sold, the agent was held "liable for the fraud, though in making such representations he was merely mistaken."

In *Garrett v. Sparks Bros.*, 61 Wash. 397, 112 P. 501, the Supreme Court of Washington uses the language:

"It is fundamental that a party, whether acting for himself or another, is liable in damages for his own fraud. The fact that the principal is also liable does not relieve from responsibility the party who actually commits the wrong. * * * The party who has been wronged may elect to sue either or both."

In the Minnesota case of *Hedin v. Minn. Med. Inst.*, etc., 62 Minn. 146, 64 N. W. 158, 35 L. R. A. 417, 54 Am. St. Rep. 628, it is said:

"Counsel makes the point that, as to the defendant Lawrence, the action should have been dismissed, because he, as the president of the defendant institute, was simply acting for it as its agent. We are not aware of any rule of law which will excuse and absolve a person from the consequences of his own wrong because he happened to be the agent of another at the time of the perpetration of the wrong."

In the instant case the untrue representations caused plaintiff damage, and the defendants who made those representations are liable to him, whether they were made carelessly or with a deliberate intention to wrong him.

The judgment is affirmed.

We concur: STURTEVANT, J.; NOURSE, J.

87 Cal. App. 143

TITLE INS. & TRUST CO. v. WILSON et al.

SAME v. BEST et al.

(Civ. 5716, 5650.)

District Court of Appeal, Second District, Division 2, California. Nov. 25, 1927.

I. Appeal and error ⇐766—Where appellant's brief did not set forth pleadings, findings, judgment, or evidence sufficient to show grounds for appeal or justify reversal, respondent held entitled to affirmance (Code Civ. Proc. §§ 953a-953c).

On appeal purporting to be pursuant to Code Civ. Proc. §§ 953a-953c, where appellant's brief did not set forth any of the pleadings, findings, or judgment, and did not comply with section 953c, providing that parties should print in briefs such portions of the record as they desire to call to the court's attention, in that

no evidence was set forth sufficient to advise opponents or court concerning grounds of appeal or sufficient to justify reversal, respondent held entitled to affirmance.

2. Appeal and error ⚡803—Order dismissing appeal results in affirmance of judgment.

Ordering dismissal of appeal results in affirmance of judgment.

3. Appeal and error ⚡803—After dismissing appeal, appellate court has no jurisdiction to pass on motion for affirmance.

After appeal has been dismissed, the appellate court is left without jurisdiction to pass upon appellee's motion for an affirmance of the judgment.

Actions by the Title Insurance & Trust Company against W. T. Wilson and others and against Ada Best and husband and others, consolidated for trial. From the judgments, defendants appeal. On motions to dismiss the appeals and to affirm the judgments. Appeals dismissed.

Fred Mansur, of Los Angeles, for appellants.

Chapman & Chapman and Hunsaker, Britt & Cosgrove, all of Los Angeles, for respondents.

CRAIG, J. Upon motion of appellants it was ordered by this court that the above cases be consolidated for the purposes of appeal.

A dismissal as to Clara E. Herr and Rebecca W. Avery has been filed by the plaintiffs in Civil No. 5716.

[1] The appeal in the case of Title Insurance & Trust Company v. Wilson et al. is taken by what is known as the alternative method, purporting to be pursuant to sections 953a, 953b, and 953c of the Code of Civil Procedure. No part of the record was printed in appellants' opening brief. Later a supplemental brief was filed. However, only meager portions of the testimony of the witnesses appear therein, and respondent has made two motions in this court, one to dismiss the appeal, and the other to affirm the judgment of the superior court. These motions are the subject of this opinion and decision. Section 953c provides in unmistakable terms that:

"In filing briefs in said appeal the parties must, however, print in their briefs, or in a supplement appended thereto, such portions of the record as they desire to call to the attention of the court."

At the time of the decision of *Jeffords v. Young*, 197 Cal. 224, 239 P. 1054, it was said that the Supreme Court and District Courts of Appeal had reiterated approximately a hundred times the necessity of an appellant following the method here attempted to be used, "to print in his brief or in a printed supplement thereto sufficient of the record to justify a reversal of the judgment or order appealed from." It is apparent that this has not been done in the instant appeal. Neither in the brief of appellant nor in his supplement thereto is there set forth any of the pleadings, findings, or judgment. The only suggestion of a compliance with the requirements of section 953c is the printing of less than 10 pages of the testimony, whereas the reporter's transcript contains 205 pages. From the slight scraps of testimony which are printed it cannot be ascertained in a single instance to what property reference is made. It is clear that the appellants' briefs are wholly inadequate to advise counsel for respondent or the court concerning the asserted grounds of appeal, or to justify a reversal of the judgment from which the appeal has been taken. The provision of the Code here involved is intended for the benefit of the adversary party as well as of the appellate court. It is unfair to both, and also to other litigants whose appeals are pending awaiting decision, to cause this court to devote its time to a performance of the labors of investigation and research expressly required of the appellants by law.

Under such circumstances, the respondent is entitled to an affirmance of the judgments of the superior court. *Jeffords v. Young*, supra; *Estate of Berry*, 195 Cal. 354, 233 P. 330.

What has been said also applies to *Title Insurance & Trust Company v. Best et al.*

[2, 3] It is ordered in each case that the appeal be dismissed. It results from the foregoing order that the judgment is affirmed in each case. *Home for Care of Ineb. v. Kaplan*, 84 Cal. 486, 24 P. 119; *Taylor v. Albion Lumber Co.*, 176 Cal. 347, 168 P. 348, L. R. A. 1918B, 185. This court is then left without jurisdiction to pass upon the motion for an affirmance of the judgment. *Duncan v. Times-Mirror Co.*, 109 Cal. 602, 42 P. 147.

THOMPSON, J., being disqualified, does not participate in the foregoing opinion.

I concur: **WORKS, P. J.**

⚡ For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

202 Cal. 521

**PACIFIC INDEMNITY CO. v. INDUSTRIAL
ACCIDENT COMMISSION OF CALI-
FORNIA et al. (S. F. 12545.)★**

Supreme Court of California. Dec. 1, 1927.

Rehearing Denied Dec. 29, 1927.

1. Master and servant ⇨375(1)—Employer is presumed to have acquiesced in status of employee giving orders and assigning work to fellow employees in absence of foreman.

Where, in absence of regular foreman, one of workmen gave orders and assigned work to other employees, it must be assumed that employer acquiesced in status of such workman.

2. Master and servant ⇨375(1)—Employees were not required to investigate whether foreman was absent before complying with orders of fellow employee assigning work.

Where fellow servant gave orders and assigned work to other employees in foreman's absence, other employees had right to look upon him as subforeman and could not be required to investigate to find out whether foreman was present before complying with his orders.

3. Master and servant ⇨375(1)—Employee's right to compensation for injuries in carrying out what he erroneously thought to be superior's orders depended on good faith.

Right of employee in automobile repair shop to compensation for injuries, sustained when he ran into street in alleged attempt to comply with what he erroneously thought was superior's order, depended on good faith and honesty of employee.

4. Master and servant ⇨417(7)—Whether injured employee's testimony as to superior's order was fraudulent scheme held question of fact for commission (Workmen's Compensation Act).

In proceeding under Workmen's Compensation Act (St. 1917, p. 831, as amended) for injuries sustained by employee while proceeding to cross street in response to what he erroneously thought was superior's order, question whether employee's testimony involved fraudulent scheme was one of fact for determination of commission.

5. Master and servant ⇨417(7)—Credibility of witness in compensation proceeding is for commission.

When question of fact is determined by commission in compensation proceedings, under circumstances which would admit of conclusion either way, court may not substitute its conclusion as to credibility of a witness.

6. Master and servant ⇨405(4)—Finding of compensable injury to automobile repairman, crossing street in attempt to comply with superior's signal, held sustained by evidence (Workmen's Compensation Act).

Finding of Industrial Accident Commission that injury to automobile repairman, crossing street near shop in alleged attempt to carry out what he mistakenly supposed to be order of his superior, who was crossing street towards parked automobile and threw his hand up arose out of and in course of his employment held sustained by evidence in proceedings under Workmen's Compensation Act (St. 1917, p. 831, as amended).

7. Master and servant ⇨391¼—Power to award interest in compensation proceedings is statutory.

Power to award interest in compensation proceedings depends on statutory authority.

8. Master and servant ⇨391¼—Order allowing interest held unauthorized, where there was no unreasonable delay in payment of workmen's compensation (Workmen's Compensation Act, § 23).

Where there was no unreasonable delay in payment of compensation, under Workmen's Compensation Act, § 23 (St. 1917, p. 851), order providing that all payments should bear interest beginning "with the date of this award, or the date thereafter at which payments become due," was unauthorized and void, as requiring interest on payments not yet due.

9. Master and servant ⇨391¼—Workmen's compensation award not filed with clerk of court does not draw interest as "judgment" (Code Civ. Proc. § 1035; Workmen's Compensation Act, § 21).

Award in compensation proceeding is not a "judgment" as contemplated by Code Civ. Proc. § 1035, and does not draw interest as a judgment until a certified copy of findings and award is filed with clerk of superior court as provided by section 21 of the Workmen's Compensation Act (St. 1917, p. 851).

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Judgment (in Law)].

In Bank.

Proceeding under the Workmen's Compensation Act by Alexander Michie, claimant, opposed by the Pacific Indemnity Company, insurer. Award of the Industrial Accident Commission in claimant's favor, and the insurer applies for certiorari. Award affirmed, and order for interest annulled.

Cooley & Gallagher, of San Francisco, for petitioner.

G. C. Faulkner, of San Francisco, for respondents.

SHENK, J. This is a proceeding to review an award of the Industrial Accident Commission in favor of Alexander Michie. Petitioner is the insurance carrier of the employer. The award is sought to be annulled on the ground that the finding of the

commission that the injury arose out of and in the course of the employment is without evidence to support it.

Alexander Michie was an automobile repairman in the employ of Don Lee Company at Sacramento. His working hours were from 8 o'clock a. m. to 5 o'clock p. m. The injury occurred about 4:45 p. m. on November 3, 1926, and under the following circumstances as shown by the evidence appearing in the record: Two other employees, Nugent and Lyle, were playing ball in an alley back of the shop between K and L streets and leading into Fifteenth street. The ball, thrown by one of the players, rolled out of the alley into Fifteenth street. Nugent ran across the street to recover the ball. Michie testified that he had been working on a car in the shop; that he came from underneath the car and stepped to the back door of the shop which opened onto the alley; that he there engaged Bud Keeler in conversation; that he did not see the ball roll into Fifteenth street; that he did not see nor know that Nugent was running after it; that he could not see Nugent from where he was then standing inside the door; that he heard some one call and stepped out of the door; that he then saw Nugent in the middle of the street crossing the same toward an automobile parked across the street and occupied by some person; that Nugent threw him arm up "like that" (indicating); that he (Michie) thought the car across the street was "stuck" and that Nugent was signaling him to come across the street and assist in the repair of that car. Michie started across the street toward that car when he was struck by a passing automobile and suffered the injury for which compensation was awarded. It was in evidence that it was customary for the different employees in the mechanical department, of whom Michie was one, to go into the alley and street to repair cars which had stopped outside of the shop for "trouble shooting" and repairs. It also appeared that in the absence of Mr. Young, foreman of the shop, Nugent had authority to assign work and give orders to other employees. It did not appear that Young was present or absent from the shop at this particular time, but it was shown that Nugent had issued orders to Michie on several occasions.

It developed at the hearing that the car across the street had not stopped there for repairs, and that Nugent had not summoned Michie for help.

There would seem to be no serious question but that the injury arose out of the employment. The difficulty is in determining whether Michie was injured in the course of his employment. We find no case in this state or elsewhere directly in point on this or a similar state of facts, so that a conclusion herein must rest on certain general

principles inherent in compensation cases under our law.

[1-3] First, with reference to the relationship existing between Nugent and Michie, it may be said that the evidence is susceptible of the construction that must necessarily have been placed upon it by the commission, namely, that in the general work in and about the repair shop Michie was not in position to refuse to answer the call of Nugent for assistance. Although Young was the regular foreman, it was in evidence that, in the absence of Young, Nugent gave orders and assigned work to other employees. It must be assumed that the employer acquiesced in this status of Nugent. Under such circumstances, the other employees had a right to look upon Nugent as somewhat of a subforeman and could not be expected, when called upon by Nugent to perform work, to enter upon an investigation to find out whether Young were absent before complying with Nugent's request or order. So that in a consideration of what took place immediately prior to the injury, this relationship of superiority occupied by Nugent over Michie in the conduct of the shop must be kept in mind. Having this relationship in mind, it must be conceded that if Nugent and Michie had both been at work in the shop and Nugent had requested Michie by a signal of the hand or spoken word to come to another part of the shop to render assistance, it would have been proper for Michie to respond, and if Michie were injured in so responding, he would be entitled to compensation. Again, if, while in the shop Michie were injured in proceeding from his own job to a car on which Nugent was working under the honest belief that some signal or word from Nugent required his assistance, he would undoubtedly be entitled to compensation, even though he might have been mistaken in his conclusion that Nugent required his assistance. Furthermore, the field of operations for repair work on the part of the employer was not confined to the four walls of the shop. It extended, under the evidence, to the adjacent alley and street as occasion might require. If Nugent had gone across the street to attend to some repair work required to be done on the car parked at that place and had summoned Michie to come to his assistance, it clearly would have been the duty of Michie to respond. In the practical conduct of the shop it could not reasonably be assumed that any question would arise as to his obligation in that respect. In the event of injury to an employee so responding to a call for assistance and while crossing the street, the commission might well hold that the injury so sustained would be compensable. It would then seem to be reasonable to take the further step and to conclude that when the car with an occupant is across the street in a

position where it was usual to have cars located for repairs, and when Nugent was proceeding in the direction of that car and making a signal with his arm, it would be consonant with the duty of Michie to his employer to respond to the signal when he believed in good faith that the signal was one requiring him to proceed across the street to the assistance of Nugent in the repair of a car. This would seem to be so, even though Michie was mistaken in his belief as to the effect of Nugent's action. The question to be determined is one of good faith and honesty on the part of Michie under the circumstances here shown.

[4-6] The petitioner inquires:

"What would interfere with recovery by an employee who had stepped aside from his employment and who conceives the fraudulent scheme of testifying that he *thought* his employer (or in our case, a fellow servant) told him to do an errand?"

The answer is that the question of whether there is such a fraudulent scheme is one of fact for the determination of the commission. When that question is determined by the commission under circumstances which would admit of a conclusion either way, this court may not substitute its conclusion as to the credibility of the witness. Cases may well be imagined when even an honest belief on the part of an employee as to his duty and the nature of his service in the premises would not be at all determinative. But when it appears, as here, that the working hours had not closed and both Nugent and Michie were still on duty; that Nugent had a right to call upon Michie for assistance in the work of the shop which extended in some cases to the repair of cars on the street; that Michie did not know that Nugent was running after the ball, but was motioning in such a way as to cause Michie to conclude that his assistance in the repair of a car across the street was required, and the other circumstances here shown are made to appear, we think the finding of the commission that the injury occurred in the course of the employment was supported by the evidence.

Petitioner calls attention to the fact that the evidence shows that when Nugent was crossing the street he dropped some coins from his pocket, and it argues that the unquestioned purpose, and none other, of Michie in going into the street was to recover this money. Michie testified that he saw something bright drop from Nugent's pocket, but that he did not go into the street to pick it up, and Nugent testified that at the time Michie was struck by the passing automobile he had gone past the point where the coins had fallen. We think this evidence was sufficient to meet the petitioner's contention.

[7-9] Petitioner takes further exception to

that portion of the award ordering interest thereon. The order is as follows:

"It is hereby ordered that all payments herein awarded shall bear interest at the rate of 7 per cent. per annum until paid, beginning with the date of this award, or the date thereafter at which payments become due."

The power of the commission to include interest on an award is contained in section 23 of the Workmen's Compensation Act (St. 1917, p. 851). After providing for costs in the discretion of the commission, that section provides as follows:

"* * * And the commission may, in its discretion, where payments of compensation have been unreasonably delayed, allow the beneficiary thereof interest thereon, at not to exceed one and one-half per cent. per month, during such period of delay."

There was no finding that payments of compensation had been unreasonably or at all delayed. The commission attempts to justify the order by saying that:

"If there have been no payments of compensation unreasonably delayed, then logically petitioner has not been called upon to pay any interest. If petitioner is not compelled to pay any interest, it has no complaint."

The difficulty with this contention on the part of the commission is that the order provides for interest on the award "beginning with the date of the award, or the date thereafter at which payments become due." The order is ambiguous but in any way it is read *all* of the payments would begin to bear interest either at the date of the award or upon the due date of any payment. In either event, the order provides for interest on payments not yet due. We find no authority for the order. The power to award interest is statutory and as the condition named in the statute as a prerequisite to the award of interest, viz., an unreasonable delay in payment, is unfulfilled this portion of the award must be annulled. The award is not a judgment as contemplated by section 1035 of the Code of Civil Procedure. It may be given the effect of a judgment by the filing of a certified copy of the findings and award of the commission with the clerk of any superior court as provided in section 21 of the act (St. 1917, p. 851). Until this is done, the award does not draw interest as a judgment.

As the order for interest is separable from the award of compensation, we deem it unnecessary to remand the proceedings for further action by the commission.

The award of compensation is affirmed. The order providing for interest on payments of the award is annulled.

We concur: PRESTON, J.; RICHARDS, J.; CURTIS, J.; SEAWELL, J.; LANGDON, J.

**NEWSOM et al. v. BOARD OF SUP'RS OF
CONTRA COSTA COUNTY et al.**
(S. F. 12273.)★

Supreme Court of California. Nov. 22, 1927.

Rehearing Granted Dec. 22, 1927.

1. Bridges ⇐14—Right to operate toll bridge is limited to corporations formed for exclusive purpose of assisting in administration of governmental affairs (Civ. Code, §§ 528, 529 [as amended by St. 1927, p. 1200], 530; Pol. Code, §§ 2843 et seq., 4058).

Under Civ. Code, §§ 528, 529 (as amended by St. 1927, p. 1200), 530, and Pol. Code, §§ 2843 et seq., 4058, only such corporations as are formed for specific purpose of assisting state in administration of governmental affairs may demand right to enjoy franchise to operate toll bridge.

2. Bridges ⇐4—Toll bridge is part of "public highway."

Bridge on which right is given corporation to collect tolls is part of "public highway."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Highway.]

3. Turnpikes and toll roads ⇐2—All highways on which corporation is permitted to take or charge tolls become ipso facto public highways.

All highways for use of which state permits corporations to take or charge tolls become public highways by force of right granted, subject to right of licensee to collect tolls for limited time.

4. Statutes ⇐195—Statutory requirement that thing be done in particular manner prevents doing it otherwise.

If by language of statute thing is limited to be done in particular manner, statute includes negative that it shall not be done otherwise.

5. Bridges ⇐14—Private corporation organized to construct for profit roads and bridges and other structures, and to collect tolls, held without authority to operate toll bridge (Pol. Code, §§ 2843 et seq., 2871, 4058; Civ. Code, §§ 528, 529 [as amended by St. 1927, p. 1200], 530).

Corporation organized as private corporation for purpose of carrying on general business for profit in construction of roads and bridges and other structures and for collection of tolls, except from structures "permitted to be operated only by corporations formed for a specific purpose," held without authority, under Pol. Code, §§ 2843 et seq., 2871, 4058, and Civ. Code, §§ 528, 529 (as amended by St. 1927, p. 1200), 530, to operate toll bridge, in view of requirement that corporations exercising such franchise be exclusively engaged in performing public service, especially where time for application for franchise had expired.

6. Statutes ⇐181(2)—Construction of statute which leads to absurd result is avoided.

Courts will avoid construction of statute which leads to absurd result.

7. Quo warranto ⇐5—Question of dissolution of corporation may be raised only by quo warranto proceeding.

Question of dissolution of corporation may be raised only by quo warranto proceeding, and is not involved in proceeding to require submission of ordinance granting franchise to corporation.

8. Counties ⇐55—Ordinance in excess of power of county supervisors could not be made effective by initiative.

Where board of supervisors of county did not have authority to pass ordinance, ordinance could not be made effective by initiative of electors of county.

In Bank.

Application by Fred S. Newsom and another for mandamus to be directed to the Board of Supervisors of Contra Costa County and W. J. Buchanan and others, members thereof, requiring them to pass as an ordinance or submit to a vote a proposed initiative ordinance granting a toll bridge franchise. Writ discharged.

Pierce & Carlson, of Richmond, for petitioners.

Archibald B. Tinning, Dist. Atty., for respondents.

J. E. Rodgers and A. F. Bray, both of Martinez, amici curiæ, for American Toll Bridge Co.

SEAWELL, J. This is the second application made to this court wherein the prayer of respective petitioners was for the issuance of the writ of mandamus commanding the board of supervisors of the county of Contra Costa, and the members thereof acting in their official capacity, to pass as an ordinance or to submit to a vote of the electors of said county for adoption or rejection a proposed initiative ordinance granting to the Northern California Development Company, a domestic corporation, a franchise to erect, construct, and maintain a toll bridge across the Straits of Carquinez, a navigable waterway separating the county of Contra Costa and the county of Solano, between certain terminal points, with the right to charge and take tolls from persons using the same in accordance with a schedule set forth in said proposed ordinance.

A number of the questions pertinent to the main issues herein were before this court in *Galvin v. Board of Supervisors*, 195 Cal. 686, 235 P. 450, wherein the subject-matter of the controversy was before us. The object which failed of accomplishment in that proceeding is sought to be accomplished by the instant proceeding. In the first proceeding petitioners made an application to the board of supervisors of Contra Costa county for a grant of authority to construct and maintain a toll bridge across said Straits of Carquinez between the same terminals as are described in the instant proceeding, alleging conformity

with the requirements of part 3, tit. 6, c. 4, art. 1, Political Code, Section 2843 et seq. The application was denied.

The petitioners thereupon, assuming to act in accordance with the provisions of section 4058, Political Code, prepared a proposed ordinance granting or purporting to grant to petitioners the right and privilege denied by the board of supervisors in the first instance, and by petition duly circulated procured signatures of the requisite percentage of qualified voters of the county of Contra Costa, requesting said board to pass said proposed ordinance or submit it to a vote of the people at a general or special election. The proposed ordinance and petition were accordingly submitted to said board of supervisors, with the request that it be adopted, or, if said board refused to do so, that it submit said ordinance to the electors of said county as provided by section 4058, Political Code.

Said board of supervisors, being duly advised in the premises, refused to either enact the same as an ordinance or to submit it to the electors of the county for adoption or rejection, by the electors at an initiative election or any election. Petitioners thereupon applied to this court for a writ commanding said board of supervisors to act upon said ordinance in accordance with the prayer of their petition. An alternative writ was thereupon issued by this court, and upon hearing had the relief sought therein was denied. The reasons assigned by this court in refusing to grant the relief prayed for are fully set out in *Galvin v. Board of Supervisors*, supra, and consist in the main of the omission of petitioners to give notice of their intended application for the construction of said bridge and to comply with certain statutory jurisdictional requirements, all of which were specifically considered in *Galvin v. Board of Supervisors*, supra.

[1-3] The objections there urged by respondents, which were based upon certain jurisdictional grounds, and which were deemed alone sufficient to justify a denial of the application of the petition, did not include the objection brought to our attention by an examination of the articles of incorporation, which are attached to the petition herein, but which were not attached to the petition in the former proceeding. Therefore the extent of the grant of powers conferred upon the petitioning corporation was not before this court in the *Galvin* Case, and no point was made that said corporation was without authority to demand the right to enjoy a franchise, which may only be enjoyed by such corporations as are formed for the specific and exclusive purpose of assisting the state in the administration of governmental affairs. Neither was the point discussed by counsel in the instant case upon its first presentation to us and for this failure of consideration of an important question an order of resubmission

was made. That the petitioning corporation was not incorporated in the form, manner, and for the exclusive purpose which the law exacts of a corporation in order to qualify itself to exercise governmental functions in the construction and operation of toll bridges, ferries, wharfs, chutes, or piers, and take tolls thereon from the public, is the natural, logical deduction that must be made from an examination of the various Code sections and statutes of this state which provide for corporate existence, not only for the construction and maintenance of the five divisions of the public highway system specifically mentioned in division 1, part 4, tit. 6 (section 528 et seq.), Civil Code, but also for other branches of the public highways, such as wagon roads, turnpikes and toll roads generally, none of which may be constructed and operated by corporations unless such corporations are formed for the exclusive purpose of performing the specific public service which they assume to undertake on behalf of the state.

A toll bridge is a part of the public highway. All highways for the use of which the state permits a corporation to take or charge tolls become public highways by force of the right granted, subject to the further right of the licensee to collect tolls for a limited time and at the expiration of said limited period the ways become free public highways. 25 Cal. Jur. 366; *People v. Davidson*, 79 Cal. 166, 21 P. 538. A grant of power to a corporation to engage in the business of constructing private or public buildings, works or improvements does not empower it to exercise the functions of an agent of the government unless said corporation is formed exclusively to perform the particular services described in its charter. The statutes granting the right to incorporate for toll bridge construction purposes and regulating the operation thereof, as provided by division 1, pt. 4, tit. 6, Civil Code, and other parts of the Civil as well as the Political Code, cannot be given any other meaning than that a corporation, in order to be entitled to construct and maintain a toll bridge in its own right, must be formed under the statutes enacted for that specific purpose.

Section 528, Civil Code, as it stood at the time and for many years prior to the time petitioning corporation made its application for a license or franchise to build and operate a toll bridge across Carquinez Straits or instituted this proceeding to enforce its alleged right, provided as follows:

"No corporation must construct, or take tolls on a bridge, ferry, wharf, chute, or pier until authority is granted therefor by the supervisors, or other governing body having authority in that behalf."

Section 529, Civil Code, then provided that "every such corporation ceases to be a body corporate." (Certain acts which, if not performed as provided therein, automatically worked a defeasance then follow.) The lan-

guage of the section, as above set out, was changed by the Legislature of 1927 to read:

"Every such corporation which has heretofore or may hereafter be incorporated may be dissolved." St. 1927, p. 1200.

Subdivisions follow providing for the dissolution of the corporation for failure to comply with the statute. The causes which, it would appear, automatically worked forfeitures of corporate existence as the law stood before the 1927 amendment were failure to obtain from the board of supervisors or other governing body authority to construct and operate a toll bridge within a fixed period following the filing of its articles of incorporation; failure to commence the construction of the bridge within a stated period thereafter and to actually expend thereon at least ten per cent. of the capital stock of the corporation; failure to complete said bridge within a fixed period; and, in case of destruction of said bridge, failure to reconstruct it within a fixed term.

Section 530, Civil Code, requires the president and secretary of said toll bridge corporation to annually under oath report to the board of supervisors the cost of constructing and providing all necessary appendages and appurtenances for the use of said bridge; the amount of all moneys expended thereon since its construction for repairs and incidental purposes; the amount of its capital stock, amounts paid in and actually expended; the amount received annually for tolls and from all other sources, stating each separately; the amount of dividends made and the indebtedness of the corporation, specifying for what it was incurred and such other facts and particulars respecting the business of the corporation as the board of supervisors may require. This report the president and secretary were required to cause to be published for four weeks in the daily newspaper published nearest the bridge if required by order of the board of supervisors. A failure to make such reports subjected the corporation to a penalty of \$200 and for every week permitted to elapse after such failure an additional \$50 payable in each case to the county from which the authority of the corporation was derived.

It is very convincing from the foregoing provisions of the statute that the authority to construct and operate a toll bridge is to be granted only to such corporations as are formed for the exclusive purpose of constructing and maintaining a particular designated toll bridge, and this right is not conferred upon corporations not specifically formed to execute the trust which the government delegates to its agents. The regulations and penalties provided by law for the control and supervision of said corporations are not at all applicable to the management, direction or control of the ordinary corporation formed

for private profit. In fact, the application of the statute providing for the creation of toll bridge and toll road corporations to corporations organized for general business purposes might prove ruinous to the stockholders of the latter class of corporations should said latter class undertake to build and operate a toll bridge in connection with other granted corporate powers conferred upon it by its charter. A failure to comply with any one of the toll road provisions would work a dissolution of the corporation to continue as a corporation for every purpose. Further, it is the clear intent of the statute that the revenue derived from the operation of toll bridges should not become mixed, intermixed or confused with funds derived from private sources of income. To this end toll bridge corporations must be kept separate and apart from all other corporations.

[4] The strictness of accountability to which a toll bridge corporation is held to the board of supervisors of the county authorized to grant the license or franchise, and the complete supervision which it exercises with respect to its business as provided by section 530, Civil Code, demonstrates the incompatibility and inapplicability of the law providing for the creation of a quasi public corporation with the law providing for the formation of the usual corporation created for profit only. Section 529, supra, provides that "every *such* corporation ceases to be a body corporate, * * *" meaning by the use of the word *such* the kind of corporation permitted to be created by the preceding section, which is a toll bridge, ferry, wharf, chute, or pier corporation. No other kind of a corporation than those named in the above-cited section may exercise the powers granted by said section. If by the language used a thing is limited to be done in a particular form or manner, it includes a negative that it shall not be done otherwise. Lewis' Sutherland on Statutory Construction (2d Ed.) vol. 1, § 249; *Martello v. Superior Court* (Cal. App.) 254 P. 658.

Coming to a brief consideration of "Public Ferries and Toll Bridges," as that subject appears under part 3, tit. 6, c. 4, art. 1, Political Code, it is found that the granting of rights, fixing the amount of license tax to be paid, rate of tolls that may be collected, and term of operation are matters in the exclusive control of the board of supervisors. In addition, every owner of a toll bridge must annually report to the board of supervisors from which the license is obtained the actual cost of its construction; repairs made during each preceding year; expense of labor and hire, and other costs necessarily incurred in the conduct of the business; the amount of amortization and taxes actually paid in the conduct of the business; amount of tolls collected; the estimated cash value of the bridge exclusive of the franchise. The various provisions of the Political Code are repugnant to the

theory that a corporation existing for general business purposes merely is entitled to demand a license to construct and operate a toll bridge in connection with its other business. Every corporation making application for a franchise must attach to and file with its application a copy of its articles of incorporation certified by the secretary of state or the county clerk where filed. Pol. Code, § 2871. The reason therefor is to show that it is such a corporation as is entitled to a franchise. If it is not, it becomes the duty of the board of supervisors to deny its application.

[5] Petitioner herein has been incorporated under the general laws since August 25, 1924, with its principal place of business in the city and county of San Francisco. It did not make application for the franchise demanded herein until long after the statutory limit fixed by section 529, Civil Code, had gone by. It makes no pretense that it was organized for the exclusive purpose of constructing and operating a toll bridge across Carquinez Straits or constructing such a bridge at any named or described locality. Its subscribers of stock were associated together "for the purpose of incorporating a *private* corporation under the laws of the state of California." Petitioner's corporate powers, as set forth in its articles of incorporation, are numerous and various. In a summary of said powers petitioner has reproduced the only language to be found in its articles of incorporation which may be said to relate in any way to its right to deal in or with franchises. We quote from petitioner's brief:

"To engage in and carry on a general business for profit in constructing many structures, such as roads, bridges, wharves, piers, railroads, water systems, reclamation and irrigation works, dams, reservoirs, sea walls, electric systems, telegraph and telephone lines, factories and buildings and structures of every nature and description. To acquire, hold, enjoy and operate under franchises and rights of every description which can be acquired by grant from public authorities. To collect tolls for and charges from such franchises, structures, etc. (excepting only those permitted to be operated only by corporations formed for a *specific purpose*, such as railroads, wagon roads, telegraph lines, banks, etc.). [Italics supplied.] To deal in and operate various types of realty, mines, agricultural lands, etc. To deal in patents and secret processes. To deal in personal property. To enter into contracts of every nature with governmental agencies * * * to effect the general purposes thereof."

It will be noted that no reference is made of any intention on the part of the corporation to construct and maintain a toll bridge over the Carquinez Straits. The language which refers at all to the collection of tolls as charges arising from franchise rights is expressed in the most general terms. By its language it expressly excepts from its powers wagon roads and those corporations formed for specific purposes, in which class toll bridge

es are unquestionably included. The power authorizing said corporation to build and construct public buildings and public improvements and engage in the business described in its articles of incorporation, did not confer upon it the right to construct and operate a toll bridge across Carquinez Straits.

[6] Our views upon this point are further fortified by the fact that section 529, Civil Code, provided prior to and at the time this proceeding was commenced that if within six months from filing its articles of incorporation the applying corporation does not obtain *such* authority from the board of supervisors (the right to construct and operate the toll bridge) it "ceases to be a body corporate." By the amendment of 1927 the time within which said authority must be obtained was extended to one year. By the same amendment, as above pointed out, the mandatory language was stricken out and the words *such* corporation "may be dissolved" substituted in its place. Under the law, as it stood until 1927, no corporation organized to engage in any kind of business for profit or for any purpose whatever, including the exercise of toll privileges, was eligible to receive or demand a franchise for the operation of a toll bridge. By the amendment of 1927 *such* corporation may be dissolved if it fails to comply with any of the enumerated duties set out under a specific title of the Code providing for the organization and regulation of corporations formed for a specific purpose. No such hazard as above pointed out was intended to menace the corporate existence of a long-existing corporation formed for general business purposes or to capriciously deny it a privilege obtainable by corporations subsequently organized. A construction that leads to an absurd result is to be avoided. Therefore, we must conclude that the statutes relate to corporations that are formed for a special purpose. The time limit and forfeiture provisions in such cases are reasonable and workable; in other cases they are not.

[7, 8] No question of the dissolution of the corporation is presented by this proceeding, which may be done only by a quo warranto proceeding, as argued by petitioner corporation. The sole question we decide in that respect is that petitioner in its corporate form is not authorized to exercise the privileges it seeks to enforce by this proceeding. The board of supervisors upon an inspection of its articles of incorporation doubtless concluded that it did not have jurisdiction to adopt the ordinance requested nor to do the idle thing of submitting to initiative vote an ordinance which, if adopted, conferred no right upon petitioner. That which cannot be done by the board of supervisors could not be done by initiative. *Galvin v. Board of Supervisors, supra.*

Other questions of considerable importance, such as whether a franchise right to construct

and operate a toll bridge over navigable waters is a proper subject for the application of the initiative and referendum provisions of the state Constitution and Political Code, and the alleged insufficiency of description of the Solano county terminus, are rendered moot by the view we take of the law governing the corporate rights of petitioner in the premises.

The writ is discharged.

We concur: WASTE, C. J.; RICHARDS, J.; SHENK, J.; CURTIS, J.; PRESTON, J.

202 Cal. 501

KIRK v. CULLEY. (L. A. 10025.)

Supreme Court of California. Nov. 30, 1927.

1. Attorney and client $\S$ 76(1)—Attorney may be discharged at any time unless he has vested interest in subject-matter of litigation.

Client may at any time discharge attorney unless attorney has vested interest in subject-matter of litigation, and this is true both under law of agency and on grounds of public policy.

2. Attorney and client $\S$ 134(2)—Contract for contingent fee does not prevent client from discharging attorney at any time.

Client may at any time discharge his attorney, although there exists contract for contingent fee.

3. Pleading $\S$ 380—Issues made by pleadings must be followed unless new issues are tried by consent.

Issues made by pleadings must be followed unless, by consent, new issues are actually introduced, tried, and determined.

4. Attorney and client $\S$ 165—Proof of contract for contingent fee, wrongful discharge, and happening of contingency held not allowable under plea of performance of specific contract at fixed price.

Where specific contract of employment calling for legal services at fixed price and fully performed is pleaded in attorney's action for legal services, proof of contract for contingent fee, wrongful discharge, and happening of contingency substituted an entirely new issue for one pleaded and cannot be allowed without prejudicing defendant's rights.

5. Contracts $\S$ 346(1)—Under allegation of full performance, recovery on proof of excuse for nonperformance cannot be had.

Recovery on proof of excuse for nonperformance cannot be had on allegation of full performance.

6. Attorney and client $\S$ 134(1)—Attorney may sue for damages on wrongful discharge under partially performed contract, and full contract price may sometimes be measure of damages.

Attorney on his wrongful discharge under partially performed contract may sue for damages, and in some cases full contract price may be allowed as measure of such damages.

7. Action $\S$ 65—Attorney suing for legal services cannot recover on cause of action arising after entry of suit, and finding of facts occurring after instituting suit is without substance.

In action by attorney for legal services performed in criminal prosecution, which services were dispensed with before charges were dismissed, finding that indictments were dismissed after institution of suit for services and before trial thereof held without substance, since plaintiff's cause of action must have arisen before filing of complaint, and no recovery can be had on cause of action arising after entry of suit and developed by evidence during trial.

8. Attorney and client $\S$ 165—Recovery for legal services under count in special assumpsit on contract fully performed held unwarranted under evidence showing attorney was discharged before performance and that contingency on which fee was based occurred after filing of suit.

In action by attorney for legal services in criminal prosecution, recovery on count in special assumpsit on contract of employment alleging full performance was unwarranted under evidence showing services were dispensed with before indictments were dismissed, and that dismissal of indictments on which fee was contingent occurred after filing of suit.

9. Appeal and error $\S$ 1122(2), 1175(2), 1176(2)—Supreme Court and District Court of Appeal may make findings contrary to trial court findings and enter or direct entry of proper judgment, where jury trial does not exist as matter of right or is waived (Const. art. 6, $\S$ 4 $\frac{3}{4}$; Code Civ. Proc. $\S$ 956a).

Under Const. art. 6, $\S$ 4 $\frac{3}{4}$, and Code Civ. Proc. $\S$ 956a, Supreme Court and District Court of Appeal are authorized to make findings of fact contrary to or in addition to those made by trial court in cases where jury trial does not exist as matter of right, or where jury has been waived, and may take additional evidence and enter proper judgment or direct that it be done by trial court.

10. Appeal and error $\S$ 1122(2), 1176(2)—Supreme Court held authorized to direct judgment on additional findings of reasonable value of legal services, where trial court's findings on contract were not sustained (Const. art. 6, $\S$ 4 $\frac{3}{4}$; Code Civ. Proc. $\S$ 956a).

In action by attorney for legal services in criminal prosecution, where no findings of fact were made by trial court as to reasonable value of legal services rendered, and findings based on performance of alleged contract were not sustained by evidence, Supreme Court, under Const. art. 6, $\S$ 4 $\frac{3}{4}$, Code Civ. Proc. $\S$ 956a, was authorized to make additional findings of fact as to value of services and direct proper judgment under record showing services rendered by attorney prior to wrongful discharge.

11. Attorney and client $\S$ 166(3)—Trial judge may appraise legal services sued for independent of testimony as to value.

Trial judge in court of record, who must himself be attorney at law, has power independent of testimony as to value to appraise

legal services shown by record to have been rendered.

12. Evidence ☞571(7)—Expert testimony as to value of legal services sued for is not conclusive on jury or court, which may fix amount independent of testimony.

In action by attorney for legal services, expert testimony as to value of services, though admissible, is not conclusive either on jury or trial court, which has power to fix amount to be allowed for attorney's fees independent of expert testimony.

13. Appeal and error ☞1013—Appellate courts may appraise value of legal services sued for.

In action by attorney for legal services, appellate courts as well as trial court may make appraisal and adjudication of value of services rendered.

14. Appeal and error ☞1122(2)—Judgment for full amount claimed for legal services applied to count on contract or quantum meruit and could be sustained on latter count by Supreme Court, though findings failed to support former count (Const. art. 6, § 4¾; Code Civ. Proc. § 956a).

In action by attorney for legal services based on count in special assumpsit on contract of employment alleging full performance and on count in quantum meruit on same transaction for same amount, judgment for attorney for full amount claimed could apply to either count, and could be applied by Supreme Court under modified findings of fact authorized by Const. art. 6, § 4¾, and Code Civ. Proc. § 956a, on count in quantum meruit, without reversing case where only findings of trial court on count in assumpsit were not sustained by evidence.

McLucas, Justice pro tem., dissenting.

In Bank.

Appeal from Superior Court, Los Angeles County; John L. Fleming, Judge.

Action by Wally A. Kirk, executrix of the estate of E. E. Kirk, deceased, against B. F. Culley. Judgment for plaintiff, and defendant appeals. Modified and affirmed. Super-seding opinion in 257 P. 461.

Lucien Gray, of Los Angeles, for appellant.
William A. Schreider, of Los Angeles, and
E. E. Kirk, of Burbank, for respondent.

PRESTON, J. This is a suit by plaintiff below, respondent's testate, an attorney at law, against the defendant below for a balance of \$1,000 claimed as an attorney's fee. The complaint is in two counts, the first in special assumpsit on the contract of employment, alleging full performance thereunder, with the unpaid balance above stated due. The second count is in quantum meruit on the same transaction and for the same amount. The answer is a general denial with specific allegations admitting employment and certain services, but claiming full payment

thereof by the sum of \$350 admittedly received by the plaintiff.

The contract found by the court to exist between the parties is set forth in an unexecuted writing prepared by the attorney, which reads as follows:

"Los Angeles, Cal., September 12, 1922.

"Messrs. B. F. Culley and Ovid D. Bohlen, Black Building, Los Angeles, California—Gentlemen: Re People v. B. V. Culley and Ovid D. Bohlen (re Indictments Nos. 18311 and 18491).

"In order to reduce our understanding regarding services and fees in the above-entitled matters, the substance of our agreement is hereby set down in writing.

"In consideration of my services as the attorney for each of you, my fees are \$350 each, to include preparation for trial now set for November 1, 1922. These preliminary fees have been paid in full by each of you.

"For the trial of the above-mentioned cases my charges are to be \$250 in each case, from each of you, payable either during or before the termination of each of said trials or of the one trial should the cases be consolidated.

"Should these actions be dismissed against you at any time, before the commencement of the trial, during the trial, or prior to the termination of the trial, or in the event of a verdict of acquittal, then it is agreed that my fee is to be a total of \$1,000 from each of you. This fee will eliminate all other fees excepting the ones already paid. It is understood and agreed that each of you will, on or before November 1, 1922, procure cashiers' checks, each payable to yourselves and indorsed in blank, and deliver the same to William A. Schreider, attorney at law, in escrow with him, to be delivered to me unconditionally on the date said charges may be dismissed against each of you in any of the manners above set forth.

"E. E. Kirk.

"E. E. Kirk.

"I fully understand and agree to all of the terms of the above contract. Dated September 12, 1922.

"[not signed]

"B. F. Culley.

"I fully understand and agree to all of the terms of the above contract. Dated September 12, 1922.

"[not signed]

"Ovid D. Bohlen."

The gist of the findings in this connection is as follows:

"That plaintiff had fully performed the contract on his part to be performed as attorney for defendant until his said discharge and was at all times ready, willing, and able to continue and perform his contract and had it not been for said wrongful discharge, plaintiff could have obtained the dismissal of said defendant in said criminal actions without trial; that plaintiff was prevented from fully performing his contract in obtaining the discharge of the defendant in the criminal cases of said Culley and Bohlen by the acts of said Culley."

At the conclusion of plaintiff's case, defendant moved for a nonsuit upon the ground of

material variance between the evidence adduced and the cause of action pleaded. This motion was denied. Some evidence was later introduced by the defendant, but nothing appeared to change the facts upon which the claim of variance was predicated. Judgment passed for plaintiff for the full amount claimed, and defendant has appealed under the alternative method.

[1-3] The claim that the evidence received and findings made thereon will not support the cause of action made by the pleadings must be sustained. A client may at any time discharge his attorney, unless the attorney has a vested interest in the subject-matter of the litigation. This is true not alone under the law of agency, but is supported also by a well understood rule of public policy. The existence of a contract for a contingent fee does not change the rule. *Todd v. Superior Court*, 181 Cal. 406, 413, 184 P. 684, 7 A. L. R. 938; *Gage v. Atwater*, 136 Cal. 170, 174, 68 P. 581; *Ayres v. Lipschutz*, 68 Cal. App. 134, 228 P. 720, rehearing denied by this court. The issues made by the pleadings must be respected and followed unless by consent new issues are actually introduced, tried and determined. *Com'rs v. Barnard*, 98 Cal. 199, 202, 32 P. 982; *Rudel v. Los Angeles*, 118 Cal. 281, 286, 50 P. 400; *Simmons v. Simmons*, 166 Cal. 438, 441, 137 P. 20; *Crescent Lumber Co. v. Larson*, 166 Cal. 168, 135 P. 502; *Frascona v. Los Angeles*, 48 Cal. App. 135, 138, 191 P. 968; *Baar v. Smith* (Cal. Sup.) 255 P. 827.

[4, 5] To plead a specific contract of employment calling for legal services at a fixed price and fully performed, then undertake to sustain it by proof of a contract for a contingent fee, a wrongful discharge of the attorney, and the later happening of the contingency, is to substitute an entirely new issue for the one pleaded, and such action, if allowed, would in all probability work an injustice to the defendant by prejudicing his right to defend against the extraneous issue. The rule is well understood that a recovery on proof of excuse for nonperformance cannot be had on an allegation of full performance. *Daley v. Russ*, 86 Cal. 114, 117, 24 P. 867; *Peck v. Steinberg*, 163 Cal. 127, 133, 124 P. 834; *Boardman v. Christin*, 65 Cal. App. 413, 418, 419, 224 P. 97; *Estate of Warner*, 158 Cal. 441, 445, 111 P. 352; *Krotzer v. Clark*, 178 Cal. 736, 739, 174 P. 657; *Roche v. Baldwin*, 135 Cal. 522, 65 P. 459, 67 P. 903.

In *Owen v. Meade*, 104 Cal. 179, 181, 182, 37 P. 923, 924, the court had before it practically the identical state of facts here involved, and in disposing of the question now before us said:

"The contract alleged is that of an unconditional promise upon the part of defendant to pay to the assignor of plaintiff the sum of \$1,000 for his services as an attorney in the prosecution of the action referred to in the complaint, while the evidence which the court held was relevant and sufficient, if believed, to war-

rant the jury in finding that the defendant made the alleged contract, was to the effect that the promise of defendant to pay was not unconditional, but contingent. There is a wide and essential difference between the two contracts, and proof of one will not support a finding that the other was made. The plaintiff's allegation of an absolute promise was not sustained by proof of the contingent promise, and evidence in relation to such contingent promise was not relevant to the issues made by the pleadings."

[6] It is true that an attorney upon his wrongful discharge under a partially performed contract may sue for damages and in some instances the full contract price may be allowed as a measure of such damages (*Webb v. Trescony*, 76 Cal. 621, 18 P. 796), but in the case at bar plaintiff below did not elect to avail himself of this right of action.

[7, 8] There is no substance available to respondent in the finding that the indictments were actually dismissed after institution of the present suit and before a trial thereof was had. A plaintiff's cause of action must have arisen before the filing of the complaint. *Landis v. Morrissey*, 69 Cal. 83, 86, 87, 10 P. 258; *Lewis v. Fox*, 122 Cal. 244, 252, 54 P. 823; *Morse v. Steele*, 132 Cal. 456, 458, 64 P. 690; *Cuneo v. Davis*, 36 Cal. App. 351, 171 P. 1079; *Boardman v. Christin*, supra. Plaintiff may not recover on a cause of action arising after entry of suit and developed by the evidence only during the trial. *Johnson v. Moss*, 45 Cal. 515, 518; *Mondran v. Goux*, 51 Cal. 151, 152; *Owen v. Meade*, supra; *Kredo v. Phelps*, 145 Cal. 526, 529, 78 P. 1044. The judgment as applied to the first count was therefore unwarranted and may be disregarded.

[9] Addressing ourselves to the second count of the complaint, it seems appropriate at this time to make the first exercise of the power conferred upon this court by the recent amendment to our Constitution and the statutory enactment designed to put such power so conferred into practical operation. A new section, numbered 4¾, was added to article 6 on November 2, 1926, which reads as follows:

"In all cases where trial by jury is not a matter of right or where trial by jury has been waived, the Legislature may grant to any court of appellate jurisdiction the power, in its discretion, to make findings of fact contrary to, or in addition to, those made by the trial court. The Legislature may provide that such findings may be based on the evidence adduced before the trial court, either with or without the taking of additional evidence by the court of appellate jurisdiction. The Legislature may also grant to any court of appellate jurisdiction the power, in its discretion, for the purpose of making such findings or for any other purpose in the interest of justice, to take additional evidence of or concerning facts occurring at any time prior to the decision of the appeal, and to give or direct the entry of any judgment or order and to make such further or other order as the case may require."

Later and on July 29, 1927, there became effective section 956a of the Code of Civil Procedure, as follows:

"In all cases where trial by jury is not a matter of right or where trial by jury has been waived, the Supreme Court or a District Court of Appeal may make findings of fact contrary to, or in addition to, those made by the trial court. Such findings may be based on the evidence adduced before the trial court either with or without the taking of evidence by the court of appellate jurisdiction, pursuant to such rules as the Supreme Court may prescribe.

"The said courts of appellate jurisdiction may, for the purpose of making such findings or for any other purpose in the interest of justice, take, pursuant to such rules, additional evidence of or concerning facts occurring at any time prior to the decision of the appeal and may give or direct the entry of any judgment or order and make such further or other order as the case may require. This section shall be liberally construed to the end, among others, that wherever possible causes may be finally disposed of by a single appeal and without further proceedings in the trial court, except where the interest of justice requires a new trial."

These provisions are plain and intended to be effective in broadening the powers of this court and the District Court of Appeal in the disposition of appeals in cases where a jury trial does not exist as a matter of right, or where, if the right does exist, it has been waived. We are thereby expressly authorized to "make findings of fact contrary to, or in addition to, those made by the trial court." We may base such findings either upon the evidence heard in the court below or may on our own account, under such rules as we may prescribe, take additional evidence on any fact occurring at any time prior to the disposition of the appeal. Likewise, we may make and enter a proper judgment ourselves or direct that it be done in the trial court.

[10, 11] It will be noted that under the second count of the complaint in this action a proper cause of action in quantum meruit is set forth. It is also apparent that no findings of fact thereunder were made by the trial court as to the reasonable value of the legal services rendered by the plaintiff below to defendant. With a finding upon this subject the cause is in proper condition for this court to make or direct the judgment that shall be entered and the cause thereby finally determined. It is unnecessary to take further evidence, and it is, therefore, unnecessary to await the effective date of the rules upon this subject promulgated by this court. The record is complete as to the services rendered by the attorney, plaintiff below, prior to his wrongful discharge by the defendant. It has many times been held and is a sound principle of law that a trial judge in a court of record, who must himself be an attorney at law, has the power, independent of testimony as to value, to appraise the legal services shown by the record in the cause before

him to have been rendered. This is the necessary deduction from many cases, among which are the following:

Estate of Dorland, 63 Cal. 281, which involved the determination of the value of services rendered by an attorney in the settlement of the estate. Witnesses testified that the services were worth the amount paid, but the court below thought otherwise and reduced the credits from \$5,075 to \$1,000. In upholding the action of the court below, this court said:

"The court below was not bound by the opinions of the professional witnesses as to the value of the services rendered by the attorney for the administratrix, and as to the proper amount to be allowed therefor. The court was authorized to compare its own judgment as to such value with the opinions of the witnesses, and make such allowance as should be just. *Head v. Hargrave*, 105 U. S. 45 [26 L. Ed. 1028]; *Anthony v. Stinson*, 4 Kan. 211."

Estate of Straus, 144 Cal. 553, 557, 558, 77 P. 1122, 1123, where the court said:

"As to attorney's fees: The court * * * had before it sufficient data from which to determine what would in all probability be a reasonable compensation and the amount to be retained by the executor sufficient to meet its payment. It was not necessary that any evidence of a professional nature should have been introduced upon this subject. All the proceedings in the estate and all matters in which the executor could have enlisted or required the services of an attorney were before the court, and from these the court of its own knowledge and experience could determine what would be a reasonable fee. *Estate of Dorland*, 63 Cal. 281; *Freese v. Pennie*, 110 Cal. 469 (42 P. 978)."

[12] While expert testimony is clearly admissible, it is not conclusive either upon the jury or the trial court, which has "the unquestioned power to fix the amount to be allowed for attorneys' fees, without, and independent of, expert testimony." *Estate of Dorland*, supra; *Spencer v. Collins*, 156 Cal. 298, 307, 104 P. 320, 20 Ann. Cas. 49; *Zimmer v. Kilborn*, 165 Cal. 523, 525, 132 P. 1026, Ann. Cas. 1914D, 368; *Estate of Duffill*, 188 Cal. 536, 552, 206 P. 42. See, also, *Reid v. Warren Imp. Co.*, 17 Cal. App. 746, 748, 121 P. 694; and *Kendrick v. Gould*, 51 Cal. App. 712, 718, 197 P. 681.

[13] If the trial court may make such an appraisal and adjudication of value of such services, it must be presumed that appellate courts possess like power and ability so to do. In this cause the contract found to exist between the parties throws additional light on the value of such legal services. The contract provided that in the event of trial of the cause in the ordinary way, without regard to the result thereof, the compensation of the attorney was to be the additional sum of \$250 in each case, or \$500 as a total in both cases.

The court, after a consideration of the evi-

dence, hereby makes additional and supplemental findings of fact as follows: That the reasonable value of the legal services performed by plaintiff below for the defendant between June 1, 1922, and November 1, 1922, was and is the sum of \$850, and that the sum of \$350 has been paid thereon and the balance due and unpaid on account of such services was and is the sum of \$500.

[14] The judgment is general in its terms and could apply to either count. It may stand with proper modification when supported by the finding here made as to the issues under the second count, and a reversal becomes unnecessary.

It is therefore ordered that the judgment be modified so as to read as follows:

"It is ordered and adjudged that plaintiff have and recover of and from the defendant the sum of \$500, with interest thereon at the rate of 7 per cent. from November 1, 1922, together with his costs and disbursements expended in this action, which are hereby fixed at \$13.10."

As so modified the judgment is affirmed, the appellant to recover his costs on appeal.

We concur: RICHARDS, J.; SHENK, J.; CURTIS, J.; SEAWELL, J.

McLUCAS, Justice pro tem., dissenting.

202 Cal. 511

KIRK v. BOHLEN. (L. A. 10026.)

Supreme Court of California. Nov. 30, 1927.

1. Appeal and error $\hookrightarrow$ 1175(5)—Supreme court could render judgment in quantum meruit for attorney's services, where evidence failed to support trial court's judgment on contract (Const. art. 6, § 4¾; Code Civ. Proc. § 956a).

Where evidence failed to support cause of action by attorney for legal services on count in special assumpsit on contract, but sustained count in quantum meruit on same transaction for same amount, and no findings of fact as to reasonable value of such services were made by trial court under second count, Supreme Court, under Const. art. 6, § 4¾, and Code Civ. Proc. § 956a, was authorized to make findings of fact on count in quantum meruit and to enter judgment for reasonable value of services rendered prior to wrongful discharge.

2. Appeal and error $\hookrightarrow$ 1122(2)—Judgment for legal services held applicable to counts on contract or quantum meruit, and could stand under modified findings by Supreme Court (Const. art. 6, § 4¾; Code Civ. Proc. § 956a).

In action by attorney for legal services based on count in special assumpsit on contract and on count in quantum meruit for same amount, judgment for attorney for full amount claimed could apply to either count, and could stand under modified findings of fact by Su-

preme Court, authorized by Const. art. 6, § 4¾, and Code Civ. Proc. § 956a, as to reasonable value of services rendered, though trial court's finding based on contract was unsupported by evidence.

McLucas, Justice pro tem., dissenting.

In Bank.

Appeal from Superior Court, Los Angeles County; John L. Fleming, Judge.

Action by Wally A. Kirk, executrix of the estate of E. E. Kirk, against Ovid L. Bohlen, sued as Ovid D. Bohlen. Judgment for plaintiff, and defendant appeals. Affirmed.

Superseding opinion 257 P. 463.

Ray W. Bruce, of Los Angeles, for appellant.

William A. Schreider, of Los Angeles, for respondent.

PRESTON, J. Plaintiff below, respondent's testate, an attorney at law, was employed by defendant below and one B. F. Culley to perform legal services for said parties in connection with certain criminal charges filed against them. At the time of employment defendant and said Culley each paid plaintiff a fee of \$350, but later, and prior to dismissal of the charges against them, they dispensed with his services, whereupon he brought this action to recover from defendant an alleged balance of \$1,000 due him under his contract of employment, and brought a like action against said Culley for recovery of the same sum. The pleadings in the two actions are practically identical, and in the court below said actions were consolidated and heard on the same evidence. Kirk v. Culley (Cal. Sup.) 261 P. 994.

At the conclusion of plaintiff's case defendant moved for a nonsuit upon the ground of material variance between the evidence adduced and the cause of action pleaded. This motion was denied. Some evidence was later introduced by defendant, but nothing appeared to change the facts upon which the claim of variance was predicated. Judgment was rendered in favor of plaintiff in both cases, and defendants appealed under the alternative method.

[1] Upon the same grounds and for all the reasons set forth in said case of Kirk v. Culley, supra, the court in this cause holds that the evidence received and findings made thereon do not support the cause of action made by count 1 of the complaint in special assumpsit on the contract of employment, but as to the second count in quantum meruit on the same transaction and for the same amount a proper cause of action is set forth. The record is complete as to the services rendered by the attorney, plaintiff below, prior to his wrongful discharge by defendant, but no findings of fact as to the reason-

able value of such services were made by the trial court under said second count. Findings upon this subject will place the cause in proper condition for this court to make or direct the judgment to be entered therein. After a consideration of the evidence and by reason of the authority conferred upon it by section 4%, art. 6 of the Constitution, and section 956a of the Code of Civil Procedure, this court therefore makes the following additional and supplemental findings of fact:

That the reasonable value of the legal services performed by plaintiff below for defendant between June 1, 1922, and November 1, 1922, was and is the sum of \$850, and that the sum of \$350 has been paid thereon, and the balance due and unpaid on account of such services was and is the sum of \$500.

[2] The judgment is general in its terms and could apply to either count. It may stand with proper modification when supported by the finding here made as to the issues under the second count, and a reversal becomes unnecessary.

It is therefore ordered that the judgment be modified so as to read as follows:

"It is ordered and adjudged that plaintiff have and recover of and from the defendant the sum of \$500, with interest thereon at the rate of 7 per cent. from November 1, 1922, together with his costs and disbursements expended in this action, which are hereby fixed at \$13.10."

As so modified the judgment is affirmed, the appellant to recover his costs on appeal.

We concur: CURTIS, J.; RICHARDS, J.; SHENK, J.; SEAWELL, J.

McLUCAS, Justice pro tem., dissenting.

202 Cal. 598

NELSON v. NELSON. (L. A. 8877.)

Supreme Court of California. Dec. 13, 1927.

1. Limitation of actions $\S$ 148(4)—"Acknowledgment of debt," sufficient to toll limitations statute, must be unqualified admission of debt, which party is liable for and willing to pay (Code Civ. Proc. § 360).

Acknowledgment of debt, in contemplation of Code Civ. Proc. § 360, relating to acknowledgments or promises sufficient to take case out of operation of statute of limitations, must be direct, distinct, unqualified, and unconditional admission of debt for which party is liable and willing to pay.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Acknowledgment.—Acknowledgment.]

2. Limitation of actions $\S$ 148(4)—Letter referring to assistance rendered writer by plaintiff and expressing intention to repay plaintiff, not admitting debt, held insufficient to toll limitation statute (Code Civ. Proc. § 360).

Letter written by deceased's brother to plaintiff, referring to certain assistance rendered by plaintiff, and expressing an intention on his part sooner or later that plaintiff should be repaid, containing no admission or statement as to nature of assistance rendered, and whether or not it resulted in any obligation of financial nature due from deceased, held insufficient acknowledgment of debt, under Code Civ. Proc. § 360, to take case out of operation of statute of limitations.

3. Limitation of actions $\S$ 196(4)—Where purported written acknowledgment of debt contains no mention of indebtedness, parol evidence is inadmissible to alter terms of acknowledgment or vary its meaning (Code Civ. Proc. § 360).

When purported written acknowledgment of indebtedness, which it is claimed tolls statute of limitations under Code Civ. Proc. § 360, contains no mention of any indebtedness whatever, parol evidence may not be introduced to alter terms of acknowledgment or vary its meaning, and thereby import into it something not otherwise contained therein.

4. Executors and administrators $\S$ 221(4)—To enforce stale claim against decedent's estate, evidence as to acknowledgment tolling limitations must be clear and convincing.

Enforcement of stale claims against estates of deceased persons is not looked on with favor by courts, and, in order for plaintiff in such proceeding to succeed, his case should be most clear and convincing.

5. Limitation of actions $\S$ 148(4)—Plaintiff's claim for \$8,000 for services rendered brother over 50 years before brother's death held not sufficiently established by pleadings setting forth deceased's letter to plaintiff.

Plaintiff's claim against deceased brother's estate for \$8,000 for services rendered brother over 50 years before his death held not sufficiently established by pleadings setting forth letter by deceased referring to assistance rendered him by plaintiff, and expressing intention to repay plaintiff, and demurrer was properly sustained.

Appeal from Superior Court, San Bernardino County; Benjamin F. Warmer, Judge.

Action for services by Andrew J. Nelson against Louise M. Nelson, as the executrix of the last will and testament of, and the estate of, Arthur P. Nelson, deceased. From a judgment for defendant, plaintiff appeals. Affirmed.

A. S. Maloney and John L. Campbell, both of San Bernardino, for appellant.

McNabb & McCloskey, of San Bernardino, for respondent.

PER CURIAM. Action against an estate to recover for services claimed to have been rendered by plaintiff at the special instance and request of the deceased. There were two demands set up in the fourth amended complaint, under which the proceedings involved herein were had. One was for services rendered between the years 1866 and 1876, and the other for services rendered prior to the year 1894. For the purpose of avoiding the statute of limitations, plaintiff set forth in his said pleading a letter, dated February 20, 1920, alleged to have been written from San Diego, Cal., by deceased to plaintiff, who was his brother, which letter contained the following statement:

"Now, Andrew, we have been wondering if there was anything that we had or had not done, or if there was anything that had been written, that was displeasing to you. We sincerely hope not. Surely there was nothing of the kind ever intended, for you and our brother Lafagat, long since passed on, are the only persons that were of any real assistance to us in my struggle, which came on at and after the death of our father, and sooner or later I fully intend that you shall be amply repaid."

The defendant demurred to this fourth amended complaint on a number of grounds, among which was that the causes of action set forth therein were barred by the statute of limitations. The demurrer was sustained, without leave to amend, and judgment was accordingly entered in favor of defendant.

[1, 2] The writing was insufficient to avoid the statute. Section 360 of the Code of Civil Procedure provides:

"No acknowledgment or promise is sufficient evidence of a new or continuing contract, by which to take the case out of the operation of this title, unless the same is contained in some writing, signed by the party to be charged thereby."

The acknowledgment of a debt in contemplation of this statute must be a direct, distinct, unqualified, and unconditional admission of the debt for which the party is liable and willing to pay. *McCormick v. Brown*, 36 Cal. 180, 95 Am. Dec. 170; *Powell v. Petch*, 166 Cal. 329, 331, 136 P. 55; *Clunin v. First Federal Trust Co.*, 189 Cal. 248, 252, 207 P. 1009.

In the letter written by deceased to his brother there is no direct unqualified admission of any debt. He refers to certain "as-

sistance" rendered by the plaintiff and his brother, and expresses an intention on his part sooner or later that plaintiff be repaid. There is no admission or statement as to the nature of the assistance rendered, and whether or not it resulted in any obligation of a financial nature due from the deceased. It is just as reasonable to suppose that this assistance consisted of certain acts of kindness or helpfulness which the brothers had rendered to the deceased during his struggle after their father's death, and which the latter at some time intended to repay.

[3] Appellant contends that, where the acknowledgment is uncertain as to the particular indebtedness to which it refers, parol evidence is admissible to explain this uncertainty, and to identify the indebtedness intended to be acknowledged. We may concede this to be true, but, when the acknowledgment contains no mention of any indebtedness whatever, we know of no authority, and appellant has called our attention to none, which will permit the introduction of parol evidence to alter the terms of the acknowledgment or vary its meaning and thereby import into it something not otherwise contained therein. The amount of the indebtedness claimed by plaintiff was \$8,000, besides interest, a large portion of which it is claimed was for services rendered over 50 years prior to the date of the decedent's death. It hardly seems reasonable or probable that an indebtedness in this amount and of this character should have existed for so long a period of time between these brothers without some more authentic evidence of its authenticity other than the letter of February 20, 1920. It is also inconceivable that the plaintiff, during the lifetime of his brother, should have refrained from making any attempt to collect the money due him, but that immediately upon his brother's demise he takes steps to reduce to judgment his claim of over 50 years' standing.

[4, 5] The enforcement of stale claims against estates of deceased persons is not looked upon with any great degree of favor by the courts, and, in order for the plaintiff in such a proceeding to succeed, his case should be most clear and convincing. No such a case has been made out by the plaintiff's pleadings, and in our opinion the demurrer thereto was properly sustained.

Judgment affirmed.

202 Cal. 478

**STANTON et al. v. SUPERIOR COURT
WITHIN AND FOR LOS ANGELES
COUNTY et al. (L. A. 9795.)**

Supreme Court of California. Nov. 23, 1927.

1. Action $\S$ 48(1)—Where actions arise from same transaction and obligation, there is but one cause of action.

Where two actions were brought and cause of action in each arose out of one and the same transaction and obligation, there was but one cause of action.

2. Action $\S$ 48(1)—Actions based on same cause of action may be consolidated (Code Civ. Proc. $\S$ 1048).

Where cause of action is single, separate actions based thereon are susceptible of consolidation, under Code Civ. Proc. $\S$ 1048.

3. Action $\S$ 59—After consolidation of cases, court should not make separate findings or judgment.

Where two actions based on same cause of action were consolidated, they should have been determined with single set of findings and single judgment.

4. Certiorari $\S$ 64(1)—Where separate findings and judgment appeared in consolidated cases, reviewing court will consider case as though there were single set of findings and single judgment.

Where, after consolidation of cases, court rendered two judgments and made separate findings, reviewing court will consider case as though there were single set of findings and single judgment; lower court's action being at most misprision or inadvertence.

5. Judgment $\S$ 301, 345—Single judgment in consolidated cases may be interfered with only by new trial or appeal and not by amending or vacating judgment (Code Civ. Proc. $\S$ 473, 663, 663a).

Single judgment rendered in consolidated cases held not to be interfered with, except by motion for new trial and appeal; there being no grounds on which to assert court's power to amend judgment to speak truth, nor for proceeding, under Code Civ. Proc. $\S$ 473, or sections 663, 663a, authorizing setting aside of judgment when erroneous conclusions not consistent with findings are shown.

6. Judgment $\S$ 356—Statute, authorizing setting aside of judgment where conclusions are inconsistent with findings, held not to authorize attack on findings of fact (Code Civ. Proc. $\S$ 663, 663a).

Code Civ. Proc. $\S$ 663, 663a, authorizing setting aside of judgment and entry of another where incorrect conclusions are not consistent with findings, do not authorize attack on findings of fact.

7. Certiorari $\S$ 5(1)—Orders and judgments not conforming to rules of procedure held not appealable, as regards right to writ of review (Code Civ. Proc. $\S$ 663a).

Orders and judgments which fail to conform to any of the rules of procedure cannot be

said to be appealable, under Code of Civ. Proc. $\S$ 663a, as regards right to writ of review.

8. Appeal and error $\S$ 82(3)—Orders and judgments vacating judgments and entering others held not "special orders after final judgment," within meaning of statute relative to appeals (Code Civ. Proc. $\S$ 963).

Orders and judgments vacating judgment and entering other and different judgments in lieu thereof held not "special orders made after final judgment," within meaning of Code of Civ. Proc. $\S$ 963, relative to appeals.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Special Order.]

9. Judgment $\S$ 336—Orders and judgments vacating judgments and entering others held void, under rule that litigation must not be piecemeal.

Orders and judgments vacating judgments and entering other and different judgments in lieu thereof held void, under rule that litigation must not be piecemeal, where several orders were made over period of time.

In Bank.

Applications by Fannie Stanton, as executrix of the estate of A. A. Stanton, deceased, and another, for a writ of review to annul orders and judgments of the Superior Court of Los Angeles County, Hugh J. Crawford, Judge. Orders and judgments annulled.

Superseding opinion of District Court of Appeal, 253 P. 973.

A. W. Sorenson and Kemper B. Campbell, both of Los Angeles, for petitioners.

Montgomery, Stick, Moerdyke & Gibson, of Los Angeles, for respondents.

PRESTON, J. In November, 1925, Anna Graziade Alvarado and William P. Alvarado commenced action No. 182980 in respondent superior court against A. A. Stanton, Fannie Stanton, his wife, et al., the complaint alleging their ownership of certain real property theretofore leased to defendant A. A. Stanton for oil-drilling purposes, failure of defendants to perform the conditions of such lease, and its termination. The prayer was in ejectment, seeking recovery of possession of the land by plaintiffs and damages resulting from the withholding thereof by Stanton. The two defendants Stanton answered and also filed a cross-complaint alleging that they were lawfully in possession of and entitled to retain 20 acres of said property under the terms of an executed oral agreement with plaintiffs, which agreement said plaintiffs had failed and refused to perform, thereby damaging cross-complainants in the sum of \$100,000, for which amount they prayed judgment.

In March, 1926, the same plaintiffs commenced action No. 191794 in the same court against the same defendants for the purpose of quieting title to said property. Defendants Stanton filed an answer, pleading as a special defense the pendency of the above-described

prior action, and again asserted a leasehold interest in said 20 acres.

[1] It was subsequently stipulated by the respective counsel and ordered by the trial court that the cross-complaint and answer thereto in the first action should serve as such in both causes and said causes were consolidated and tried together. At the conclusion of the trial, respondent judge made a minute order announcing judgment, which read, in part, as follows:

"Causes are argued and judgment ordered for defendants for \$15,000 and specific performance."

He subsequently signed and had filed in each case separate findings of fact, conclusions of law, and judgment, in case 182980 decreeing that defendant Stanton hold and retain said 20 acres of land; that he be paid \$15,000 as damages; and that plaintiff specifically perform the oral agreement. In case 191794 he found that another suit was pending between the same parties, involving the same cause of action, and decreed that plaintiffs pay to defendant Stanton \$15,000 in damages and that they specifically perform the verbal lease. The cause of action arose out of one and the same transaction and obligation and was, therefore, but one cause of action. *Frost v. Witter*, 132 Cal. 421, 426, 64 P. 705, 84 Am. St. Rep. 53. The conclusions of law and judgments were the same and the findings were substantially identical and each covered all the issues involved in the two actions. The chief and only practical difference is the finding in the second action that another action is pending involving the same issues.

In due time following the entry of the two judgments, to wit, July 1, 1926, plaintiffs in each suit separately gave notice of motion to vacate the judgment and for entry of a new and different judgment, upon the ground that "said judgment is in conflict with the findings of fact made by the court, and is inconsistent with and not supported by the said findings of fact" in the following particulars:

"(1) That said judgment contains a lease set forth therein in full, many of the terms of which are not set forth or provided for in the said findings of fact; (2) that said judgment in setting out said lease in full attempts to make a lease for defendants and cross-complainants by order of court, which is against the rules of equity; (3) that said judgment sets forth a lease in full which has not been found by the court to be the lease to which reference is made in the findings of fact; (4) that said judgment attempts specifically to enforce performance on the part of the plaintiffs and cross-defendants of a lease not referred to and provided for in the findings of fact; (5) that said judgment attempts to compel the specific performance on the part of the plaintiffs and cross-defendants of a lease, the terms of which are set forth in the judgment and have not been found by the court to be the lease referred to and provided for in the findings of fact;

(6) that said judgment attempts to compel specific performance of the said lease set forth in said judgment, the terms, covenants, and conditions of which are not provided for in the findings of fact; (7) that said judgment set forth a restraining order and an injunction against the plaintiffs and cross-defendants, and that there is no provision in said findings of fact for such injunction or restraining order; (8) that said judgment is against law."

Said motions were presented together on July 21, 1926, and granted on July 30, 1926. On the latter date the following minute order was made in case 182980:

"Motion to vacate judgment having been heretofore made and submitted, it is now by the court granted and judgment is ordered, vacated, annulled, and set aside and stricken from the judgment roll."

A minute order was also made in case 191794, which read as follows:

"Motion to vacate judgment having been heretofore made and submitted, it is now by the court hereby granted and judgment is vacated, annulled, and set aside and stricken from the judgment roll and in lieu of judgment so vacated and in lieu of judgment vacated in case No. 182980, it is hereby adjudged and decreed that defendants and cross-complainants have and recover from plaintiffs and cross-defendants \$7,500 (seventy-five hundred dollars) as damages, and total term of lease shall be for 17 years and 4 months."

Thereupon the following formal order, also dated July 30, 1926, was made:

"No. ~~182980~~ 191794. Order Vacating and Setting Aside Judgment Rendered. * * * Now, therefore, it is hereby ordered, * * * that the said motion is hereby granted and said judgment heretofore signed by the court and filed in the above-entitled action * * * be, and the same is hereby vacated, annulled, and set aside and stricken from the judgment roll in said action. * * *

"A similar order in case No. 191794, same title. * * * It is further ordered that in lieu of the said judgments vacated and set aside it is hereby ordered, adjudged, and decreed that the said defendants and cross-complainants do have and recover of and from the said plaintiff and cross-defendant the sum of \$7,500 as damages. It is further ordered * * * that the total term of the said lease herein shall be for 17 years and 4 months. The attorney for said plaintiff is hereby ordered to prepare a judgment in accordance herewith."

It appears that counsel for plaintiffs did not prepare a judgment, but that counsel for petitioner herein prepared two new judgments, one in each case, and two "Orders Directing Entry of New Judgment," and presented them ex parte to respondent judge, who thereupon, on the 8th day of September, 1926, signed both of said orders and both of said judgments and the judgments were thereafter entered. The wording of both orders directing entry of new judgment is as follows:

"Whereas, a judgment in the above-entitled action was duly and regularly entered on the 18th day of July, 1926, * * * and whereas, on or about the 30th day of July, 1926, the court duly and regularly made its order vacating and setting aside said judgment on motion of the said plaintiffs, which motion was duly heard and filed in said action, and whereas, by said motion the plaintiffs move for an order directing the entry of another judgment in addition to the motion to vacate said judgment, and the court being duly advised, and after having considered the same, does hereby grant said motion for an order directing the entry of another judgment, and in accordance herewith, it is hereby ordered, adjudged, and decreed that there be entered in said action a judgment, a copy of which is hereto attached."

The new judgment in action 182980 decreed that plaintiffs' title be quieted to all of the property, except 20 acres constituting the verbal leasehold interest of Stanton and that plaintiffs specifically perform the verbal agreement. The new judgment in action 191794 decreed that plaintiffs specifically perform the verbal agreement and that defendants and cross-complainants Stanton have and recover from plaintiffs and cross-defendants the sum of \$7,500 as damages, less the amount of a counterclaim for \$850, "being a counterclaim hereby allowed in favor of said plaintiffs and cross-defendants against defendants and cross-complainants and each of them, to wit, the sum of \$6,650." The findings of fact and conclusions of law in each case were allowed to stand as originally made.

Upon death of defendant A. A. Stanton, his widow, Fannie Stanton, as executrix of his estate, was substituted in his stead, and she, individually and as such representative, instituted these proceedings, which were by stipulation of the parties consolidated herein, seeking to have reviewed and annulled the said orders and judgments above set forth.

The differences between the original judgments and the two purported new judgments are substantially as follows: In the original judgments, the term of lease, the specific performance of which is decreed, is 16 years, 2 months, and 18 days, to wit, from June 29, 1925, to September 17, 1941, together with an additional term of 20 years commencing September 17, 1941, and ending September 16, 1961. In the new judgments, the latter 20 years of this period is eliminated. In the original judgments damages to cross-complainants are fixed at \$15,000, whereas in one of the new judgments no damages are specified and in the other they are fixed at \$7,500, less an offset of \$850. The term of lease and damages stated in the findings are identical with the provisions of the original judgments.

[2, 3] It abundantly appears from the record that the cause of action was single and hence that the actions were susceptible of consolidation under section 1048 of the Code of Civil Procedure, and that such consolidation was in fact made by order of the court

on stipulation of the parties. Viewing that situation, the two actions became one action, and therefore should have been determined with a single set of findings and a single judgment. "After a consolidation the court should not make separate findings for each cause nor render a separate judgment for each plaintiff, for the finding and judgment upon an issue operates in favor of all of the plaintiffs in the same manner as if they had originally joined as plaintiffs in bringing the action." 1 Cal. Jur. § 51, p. 374.

"The provision of section 1195 of the Code of Civil Procedure, authorizing such consolidation, is placed in the same category with that permitting the several claimants to join as plaintiffs in one action; and after the order of consolidation had been made, the court should thereafter have treated the actions as a single action by the respective plaintiffs against the defendants, and embodied its decision in a single set of findings, upon which a single judgment should have been entered." *Willamette, etc., Co. v. College Co.*, 94 Cal. 229, 232, 29 P. 629, 630.

"Upon the consolidation of the several actions there was presented only a single action by the respective plaintiffs against the defendants, and the decision thereon was to be made as if the cause of action had been presented in a single complaint, and was to be embodied in a single set of findings in which all facts in issue in the consolidated action were to be incorporated. *Willamette Co. v. College Co.*, 94 Cal. 229, 29 P. 629. This issue affected the rights of each of the plaintiffs, and its presentation in any of the original complaints became an issue in the consolidated action, and the finding and judgment thereon operated in favor of all of the plaintiffs in the same manner as if they had originally joined as plaintiffs in bringing the action with this averment in their complaint." *Union Lumber Co. v. Simon*, 150 Cal. 751, 762, 89 P. 1077, 1080. See, also, *Coghlan v. Quarataro*, 15 Cal. App. 662, 115 P. 664; *Tyler v. J. I. Mitrovich Bldg. Co.*, 47 Cal. App. 59, 190 P. 208; *Olson-Mahoney Lumber Co. v. Dunne Investment Co.*, 30 Cal. App. 332, 159 P. 178.

It is evident that the court so intended by the use of these words in its minute order:

"Causes argued and judgment ordered for defendants for \$15,000 and specific performance."

This fact is also evidenced by the finding as follows:

"That it is true that there was at the commencement of this action, and still is, another action pending in the superior court of the state of California, in and for the county of Los Angeles, being case No. 182980, filed November 9, 1925, between the same parties, and for the same cause of action as in the complaint herein alleged."

[4] The fact that there is a duplicate set of findings, duplicate conclusions of law, and

duplicate judgments is at most but a misprision or inadvertence of the court. We therefore have concluded that the record abundantly supports the conclusion that in reality there is here presented but one set of findings of fact and but one set of conclusions of law and but one judgment. Cross-complainants should not desire more and plaintiffs under the court's conclusion cannot expect less.

[5] Treating the findings as one and the judgments as one, made in the consolidated cause, our path is illuminated as we travel through the mazes that are to follow. Treating the judgments as one precludes any right to interfere therewith in any other manner than by the ordinary procedure of motion for new trial, and, if unsuccessful, to review the action had by appeal. There are under this interpretation no grounds upon which to assert the inherent power of the court to amend or correct the judgments to speak the truth, for the judgment in that event would literally speak the truth. Nor is there in such case any excuse for a proceeding under section 473 of the Code of Civil Procedure. There is still less reason for a proceeding under sections 663 and 663a of the Code of Civil Procedure. There is no inconsistency between the conclusions of law and findings of fact nor between the judgment and conclusions of law or findings of fact. Any attack on this judgment, as a single and sole disposition of all the issues other than proceedings on new trial, is wholly unwarranted from every possible view. Notwithstanding this fact, we find repeated orders and purported judgments attempting to wear away and erode the judgment by alien processes. Treating the two motions as a single motion, attacking a single judgment, we at once can see it to be unauthorized by sections 663 and 663a by which it is sought to be sustained. These sections authorize the setting aside of a judgment by the court which rendered it and the entry of another and different judgment when incorrect or erroneous conclusions of law not consistent with nor supported by the findings of fact are shown, in which case, after the judgment is set aside, the conclusions of law shall be amended as corrected.

[6] It is further provided by said sections that the party intending to make such a motion must, within ten days after the notice of entry of judgment, serve on the adverse party and file with the clerk of the court a notice of his intention designating the grounds upon which and the time at which the motion will be made and specifying the particulars in which the conclusions of law are not consistent with the findings of fact. The notices before us set forth no particulars wherein the conclusions of law or judgments do not follow logically from the findings of fact. In fact, the conclusions of law are not attacked and are not even so much as mentioned in the notices. Likewise the notices give no indication of the judgment or judgments sought

to be substituted for the original judgment entered. Neither do they contemplate an order contemporaneously given vacating the judgment and establishing a new one in its stead. Nor do they contemplate an order entering a new judgment as an integral part of the order vacating the old one. None of the proceedings taken and none of the orders in question can properly be identified as procedure authorized by or contemplated by said sections of the Code. The limits set by these sections cannot be transgressed. The sections in no case authorize an attack upon the findings of fact and this is the essence of the attack attempted here. In *Dahlberg v. Girsch*, 157 Cal. 324, 327, 107 P. 616, 619, the court, speaking through Mr. Justice Angelotti, said:

"Section 663 of the Code of Civil Procedure authorizes simply the substitution of the judgment that should have been given as a matter of law upon the findings of fact in a case where the judgment already given is an incorrect conclusion from such findings. The court cannot on such a motion in any way change any finding of fact. The sole remedy in the trial court of a party who is aggrieved by any finding of fact is a motion for a new trial."

In *Hole v. Takekawa*, 165 Cal. 372, 375, 376, 132 P. 445, 446, the limits of said sections were again set, the court saying:

"As applied to a judgment based upon findings of fact made by a trial court, the sections simply authorize a motion to vacate the judgment to make it and the conclusions of law consistent with and supported by the findings of fact, and do not authorize any change in any finding of fact. 'Section 663 of the Code of Civil Procedure authorizes simply the substitution of the judgment that should have been given as a matter of law upon the findings of fact in a case where the judgment already given is an incorrect conclusion from such findings. The court cannot on such a motion in any way change any finding of fact. The sole remedy in the trial court of a party who is aggrieved by any finding of fact is a motion for a new trial.' *Dahlberg v. Girsch*, 157 Cal. 324, 327, 107 P. 616, 619. The only mode under our system by which findings of fact may be disturbed by the trial court after they have been filed and judgment has been entered thereon, 'except perhaps in respect of a mere clerical error or misprision,' is by the granting of a new trial. *Hawxhurst v. Rathgeb*, 119 Cal. 531, 51 P. 846, 63 Am. St. Rep. 142; *Los Angeles County v. Lankershim*, 100 Cal. 532, 35 P. 153, 556; *Pico v. Sepulveda*, 66 Cal. 336, 5 P. 515. The order of December 16, 1911, purporting to change one of the findings of fact, was therefore ineffectual for any purpose. It, of course, in no way affected the judgment given and entered long prior thereto, and no new findings or judgment could be legally filed or made."

[7] Counsel for respondents, however, urge with much earnestness, the contention that the writ of review will not lie in this case because of the existence of the right of appeal under section 663a. As above stated, these

purported orders and subsequent purported judgments are hybrids in our procedure. Orders and judgments which fail to conform to any of the rules of procedure cannot be said to be appealable under section 663a of the Code of Civil Procedure. In *Fountain Water Co. v. Superior Court*, 139 Cal. 648, 652, 73 P. 590, the court on October 29, 1901, settled, allowed, and certified a statement of appeal. Later, on May 12, 1902, it undertook to cancel and annul said order and amend the said statement. This order was annulled on certiorari, the court saying:

"It is objected that this court should not entertain this application because the petitioner has a plain, speedy, and adequate remedy at law by appeal. We are unable to agree with counsel in this regard. An order granting an amendment to a statement upon motion for a new trial is not an appealable order (*Yerian v. Linkletter*, 80 Cal. 137 [22 P. 70]); and this is true whether the amendment is made on application of counsel or on the court's own motion. Neither is an order settling a statement appealable. *Henry v. Merguire*, 106 Cal. 145 [39 P. 599]."

The situation here is not unlike in principle to the case of *Diamond v. Superior Court*, 189 Cal. 732, 739, 740, 210 P. 36, where the court granted a new trial upon a ground unknown to the law. The order was annulled on certiorari, the court saying:

"The respondent had jurisdiction to determine the motion for a new trial, but the exercise of its power to grant the motion was limited to the grounds specified in the statute. When it granted the new trial for a cause not so designated it acted without and in excess of its jurisdiction, and beyond the scope of its power. Under such circumstances certiorari will lie. *Estate of Paulsen*, 179 Cal. 528, 529, 178 P. 143. The order granting a new trial is annulled."

On rehearing the court said:

"If the order granting the new trial had not shown on its face that it was denied on all the grounds mentioned in the notice of intention, and that it was granted solely on the ground that the court stenographer who took the testimony had died before the judgment and decision, the court would have had jurisdiction to grant the new trial. But since it did show that it was granted solely on a ground not covered by the statute, the court was acting beyond its jurisdiction. It is only for this reason that certiorari will lie."

[8] We are therefore satisfied that said sections of the Code were never intended to apply to orders or judgments attempted after the fashion herein disclosed. We are also satisfied that neither of these orders or subsequent judgments can be said to be special

orders made after final judgment within the meaning of section 963 of the Code of Civil Procedure, because such section contemplates orders given by a court having jurisdiction to act.

[9] We are satisfied that the contention is sound; also that these orders and subsequent judgments are the result of repeated piecemeal attempts to act on the part of the court below and are void under the principles announced in *Dolan v. Superior Court*, 47 Cal. App. 235, 240, 190 P. 469. This was a certiorari proceeding wherein the relief prayed for was granted, the court saying:

"The notice of motion is required to specify the particulars in which the conclusions of law are not consistent with the findings, and an order granting the motion may be reviewed on appeal. Code Civ. Proc. § 663a. These Code provisions are consistent with the rule that litigation must not be piecemeal. If the original judgment is correct, the party in whose favor it was is entitled to have it enforced, and, if it is not supported by the findings, the other party is entitled to have another and correct judgment entered. In either case the loser is given the right of appeal. The Code sections do not permit two motions to be made, nor two orders, one setting aside the judgment and another at a later day directing the entry of a different judgment. If on the motion it appears to the court that the findings require the judgment to be set aside, it must also appear what conclusions of law should be made on the facts, and the only order within the power of the court under these circumstances is one setting aside the judgment and directing as a part of the same order the entry of another judgment. It is from such an order only that an appeal is provided. An order merely setting aside the judgment and leaving the case undetermined is void and not merely erroneous. Any other rule might lead to interminable delays and the loss of important rights by litigants. On such a motion the court has no power to consider or determine any matter except what judgment should be entered upon the facts as found."

See, also, to the same effect, *Prothero v. Superior Court*, 196 Cal. 439, 238 P. 357.

To require review to be by appeal of every unauthorized order or judgment attacking the proceedings by which the regular judgment was given and made would seriously embarrass, if not destroy, the efficiency of our whole legal system.

The orders purporting to vacate the judgment, the orders directing the entry of different judgments in lieu thereof and all said last-named judgments following said orders are annulled.

We concur: WASTE, C. J.; RICHARDS, J.; CURTIS, J.; SHENK, J.; SEAWELL, J.

202 Cal. 542

NOYES et al. v. CHAMBERS & DE GOLYER
et al. (Sac. 3802.)

Supreme Court of California. Dec. 1, 1927.

1. Municipal corporations $\S$ 488, 489(5)—Objections to improvement proceedings are waived if not seasonably and properly urged.

Objections to proceedings for assessment of property for public improvements, excepting those addressed to proceeding necessary to constitute compliance with due process clause, are waived if not seasonably and properly urged before local legislative body authorizing and directing such improvements.

2. Municipal corporations $\S$ 488, 489(6)—Property owners failing to object to improvement district after notice cannot, in suit to quiet title, collaterally attack assessment (Street Improvement Act 1911, $\S$ 16).

Property owners who were duly apprised of contemplated sewer improvements and extent of assessment district, and who failed to seasonably object to such improvement proceedings, are, under the Street Improvement Act 1911, (St. 1911, p. 730), $\S$ 16, precluded in a subsequent suit to quiet title from collaterally attacking the assessment imposed.

3. Municipal corporations $\S$ 488, 489(7)—Property owners failing to complain of imperfection in improvement work held precluded from objecting (Street Improvement Act 1911, $\S$ 26).

Under Street Improvement Act 1911 (St. 1911, p. 730), $\S$ 26, property owners are precluded from urging as objection to validity of sewer improvement that certain house branches were not "plugged and capped" in accordance with specifications, where they did not, within 30 days after issuance of warrant for work, appeal to city council.

4. Appeal and error $\S$ 1050(1)—Admission of evidence as to reason for sewer improvement contractors' alleged failure to comply with specifications, even if error, held harmless, where improvement proceedings were no longer open to collateral attack.

Where property owners in suit to quiet title alleged that sewer improvement contractor did not plug and cap certain house branches as required by specification, admission of evidence that house branches had been connected with other sewers simultaneously constructed, even if error, was not prejudicial, where improvement proceedings were immune from collateral attack by property owners.

In Bank.

Appeal from Superior Court, San Joaquin County; George F. Buck, Judge.

Action by Charles Warren Noyes III and others against Chambers & De Golyer and others to quiet title, wherein defendants filed a cross-complaint. Judgment for defendants, and plaintiffs appeal. Affirmed.

Aitken & Aitken, of San Francisco, for appellant Charles Warren Noyes III.

Frank W. Aitken, of San Francisco, as guardian in pro. per.

Foltz, Rendon & Wallace, of Stockton, for appellant Dunn.

Daniel V. Marceau, of Stockton, for respondents.

PER CURIAM. This is an appeal from a judgment in favor of defendants in an action brought by plaintiffs to quiet title to some 21 lots situate in the city of Stockton and to enjoin the defendants from asserting any adverse claim or interest therein. By way of answer and cross-complaint the defendants admit plaintiffs' title to the lots, but claim and assert certain street assessment liens thereon by virtue of an assessment for the cost of certain sewer improvements installed by defendants pursuant to proceedings under the Street Improvement Act of 1911 (Stats. 1911, p. 730) and amendments thereto. The cross-complaint closed with a prayer that the said liens be foreclosed. After trial without a jury, the plaintiffs were adjudged to be the owners in fee simple and entitled to the possession of said 21 lots, subject to the lien of defendants upon each in the sum of \$88.09, together with interest. As requested by defendants, provision was made in said judgment for the foreclosure of said liens.

The resolution of intention passed by the city council, and under which the work was done, declared, in accordance with the provisions of section 4 of the Improvement Act, that the work was of more than local or ordinary public benefit. An assessment district was thereupon created and described therein and charged with the expense of the proposed improvement. As required, the resolution of intention also fixed a time and place for the interposition and hearing of objections or protests to the contemplated improvement. Provision was likewise made for the publication and posting of notice of the passage of said resolution of intention. Among other things, the trial court found that there had been legal and sufficient posting and publication of notice of the improvement proceedings. A finding was also made to the effect:

"That prior to the hour set in said resolution of intention for hearing objections to the proposed work, none of the owners of property liable to be assessed for said work made any written or any protest against the proposed work or the extent of the district to be assessed and for the cost and expenses of said work and improvement, or either."

These findings of the lower court are not assailed by the appellants.

It is urged, however, that the assessment upon the respective lots herein involved is void. This contention is founded upon the asserted invalidity of the improvement pro-

ceedings giving birth to such assessment. The appellants vigorously argue that the assessment district created by and described in the resolution of intention consisted of two separate and distinct sections of the city of Stockton which were improperly included in one district; that the sewer construction work performed in each of said sections of the district was peculiar thereto and without benefit to the other; that a portion of the work was wholly useless and not an "improvement" within the meaning of the act under which the same was performed; and that the specifications, descriptive of the improvement work, were uncertain and indefinite.

[1] We have grouped these several attacks upon the improvement proceedings for the reason that they may be considered and disposed of as a unit. This court has, upon many occasions, declared that objections to proceedings having for their purpose the assessment of property for proposed public improvements are waived if not seasonably and properly urged before the local legislative body authorizing and directing said improvements. *Blake v. City of Eureka* (Cal. Sup.) 258 P. 945; *Watkinson v. Vaughn*, 182 Cal. 55, 58, 186 P. 753; *Chase v. Trout*, 146 Cal. 350, 357, 80 P. 81. It is true, however, that the decisions have steadfastly recognized that objections addressed to the proceeding constituting, or necessary to constitute, a compliance with the "due process" clause of the state and federal Constitutions are not waived by failure to urge the same before the legislative branch of the municipality wherein the improvement proceedings were had. *Chase v. Trout*, supra; *Watkinson v. Vaughn*, supra. With this exception to the general rule above announced we are not here concerned, for, as already indicated, the court below found that sufficient and legal notice of the improvement proceedings had been given and ample opportunity for the advancement and hearing of objections thereto provided. The provisions of the due process clause were therefore satisfied.

Section 16 of the Improvement Act of 1911 provides, in part, that:

"All objections to any act or proceeding occurring prior to the date of the first publication of the aforesaid notice of award, in relation to said improvement, not made in writing and in the manner and at the time aforesaid, shall be waived; provided, the resolution of intention to do the work has been actually published and the notices of improvement posted as provided in this act."

In discussing the waiver of objections not seasonably advanced before a city council, this court in the very recent case of *Blake v. City of Eureka*, supra, declared that:

"Plaintiffs cannot raise any objection in this action which they could have raised before the city council at the time provided by section 6 of

said act for the hearing of protests, and which they failed to make by means of written protests filed as provided in said act."

That case, like the instant one, was concerned with the Improvement Act of 1911. That an objection to the extent or boundary of an assessment district is waived if not seasonably urged before the city council has been decided in the case of *Duncan v. Ramish*, 142 Cal. 686, 696, 76 P. 661, 665, wherein it is stated:

"Under the Street Improvement Act the council has the power to declare the work to be of more than ordinary public benefit, and to make the assessment upon a district instead of upon the front foot plan. The same section gives the property owners the right to object to the boundaries of the district, and to a notice and hearing before the council upon that subject. Upon the same principles and authorities heretofore referred to in reference to the question of benefits, it must be held that the property owner, having this right, must avail himself of it, or be concluded by the decision of the council. It does not appear that any objection was made to the boundaries of the district, and hence it must be held that the decision of the council as to its extent was correct."

While the Improvement Act of 1911 was not there involved, the above reasoning is peculiarly pertinent to the instant cause. The opinion in the last cited case also declares:

"That where the property owner has an opportunity given him, under the prescribed proceedings, to appear and contest the question before the legislative body, the determination of that body on the subject of benefits is final, and that if he fails to appear he thereby admits the finality of the determination."

This latter declaration is approved in the case of *Empire Securities Co. v. Matthews*, 179 Cal. 240, 241, 176 P. 160.

The respective sections of the several improvement acts providing for the waiver of defects in proceedings thereunder, and the many decisions interpreting and upholding the same, find abundant support in reason, for, as stated in *Haughwout v. Raymond*, 148 Cal. 311, 312, 83 P. 53:

"Notwithstanding that the proceedings for street work and sewer work, like proceedings in taxation, are in invitum, and that therefore a fairly strict and accurate compliance with all the statutory requirements is necessary, this is the limit to which any court should be expected to go in disposing of the questions which are involved. The contractor who has honestly and substantially complied with his contract, of which the property owners have received and will continue to receive the benefit, is quite as much entitled to the protection of the law as are the property owners themselves, and, upon the other hand, an endeavor—even a successful endeavor—upon the part of the property owners to defeat the just claims of such a contractor by a resort to the extreme technicalities of the law can, upon the whole, operate only to the

disadvantage of the property owners themselves, since it necessarily tends to increase the price at which any and all future contractors will be willing to engage in work, payment for which, after having been duly performed, is met by harassment and vexatious delay, with the prospect at the end of utter failure of recovery."

[2] As already stated, the appellants herein were duly and regularly apprised of the contemplated improvements and of the extent of the assessment district to be charged with the cost thereof. Having failed to seasonably protest and object to said proceedings they are now precluded in this suit to quiet title from collaterally attacking the assessment imposed by virtue thereof. This conclusion disposes of the several contentions above enumerated.

[3] The appellants' next contention touches upon an asserted change in the work while in progress. In this connection it may be said that the specifications, which were by reference and incorporation made a part of the resolution of intention, required that certain house branches or connections after installation be "plugged and capped." Appellants urge that said house branches were "plugged and capped" at but one end, the other end having been connected with sewers constructed by the city. That the appellants should urge as an objection to the validity of the improvement proceedings a variation in the work which must have resulted in a benefit rather than a detriment to the property owners is difficult to understand. The trial court found that respondents had "duly performed * * * the said work according to the specifications and the terms of said contract and with materials complying with said specifications, all under the direction and to the satisfaction of the city engineer of said city of Stockton." This finding has not been attacked by the appellants. In addition thereto, the court also found that more than 30 days had elapsed since the date of the issuance of the warrant for the work, and that appellants and all others interested therein had failed to appeal to the city council on account of any asserted imperfection in the work. Under section 26 of the Improvement Act the appellants are now precluded from urging the objection under consideration. The case of *Jennings v. Le Breton*, 80 Cal. 8, 11, 21 P. 1127, 1128, while considering the act of 1872, correctly declares:

"It seems to be well settled that the defendants had no other remedy for the alleged failure of the contractor to complete the work, or for misconduct of the superintendent of streets in approving or accepting the work before it was completed, than by appeal to the board of supervisors * * * and that by failing so to appeal, they waived the objections here made."

Moreover, in 2 *Elliott on Roads and Streets*, p. 895, § 718, it is stated:

"While it is true that the highway officers are bound, in general, to proceed in substantial accordance with their own order directing the improvement, still a slight deviation from it will not vitiate the proceedings unless it does the landowner some material harm. It is by no means every departure from the order or ordinance that will defeat the assessment, for, where no substantial injury is done to the property owners, the officers who made the order or enacted the ordinance may rightfully amend or change it. The public welfare and the interests of the landowners may often be promoted by some change, and the officers who made the original order ought to have some latitude allowed them so that they may be enabled to rectify mistakes or secure better results. The cardinal rule is that nothing shall be permitted that will tend to do harm to the property owners, but this salutary rule is obeyed rather than violated in permitting a change that is beneficial and it is not infringed by permitting changes that work no harm to the citizens."

In view of what has been said, we are of the opinion that the contention under consideration is without merit.

[4] It is next urged that the trial court erred in admitting certain evidence tending to establish that the city of Stockton had constructed certain sewers simultaneously with the performance of the work by respondents, and that certain of the house branches installed by respondents had been connected therewith. We are not prepared to declare this evidence immaterial to the issues involved in this action for the introduction thereof served to explain and account for the asserted noncompliance with and deviation from the specifications as regards the plugging and capping of the house branches. The connection of said house branches with the main sewer line obviated the necessity of such plugging and capping. However, even if it be assumed that such evidence was erroneously admitted, the error cannot be said to have been prejudicial to the appellants' cause and certainly would not warrant a reversal of the judgment in view of the conclusion that the improvement proceedings are now immune from collateral attack by said appellants. This latter reason applies also to the ruling of the trial court rejecting appellants' offer of testimony touching upon the knowledge of the public generally as regards the simultaneous construction by the city of said other sewers.

The final contention of appellants is to the effect that the lower court, under the findings made, was duty bound to enter judgment for them. With this contention we must also disagree. It is true that the findings relied upon in support thereof lend credence to certain of the allegations of appellants' answer to the cross-complaint; that is to say, the trial court found, among other things, that the work performed in each of the alleged sections of the assessment district was without benefit to the other, and

that the plans and specifications of the work were, in part, uncertain and indefinite. The appellants have apparently overlooked the findings to the effect that the district did not consist of two separate and distinct sections of the city of Stockton, and that the cost of the said improvement work had been assessed upon each parcel of land in the district "in proportion to the estimated benefits to be received by each." Moreover, it will be remembered that the court also found that the appellants had failed to protest the proceedings or advance any objection to the work before the city council as required by law. We have already determined herein that, in the absence of such timely protest and objection, the appellants are now precluded from collaterally attacking the validity of the improvement proceedings and the legality of the resulting assessment. It follows, therefore, that the court below, under the findings made and the law applicable thereto, had no alternative but to enter judgment for the respondents.

For the foregoing reasons, the judgment is affirmed.

202 Cal. 527

PEOPLE v. GOODWIN. (Cr. 2974.)★

Supreme Court of California. Dec. 1, 1927.

Rehearing Denied Dec. 30, 1927.

1. Criminal law §940—Newly discovered evidence of defendant's whereabouts at time when, according to state's theory, he must have been elsewhere, held material.

In prosecution for murder, affidavits of absent witnesses as to whereabouts of defendant at time when, according to state's theory, he must have been elsewhere to have participated in crime, held material, requiring granting of new trial, where due diligence was used in obtaining such newly discovered evidence.

2. Criminal law §939(1)—As to new trial, particular circumstances must be considered in determining whether due diligence was used.

In determining whether due diligence was used by defendant seeking new trial, it is necessary to consider all facts of particular case, as question depends largely on particular circumstances of each case.

3. Criminal law §939(2)—Defendant, required to proceed to trial several days after obtaining new counsel, was not lacking in diligence in failing to obtain traveling witness, and witness, whose name he did not know, to rebut unexpected testimony of state's witness.

Defendant, accused of murder, who was required to go to trial several days after procuring physically infirm counsel, was not lacking in due diligence in failing to have present at trial witnesses as to his whereabouts at time of alleged commission of crime, where he did not

know name of one witness, for whom he advertised, and the other was absent on theatrical circuit, and where defendant had no knowledge as to testimony of state's chief witness until time of trial.

4. Criminal law §939(2)—Refusal of new trial for newly discovered evidence of alibi of traveling actor and unidentified person held error.

In prosecution for murder, refusal of new trial for newly discovered evidence on issue of alibi, to contradict unexpected testimony of state's chief witness was abuse of discretion, where inability to have testimony at trial was due to necessity of advertising for one witness, whose name was unknown, and of securing presence of another absent on theatrical circuit.

5. Criminal law §778(11)—Instruction on defendant's flight held error, where defendant's departure several weeks after crime was in accordance with previously announced plans.

Where, before commission of alleged homicide, defendant informed persons interested that he was going to New York to try out a play, circumstance that he departed for New York for that purpose several weeks after commission of crime did not warrant instruction on question of defendant's flight, and charge permitting jury to consider flight as indication of defendant's guilty mind was error.

In Bank.

Appeal from Superior Court, Orange County; E. J. Marks, Judge.

Philip A. Goodwin was convicted of murder in the first degree, with sentence of death, and he appeals. Reversed, with instructions.

Rehearing denied; Waste, C. J., and Seawell and Shenk, JJ., dissenting.

Kitt Gould, of Clovis, and Cormac, Bolles & Surr, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and John L. Flynn, Deputy Atty. Gen., for the People.

LANGDON, J. Defendant appeals from a judgment imposing upon him the death sentence after a jury had found him guilty of the murder of Joseph J. Patterson in Orange county, California. The information charged the defendant and one Allison Dewey, whose true name appears to be Gaines, with the crime. Separate trials were had; the defendant herein being first brought to trial, and the testimony of defendant Gaines being largely responsible for his conviction.

A charred and badly decomposed human body was found in an isolated spot in Santa Ana canyon on March 22, 1926, which was identified later, beyond a reasonable doubt, by means of portions of clothing, belt buckle, watch fob, and other trinkets, as the remains of Joseph J. Patterson. For the purpose of this appeal, we will state that it also appeared beyond reasonable doubt that de-

ceased had received, in some manner, a blow on the back of the head, which broke the skull and was sufficient to have caused death, and that an attempt had been made to burn the body in the place where it was found. No eyewitness testified as to the killing. All the testimony was circumstantial, and the circumstances pointing directly and convincingly to the guilt of defendant were testified to by the codefendant, Gaines. This witness had served two sentences in the Utah state penitentiary and had pleaded guilty to a forgery charge in California. After he came to Los Angeles, Cal., in February, 1926, he appears to have engaged in no occupation, and his own account of his activities shows frequent use of assumed names, excessive drinking, brawls and fights at public dance halls, the cashing of checks, which, to say the least, he knew to be forged, if he did not himself forge them, and other matters not tending to inspire confidence in the truth of his testimony, especially when his own life was at stake in the event this crime was not fastened upon defendant Goodwin.

From the record it would seem that either one or the other of the defendants committed the crime charged. The defendant Goodwin tells a story which, if true, would exonerate him. He was subjected to a grilling cross-examination, and, as admitted by the district attorney in his remarks to the jury, every trick of cross-examination learned in 30 years' experience was tried upon him, and nevertheless his story did not weaken. In the language of the district attorney, defendant was "the worst man in cross-examination I have ever seen," and "I hadn't examined Philip A. Goodwin ten minutes before I knew as well as I know now that I would make no progress," and "I realized fully when I had met my Waterloo in cross-examination." It was a long, hard, grilling cross-examination, and the experience of ages has shown that this is usually the acid test of truth. On the other hand, the testimony of the codefendant Gaines is not only inherently improbable in numerous particulars, but the witness shows many unmistakable signs of indecision, uncertainty and evasion. No adequate idea of the false "ring" of this testimony, taken as a whole, can be given by a statement of portions of it. The record is voluminous, consisting of over 800 pages, and all parts must be fitted together for an impartial consideration of it. This cannot be done in this opinion, and we shall have to trace briefly merely the outlines of the two stories told by the codefendants.

For about a month before the crime was committed, which was fixed by the evidence as about March 14th or 15th, Gaines occupied a room in the house where Patterson lived in Los Angeles. Goodwin lived in the same block. Goodwin and Gaines had known each other in the Utah state penitentiary, where

they were fellow prisoners, and had corresponded after their separation. Gaines came to Los Angeles in February, 1926, and Goodwin met him at the railway station and engaged a room for him in the rooming house where Patterson lived. Gaines and Patterson became friendly, and Patterson, who was engaged in buying and selling stocks, purchased some stock for Gaines and probably owned some himself, which he carried about with him. Patterson did not have much money. His bank balance showed a maximum of \$200 during the period involved in this investigation. A check upon Patterson's bank account for \$130 was forged by some one—either by Gaines or Goodwin, according to the story which we accept. And it is pertinent to inject here the statement that the Attorney General concedes upon this appeal, although at the trial it was contended otherwise by the prosecution, that this forgery was the work of Gaines. This check, payable to Samuel Reader, was indorsed with that name, confessedly by Goodwin, and was taken by Goodwin to a bank, together with \$10 in cash, and deposited in an account opened in the name of Samuel Reader, apparently a fictitious person. This amount was later drawn out through checks signed by Goodwin with the name of Samuel Reader, which he had written on the signature card opening the account. We shall not go into the explanation made of this transaction by Goodwin, because, in our view of the record, it becomes immaterial at this time.

A few days after the transaction just narrated, the journey began on which Patterson met his death. Gaines says:

That Goodwin hired an automobile and invited Patterson and Gaines to accompany him on a trip to San Diego, and that the three started from Los Angeles on Saturday, March 13, 1926, to San Diego; that Gaines drove the car and Goodwin and Patterson sat in the rear; that at San Juan Capistrano Gaines was arrested for speeding; that Goodwin left the car and spoke to the policeman making the arrest, and signed the name of E. A. Cramer to the slip presented by the officer. The party then proceeded south, and toward evening invited a soldier, who was walking along the highway, to ride with them, and he rode with them to San Diego. The party stopped at a restaurant for food, and later left Goodwin at the Knickerbocker Hotel, with the understanding that the three would meet the following morning; that Gaines and Patterson then went to the Manhattan Hotel, each registering under an assumed name. Patterson and Gaines then went to a dance, where they did considerable drinking, and after the dance returned to their hotel. The following day they met Goodwin about noon as they were driving about the town, and he told them he had business to attend to, and asked them to meet

him at the Knickerbocker Hotel at about 6 o'clock. Patterson and Gaines then drove around until the time indicated, and then returned to the Knickerbocker Hotel and met Goodwin. They had dinner together, and then went to a cigar stand and shook dice for cigars. They then drove to a filling station, and had the gasoline tank of the automobile filled. Goodwin suggested that it was a long way between towns and more gasoline might be needed, and as the man at the station had nothing in which to place additional gasoline Gaines "went across the street from the filling station and bought a can" at a second-hand store. This five-gallon can was half filled with gasoline and placed on the floor of the rear of the car. Goodwin then asked Gaines if he had any liquor, and, when Gaines replied that he did not, Goodwin gave Gaines \$5 with which to purchase liquor, with the statement that it would be chilly on the return trip. Gaines purchased two pints of whisky from a sailor and the three men started to Los Angeles. At the request of Goodwin, one bottle of liquor was handed to him. Gaines did not know the roads, and Goodwin announced that they would return over a route different from the one on which they had traveled to San Diego. He then directed the driver, and he, following directions, reached Escondido about midnight, where they stopped for food. They then returned to the automobile and "rode along on the road a long time, and then Goodwin says that it was the wrong road and we would have to turn around and go back." Gaines then turned around and went back to where he had "turned on that road and started out again." Patterson at that time was not "very drunk"; he did not show the effect of liquor "very much." On the new road they stopped a "couple of times."

Gaines does not remember whether or not they passed through any towns. Goodwin asked Gaines several times if he was all right. Gaines "had to get up close to the windshield to look through to stay on the right-hand side of that mark," because, according to his testimony, "I was pretty full, and I couldn't hardly stay on the right-hand side of the road. I would have to get up close to the windshield to see that I was on the right-hand side of the mark or not, and I got over it, I guess, quite a few times." And now it is about 7 o'clock, "the sun was up, or just coming up, anyway; it was light and you could see all over." And Goodwin said Patterson was pretty drunk, and he did not intend to go back with him in that condition, and he said he knew some people down there a ways from where we were, and he was going to take him over and sober him up before we took him back. And they came to "where you could see a gate a little ways before you got to it," and Goodwin said, "We will turn into that gate," and Gaines pulled up to the

gate and stopped, and Goodwin got out and opened the gate. What followed, we shall set out in Gaines' own words:

"I guess we was about half way between the gate and where we stopped down there, and he says: 'You can't get clear over in the car, because there is a footbridge.' You could see the houses plain; there was a couple of houses over here some place (referring to photograph), * * * and we got down to a place in there, and it was a sort of a bare spot—there ain't no grass on it. It was sand, * * * and we turned to the right, and when I turned to the right I stopped, or he said, 'Stop,' and I started to get out. * * * And he said: 'Right about here is a footbridge; you can't drive over with a car;' and when I turned to the right and stopped I started to get out, and I said, 'Let me help you;' and he said, 'No; you go back and shut the gate, because the cows might get out.' * * * And he took the can and set it out just outside of the automobile, just away from the running board. * * * Goodwin set the can out, just alongside of the car, for a seat, he said, to sit Patterson on, and he helped Pat out, and set him on that can; * * * and I turned and drove the car up here, and turned around that way, and come right back by where we were, and got on this road that goes out to the gate. * * * I turned to the right, and turned around and went back to that road up to the gate. * * * He said, 'Wait at the gate;' Goodwin, he said, 'Wait at the gate,' until he hollered, and then I would know that he was ready to go back. * * * I drove up to the gate, and went outside the gate, and stopped, and shut the gate, and got back into the automobile, and set there with my feet up around the steering wheel * * * outside the fence. Well, I didn't know if I dozed off or not; but the next I noticed why Goodwin was coming through the fence—I don't know if he came through the fence or gate, but I heard the tin scratching on the wire, and I set up and looked, and he was coming to the car, and I asked him where Pat was." Goodwin had with him the five-gallon can. "I believe it was empty, * * * and I asked him where Pat was, and he said, 'Oh, God! don't discuss it; let's hurry away;' and I asked him again, and he said, 'I told you not to discuss it;' so I drove on down the canyon, and we crossed a bridge quite a ways after that, * * * and it was quite a ways after that that we crossed a kind of a long bridge, but there was no water in the bed, it was just dry, and he threw the can over the bridge, * * * and we went back to the place where he got the automobile."

In response to a question as to Goodwin's appearance when he first returned to the car, Gaines answered:

"Well, he was all nervous and worried and excited; * * * he was all nervous and upset, * * * and I guess a little further down this road, right about here, down the road further, I looked back in that direction and saw smoke coming up."

Gaines states that he had been drinking along the way from San Diego, and that Patterson had also been drinking, and, when asked whether or not Goodwin had been

drinking, replied: "Well, I don't know as I seen him take a drink." According to Gaines:

"When he last saw Patterson, Patterson was pretty drunk. * * * He was sitting facing that way, sort of stooped over like that. * * * Goodwin was on the left-hand side of him, with his arm sort of around him."

Contrast with the foregoing Goodwin's story of the journey south, as follows:

Goodwin and Gaines started to San Diego in an automobile. They "picked up" a young man upon his signal at the first little town out of Los Angeles, and took him with them upon his request for a "lift." They stopped at Whittier for a few moments to interview a theater manager. (Goodwin had written several plays, had been an actor, and was at that time producing a play.) They drove to Fullerton, where Goodwin stopped to greet some friends, and then down through Anaheim, Santa Ana, and into San Juan Capistrano, where they were stopped by a traffic officer. Goodwin got out and talked to the officer, and the driver, Gaines, signed the "speed tag" presented to him by the officer. They then drove on without stopping until they came to the marine base, near San Diego, where the soldier or marine with them left the car. They drove to the Knickerbocker Hotel, and Goodwin got out, and Gaines said he would put the automobile in the garage and return. Goodwin could not be accommodated at the Knickerbocker, and tried another hotel without being able to secure accommodations, and finally secured a room at the Warren Hotel. After making his arrangements and leaving his baggage, he returned to the Knickerbocker Hotel to meet Gaines. Gaines wasn't there, and Goodwin went into the coffee shop of the hotel and had some food, and then walked to the Balboa Theater, and as he got there he met Gaines and Patterson and a man in sailor's uniform. Goodwin had met Patterson prior to this time in Los Angeles, and the two exchanged greetings. This was about 10 o'clock Saturday evening, March 13. Patterson and Gaines said they were going to a dance, and invited Goodwin to come with them, which invitation Goodwin declined. Gaines said he had missed Goodwin at the Knickerbocker Hotel. Gaines also said he was going to Tia Juana the following morning; that that was his main purpose in coming south, and he didn't know what time he would get back. Goodwin, who was a clergyman, stated that he would go to church in the morning, and after that to the hospital to see a friend—Kehler—and that he would come downtown about 1 o'clock. Gaines said he would meet him at that hour at the Knickerbocker Hotel. Goodwin then left Patterson and Gaines, and went to the Pantages Theater, and visited a young man who was working there and returned to his hotel about 11 o'clock and went

to bed. On Sunday morning, March 14, Goodwin went to the All Saints Episcopal Church, and afterwards went to the Naval Hospital to visit George Kehler. After the visit Kehler decided to accompany Goodwin back to town, where they met Gaines in front of the Knickerbocker Hotel. They went to the coffee shop together and then went to the cigar stand and shook dice for cigars, and then got into the automobile and drove around to the beach and other places. Kehler left the automobile in front of the Balboa Theater, and Goodwin rode back to the Knickerbocker Hotel, reaching there about 4 o'clock in the afternoon. Gaines said he was going back to Tia Juana. We continue the story in the language of Goodwin:

"I said, 'Well, what time will you be back here?' and he said, 'That I do not know.' 'Well,' I said, 'I understand the customs regulation closes the line at 9 o'clock; so you ought not to be very late. Will you be back to-night?' And he says, 'I guess so, if the line closes.' And I says, 'If you are coming to-night I won't register at the hotel for to-night. I will wait for you;' and he says, 'Wherever you want I will meet you.'" Goodwin then asked if Gaines knew where the Naval Y. M. C. A. was, and, upon being told he did not, Goodwin pointed it out to him. It was arranged that Gaines would meet Goodwin there and Gaines drove away. "He said he was going back to Tia Juana—that he had left Mr. Patterson in Tia Juana, and he was going back; and I asked him if he was going to bring Patterson back, and he said, 'That I don't know; if he wants to come, all right; and, if he wants to stay with his other friends, all right.' * * * At 3:30 in the morning, I was sitting talking to some one in the lobby of the men's service room at the Y. M. C. A., and I kept watching the road at all times, because I was where I could see all the cars coming down the street." At approximately 3:30 Gaines drove up. "I went down the steps and got in the car, and we left for Los Angeles. * * * Mr. Gaines and myself. * * * Mr. Gaines and myself were alone on the return trip."

They returned to Los Angeles between 8:30 and 9 o'clock in the morning, and turned the automobile in, and Goodwin went home and to bed.

For the purpose of this appeal, the foregoing consideration of the evidence seems sufficient, without going into the mass of other evidence in the record regarding the handwriting and the effort to connect Goodwin with forgeries of the name of Patterson to stock certificates and checks. It may be conceded that there were certain financial transactions, which occurred both before and after the journey to San Diego, in which it appears that money and securities belonging to Patterson were obtained by one or the other, or both, of these codefendants, and which would tend to furnish a motive for the crime, and there were certain letters written by either or both of said codefendants, for the obvious purpose of explaining Patterson's failure to return to the place where he was

living, and of delaying an investigation into his disappearance. During the trial it was evidently the theory of the prosecution that these letters, written apparently from San Diego and purporting to be signed by Patterson, were written and signed by Goodwin, and that the indorsements on the certificates of stock were also forged by Goodwin, and that the check for \$130, which was used to open the Samuel Reader account, was also forged by Goodwin; the defendant Gaines, upon whom the prosecution relied to make out its case, having strenuously denied that he had written the name of Patterson on any of these instruments. However, the Attorney General now concedes that these forgeries were committed by Gaines, which concession puts a very different aspect upon the case made out by the prosecution and which was before the jury. And it is further admitted by the district attorney in his argument to the jury, and it is entirely clear from the record, that if Goodwin was in the Service Men's Y. M. C. A. at San Diego, as he states, until 3:30 in the morning of Monday, March 15, the story of Gaines, in so far as it is directed to the journey from San Diego to Los Angeles, is false in toto, and there is no evidence placing Goodwin at any time at or near the vicinity of the place where the body of Patterson was found. However, we are not passing upon the sufficiency of the evidence to support the verdict, but we merely consider it in its bearing upon the motion for a new trial.

[1] A motion for a new trial was made upon the ground, among others, of newly discovered evidence. Among the affidavits filed in support of said motion was one by J. A. McKenzie to the effect that said McKenzie had been in the Service Men's Y. M. C. A. at San Diego on Sunday evening, March 14, and Monday morning, March 15; that between the hours of 12 o'clock midnight of Sunday, the 14th day of March, 1926, and 3:30 a. m. of Monday, the 15th day of March, 1926, the affiant talked with Philip A. Goodwin, who was dressed as a priest; that the said Goodwin gave affiant a card with the name printed thereon, Philip A. Goodwin; that, later, affiant saw pictures of said Goodwin in a Los Angeles newspaper, a copy of which is appended to the affidavit and made a part thereof, and affiant is positive that this is a picture of the same Philip A. Goodwin that he saw in said Y. M. C. A. in San Diego on the dates and at times mentioned.

It appears that defendant did not know the name of this man with whom he had talked while in Y. M. C. A. at San Diego, and had no means of finding him, except by advertising for him, and he had done this, and had received a response to the advertisement only after the verdict had been rendered against him. The trial court deemed this showing insufficient, because the advertising

had not been started earlier. There were also other affidavits offered which tended to corroborate the defendant's story in many particulars.

Counsel for defendant begged for a continuance in order to present additional affidavits supporting the motion for a new trial. Defendant presented a telegram from Bangor, Me., in which it was stated that affidavits were in the mail by E. Stanley De Groot to the effect that defendant Goodwin was seen by affiant in the Pantages Theater at San Diego on Sunday evening, March 14, at a time when Gaines' testimony places him elsewhere. This affidavit, together with the McKenzie affidavit, would be material, and, if their recitals were true, it would have been impossible for defendant Goodwin to have participated in the crime as outlined by the chief witness for the prosecution. This corroborating testimony was, therefore, of the utmost importance, and of a character that might well change the result if a new trial were granted, and, unless the defendant was lacking in due diligence in not producing this evidence at the first trial, it should furnish ground for the granting of his motion for a new trial.

[2-4] In determining whether or not due diligence was used, it is necessary to consider all the facts of each particular case. In the instant case the record discloses that at the time of the trial Goodwin was without funds, and for some time was without an attorney. He was forced to ask for several continuances because the attorney he had engaged had declined to act without the payment of a fee, and Goodwin had been disappointed in securing the money for the fee. When it became necessary to obtain new counsel, the attorney who tried the case was brought in from another county, and arrived the evening before the day of the trial was to begin. He asked for a continuance of ten days or two weeks, claiming that he was unfamiliar with the case, and had not even examined the transcript of the evidence at the preliminary examination. The record shows that a continuance of but two days was given, and lack of preparation of counsel is manifest throughout the trial. The record discloses that this attorney was no nearly blind that he was compelled to rely upon his daughter to read, not only the transcript of the daily proceedings, but all the exhibits and documents offered at the trial, and he was also suffering from other physical infirmities of a most serious nature. He had little or no time to prepare for this lengthy trial, while the intensive preparation of the district attorney is shown in his careful and masterly handling of the prosecution. It is not surprising, therefore, that defendant Goodwin was unable to communicate with McKenzie, whom he did not know, nor to locate De Groot, who was on a theatrical circuit, and to have them

present at the trial. On the other hand, it seems to us that the response of McKenzie to the advertisement in the paper, and the finding of De Groot through the theatrical booking agencies, was an extraordinary accomplishment under the circumstances.

Defendant stated to the court, and it appeared from the record, that he had been obliged to change attorneys several times, because those who had undertaken to represent him would not proceed without a retaining fee. Defendant claims to have depended upon one of these attorneys, perhaps without justification, to follow up information which defendant gave him, and communicate with witnesses, and to have found out, later, that nothing had been done. Eight months had passed since the events in question occurred, and defendant could not surmise what would be vital or necessary to his defense until Gaines had told his story. From the record it appears that defendant had no knowledge of what Gaines' testimony would be until it was given on the stand, and it was only at the close of the trial that he was handed a copy of the alleged written statement of Gaines, which he had made to the district attorney previous to the trial, and of which the district attorney had had the benefit in advance, as a basis for the prosecution. Under these circumstances, can it be said that there was a lack of due diligence in obtaining the evidence set forth in the affidavits? Due diligence depends largely upon the peculiar circumstances of each case, and in this case we think there was not such a lack of diligence as would warrant the denial of a motion for a new trial. While the exercise of discretion by a trial judge in granting or denying a new trial is rarely interfered with upon appeal, in this case the evidence offered being material and, under the circumstances, it not appearing that the defendant was lacking in diligence, we feel that the motion for a new trial should have been granted.

[5] The record also presents an additional reason for the reversal of this judgment. With a record as unconvincing against the defendant as the one in the instant case, any error in the matter of instructions or rulings upon evidence looms large. The trial court instructed the jury:

"That the people have offered evidence for the purpose of showing flight, and this evidence you shall not receive as a part of the criminal act itself; but if you should find, beyond a reasonable doubt, that there was a flight—that is, a leaving of the state of California—for the purpose of avoiding a prosecution, then you should receive the same only as an indication of a guilty mind, and the same is to be considered by you only as a circumstance to be weighed by you as tending in some degree (if there was such flight) to prove a consciousness of guilt."

There is no evidence in the record showing flight of the defendant. Long before the

crime was committed he had been planning and discussing a journey to New York to "try out" a play which he had written, and which he had rehearsed and played in Los Angeles. The unidentified body of Patterson was found on or about the 23d day of March, 1926, and Gaines left Los Angeles the following day, apparently leaving no trace of his whereabouts. On April 6, or thereafter, Goodwin went to New York. He wrote to his friends from there, and told about the progress he was making with his play. He was presenting it publicly in New York and appearing in it. The circumstances surrounding flight are placed before a jury as admissions by acts tending to show guilt, and, assuredly, there was nothing in Goodwin's conduct with reference to his departure from Los Angeles and his subsequent whereabouts which would warrant any inference of a consciousness of guilt. In *People v. Jones*, 160 Cal. 358, 117 P. 176, in considering an instruction similar to the one we are discussing, the court said:

"This court has for a long time discounted the giving of such instructions and has refused to reverse cases where they have been given only when it could be seen that the instruction did not work injury. Thus, where a defendant flees immediately after the crime has been committed with which he knows he is charged, and the reason for his flight remains unexplained, this court has, in effect, said that it would not reverse cases for an instruction in substance declaring to the jury that this evidence can be by them considered and given such weight as they thought fit as tending to indicate a guilty mind. * * * But this court, as has been said, has frowned upon the giving of any such instructions, because it is a clear invasion of the jury's province in weighing evidence and may work much injury and prejudice to a defendant's case. The instruction here given is typical. In the first place, it omits the essential qualifications that, where flight can be indicative of a guilty conscience, the defendant must know that he is charged with the crime.

"But, more important even than this, we have before us a case where the flight of the defendant was explained, where it was in evidence that he feared mob violence and fled to avoid it, and where it was in evidence that when away from the mob he was called upon to surrender, he promptly did so. Here, certainly, it was for the jury to determine what prompted the flight, and if it was prompted by fear of mob violence, as defendant says, then no element of guilty conscience entered therein. * * * Where flight is unexplained, the giving of such an instruction may be excused, though not justified, because it is within the power of the defendant to explain it and he has not done so; but where the defendant has given a full explanation of his flight it is for the jury to say whether that explanation is true or not, untrammelled by any instructions from the court to the effect that the evidence is to be weighed by them as indicative of guilt."

Considering the state of the record in the instant case, with its conclusive evidence that

defendant gave information to every one interested that he was going to New York and his purpose in going there, long before the crime in question was committed; that he left Los Angeles weeks after the crime was committed, and when no shadow of an accusation had been made against him; that he announced his departure, and did not conceal his whereabouts, and engaged in the business upon which he had been planning to visit the metropolis—the instruction complained of is not based upon evidence before the jury and was prejudicial to the rights of the defendant.

There are other errors appearing in the record of more or less importance, which it is not necessary for us to discuss separately, as they will probably not arise upon a second trial. The matters we have discussed, in the light of the entire record, require a new trial.

The judgment is reversed with instructions to the trial court to grant the defendant's motion for a new trial.

We concur: PRESTON, J.; RICHARDS, J.; CURTIS, J.

202 Cal. 565

NIMMO v. FITZGERALD et al. (L. A. 8917.)

Supreme Court of California. Dec. 9, 1927.

1. Corporations $\Rightarrow$ 121(4)—In suit on note for stock, counterclaim alleging sellers guaranteed accounts receivable as collectible, and that defendants attempted unsuccessfully to collect accounts, held not to state cause of action (Civ. Code, § 2800).

In action on note given for balance of purchase price of capital stock of corporation, counterclaim alleging that plaintiffs guaranteed corporation's accounts receivable as collectible, "that the defendants * * * attempted to collect each and every one of the aforesaid accounts, * * * but have been unable to collect any part of the same, * * * that the balance due upon said accounts * * * is still uncollected," held insufficient to state cause of action under Civ. Code, § 2800, for failure to show that debtors were insolvent, or that claims had been reduced to judgment, and execution thereon was returned unsatisfied.

2. Evidence $\Rightarrow$ 441(9)—Parol evidence of sellers' warranty that accounts receivable of corporation were collectible held to vary terms of written agreement for sale of capital stock.

In action on note for balance of purchase price of capital stock in corporation, parol evidence of sellers' warranty that accounts receivable of corporation were collectible held inadmissible as varying terms of written contract for sale of all capital stock.

3. Evidence $\Rightarrow$ 441(9)—Parol evidence is inadmissible to prove existence of warranty as to which written sales contract is silent.

If sales contract, which imports on its face to be a complete expression of the whole agree-

ment, contains no agreement relating to warranty, parol evidence is inadmissible to prove existence of warranty.

4. Corporations $\Rightarrow$ 120—Contract for sale of corporation's assets did not imply warranty that accounts receivable could be collected (Civ. Code, § 1764).

Use of word "assets" in contract for sale of all of capital stock of corporation, and statement that it was agreed that buyers should receive all property represented by the list of assets, did not imply warranty that assets, in nature of accounts receivable, which were to be transferred, would be collectible under Civ. Code, § 1764.

Department 1.

Appeal from Superior Court, Los Angeles County; John L. Fleming, Judge.

Action by William J. Nimmo against Gerald Fitzgerald and another. Judgment for plaintiff, and defendants appeal. Affirmed.

O. C. Sattinger and LeRoy M. Edwards, both of Los Angeles, for appellants.

Lissner, Roth & Gunter, of Los Angeles, for respondent.

PRESTON, J. The complaint in this action alleges the execution by defendants to plaintiff of two promissory notes, each for \$2,000; a payment of \$1,000 on account of the first note, and the balance of \$3,000, plus interest and attorney fees, due, owing, and unpaid.

It appears that in 1923 plaintiff and one Shattuck, owners of Shattuck & Nimmo Warehouse Company, a corporation, entered into a written agreement for the sale of all the capital stock of said corporation, \$30,000 par value, to defendants, at a purchase price of \$34,000, payable in deferred payments represented by promissory notes, the last two of which are the ones here in suit. Both the assets and liabilities were set forth in said agreement, and included in the list of assets were various accounts receivable, totaling \$8,234.86, \$685.51 of which defendants claim they have been unable to collect. The contract is eminently fair. Although the par value of the stock purchased for \$34,000 was but \$30,000, nevertheless the contract shows the net assets conveyed to be worth approximately \$38,000. The entire purchase price, with the exception of the two notes involved in this litigation, was paid.

Defendants question neither the execution of the notes nor the amounts due thereon, but in their answer, to which the written agreement is an exhibit, they allege as a counterclaim that the sellers represented and warranted to them, as an inducement for entering into the contract, that each and every one of the accounts receivable was good and collectible, and they ask that the sum of \$755.51 be allowed them as a set-off against any indebtedness due on said notes.

On trial of the case, objection to the introduction of any evidence by defendants was sustained on the ground, first, that the answer and counterclaim failed to state a cause of action, and, second, that defendants were attempting to vary the terms of the written contract by parol evidence. The court gave judgment for plaintiff in amount of \$3,772.31, being the balance due on the notes, including attorney fees at 10 per cent., less a set-off of \$70, stipulated to by plaintiff.

The sole issue raised by defendants on this appeal is as to the correctness of the court's ruling in excluding the testimony offered by them.

[1] The counterclaim does not state a cause of action. It alleges that the sellers "warranted to the defendants that each of said accounts receivable was collectible, and agreed and guaranteed that the defendants would receive the money represented by said accounts receivable; that the defendants * * * attempted to collect each and every one of the aforesaid accounts, * * * but have been unable to collect any part of the same; * * * that the balance due upon said accounts * * * is still uncollected, due, owing, and unpaid to the defendants. * * *" These allegations do not tender an issue.

"A guaranty to the effect that an obligation is good, or is collectible, imports that the debtor is solvent, and that the demand is collectible by the usual legal proceedings, if taken with reasonable diligence." Section 2800, Civ. Code. Here the allegation is merely that defendants attempted to collect the accounts, but were unable to do so. There is no allegation that they were not good or collectible, or that the claims had been reduced to judgment, and execution thereon returned unsatisfied, or that the debtors were insolvent, and it would be futile to prosecute them. A case directly in point is *Ohio Electric Car Co. v. Le Sage*, 182 Cal. 450, 453, 454, 188 P. 982, 983, where defendant appealed on the judgment roll alone, upon the sole point that the complaint did not state a cause of action against him. The court said:

"There is no allegation that the plaintiff * * * has taken any legal proceedings to collect from said company indemnities alleged to be due it, or that said company is insolvent, or that for any other reason legal proceedings against them would be unavailing. No facts are alleged to indicate that the debts of the Garage Company could not have been enforced by ordinary legal proceedings. The appellant contends that the complaint is insufficient against him because of the want of such allegations and we think this contention must be sustained. * * *

"It is, in effect, a guaranty of collection such as that mentioned in section 2800 of the Civil Code. Such a guaranty imports that the debtor is solvent and that the demand is collectible by the usual legal proceedings, if taken with reasonable diligence. If such proceedings are not

taken, the guarantor is discharged unless 'no part of the debt could have been collected thereby' or unless the principal obligor has removed from the state leaving no property therein from which the obligation might be satisfied. Civ. Code, §§ 2801, 2802. The complaint does not show any of these facts, or any excuse for the failure to take legal proceedings first against the principal."

[2, 3] Exclusion of the testimony on the ground that defendants were attempting to vary the terms of the written contract by parol evidence was likewise proper. Defendants contend that where, as here, the written contract is silent, evidence is admissible to prove a parol warranty; said warranty being collateral to the written contract. Such is not the law of this state. The rule announced by this court in numerous decisions is well stated in the case of *Germain Fruit Co. v. Armsby Co.*, 153 Cal. 585, 594, 595, 96 P. 319, 322, as follows:

"There are well-considered cases holding that an express warranty can be proven by parol evidence where the contract of sale is silent in this respect. The decisions in these cases are based upon the principle that a warranty is not one of the essential elements of a sale, but is a mere collateral undertaking. *Chapin v. Dobson*, 78 N. Y. 74. 34 Am. Dec. 512.

"This view, however, is not in harmony with the cases upon which the latest declarations of the law on this subject by our Supreme Court rest * * * [citing *Thompson v. Libby*, 34 Minn. 377, 26 N. W. 2]. * * *

"Where the written sale contains no warranty * * * parol evidence is inadmissible to prove the existence of the warranty. * * * *Johnson v. Powers*, 65 Cal. 181, 3 P. 625; citing *Benjamin on Sales*, 621.

"If it (the writing) imports on its face to be a complete expression of the whole agreement, * * * parol evidence cannot be admitted to add another term to the agreement, although the writing contains nothing on the particular one to which parol evidence is directed. The rule forbids to add by parol when the writing is silent. * * * *Harrison v. McCormick*, 89 Cal. 330, 26 P. 830, 23 Am. St. Rep. 469. * * *" Also citing many other cases.

See, to the same effect *United Iron Works v. Outer H., etc., Co.*, 168 Cal. 81, 141 P. 917, and *Madera S. P. Co. v. N. B. Livermore & Co.*, 179 Cal. 116, 117, 175 P. 456.

[4] Defendants advance the further theory that a warranty is implied by the use of the word "assets" in the contract, and the statement that it is agreed that the buyers shall receive all property represented by said list of assets. The buyers received exactly what the contract purported to convey, to wit, those certain accounts receivable listed therein. There is no suggestion that the accounts were not bona fide accounts or that the sellers failed to deliver them to the buyers. "A mere contract of sale or agreement to sell does not imply a warranty." Civ. Code, § 1764. The contract to sell certain listed assets undertook no more than

to convey to the buyers the assets so agreed to be conveyed.

Judgment affirmed.

We concur: CURTIS, J.; SEAWELL, J.

202 Cal. 557

VERBECK et al. v. CLYMER et al. (L. A. 8876.)

Supreme Court of California. Dec. 9, 1927.

1. Adverse possession $\S$ 85(1)—Possession by another than holder of legal title is deemed to have been under and in subordination thereto (Code Civ. Proc. $\S$ 321).

Under Code Civ. Proc. $\S$ 321, holder of legal title to land is presumed to be entitled to possession thereof, and possession by another is deemed to have been under and in subordination to legal title.

2. Ejectment $\S$ 26(1)—Defendants in ejectment action, after admitting legal title in plaintiffs, can prevail only by setting up equitable defense which can be ripened into legal title.

Where, in ejectment action, legal title is admitted to be in plaintiffs, defendants can only prevail by setting up an equitable defense, which equity must be of character that may be ripened by decree into legal right or such as will estop plaintiff from prosecuting action.

3. Pleading $\S$ 79—Defendant must set up equitable defense in answer.

Where a defendant wishes to avail himself of an equitable defense, he must set it up in his answer.

4. Vendor and purchaser $\S$ 299(1)—Purchaser in possession under contract of purchase, after default, cannot maintain equitable defense in vendor's action of ejectment.

Where a purchaser in possession under a contract of purchase has failed to perform his part of contract, and is in default with respect thereto without excuse, he cannot maintain an equitable defense in action of ejectment by vendor, since purchaser cannot remain in possession of lands under contract and refuse to pay purchase price.

5. Abatement and revival $\S$ 40—Plea that action is premature must be specially pleaded.

The plea that an action has been prematurely brought is in the nature of a dilatory plea, which must be specially pleaded in order to be available as a defense.

6. Usury $\S$ 78, 146—Obligation to pay interest is void in case of usury and maturity date of principal is not accelerated by nonpayment of interest.

In a case where usury is established, obligation to pay interest is void and maturity date of principal cannot be accelerated on account of nonpayment of interest.

7. Usury $\S$ 18—Contract for sale of land requiring monthly payments held not "loan," within meaning of usury law.

Contract for sale of land, providing for monthly payments covering a period of 15 years, being a bona fide sale and purchase of real property where vendor retained title, held not a "loan," within the meaning of usury law.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Loan.]

Department 1.

Appeal from Superior Court, Los Angeles County; J. Walter Hanby, Judge.

Action by George I. Verbeck and another against Forest D. Clymer and another, wherein defendants filed a cross-complaint. Judgment for plaintiffs and cross-defendants, and defendants and cross-complainants appeal. Affirmed.

George L. Sanders, of Los Angeles, for appellants.

Denio & Hart, of Long Beach, for respondents.

PRESTON, J. This is an ordinary action in ejectment with a prayer for \$10,000 in damages for the unlawful withholding of possession of the premises described in the complaint. The foundation of the action is an allegation of title and the right of possession thereunder and the wrongful withholding thereof by defendants. The defendants admit title in plaintiff and also admit their possession of the premises, but they deny that such possession is wrongful. As a special defense the answer sets up a contract of sale and purchase of said premises wherein plaintiffs agreed to sell and defendants agreed to buy the same for \$20,000. It alleges also an initial payment of \$5,000, with the balance of \$15,000 to be spread out over a period of 15 years, which with the interest added would be discharged in 180 months by the payment of \$200 on the 1st of each and every month, which payments defendants agreed to make. Payment of an installment of \$200 on the 1st day of October, 1924, and of a second one on the 1st day of November, 1924, is alleged. It is not alleged, nor is it claimed, that any subsequent payments have been made or tendered, nor is it alleged that defendants have performed all or any of the covenants and conditions on their part to be kept and performed under said contract of purchase. In short, the answer does not show defendants to be free from default under said contract. The answer, however, attempts to allege usury in the transaction by stating that more than 12 per cent. per annum as interest on the deferred payments is exacted under said contract and on that account the whole obligation to pay interest is void and the maturity date of the contract is by operation of law deferred until the expiration of said period of 15 years. The

effect of the answer in short is that defendants claim the right to possession of the premises without the payment of any interest and with an obligation to pay the balance of the principal only at the expiration of the 15-year period. The answer by no means contains all of the demands of the defendants. They also filed a cross-complaint setting forth said contract of sale and purchase as above alleged and containing the further allegation that \$21,000 interest was provided for in said contract; that on account of the existence of usury in the transaction the obligation to pay interest was void and defendants were entitled as a penalty to judgment against plaintiffs for treble said interest item, to wit, the sum of \$63,000, and this without the payment of a cent of interest, except the undetermined amount in the two payments of \$200 each made by defendants before their appetites were sharpened.

The net result of the answer and cross-complaint is that defendants ask to be allowed in effect both the title and the purchase price of said property and in addition thereto that plaintiffs should pay defendants \$48,000 for the privilege of donating the property to them. There is anything but modesty in the claim of defendants. So avaricious are they that not only do they ask for all the aforesaid relief, but they claim that plaintiffs were in contempt of court in asking for judgment in their favor on the pleadings, and in that behalf they said:

"* * * And that said plaintiffs at all times since have been and now are in contempt of court and in express, gross, willful, and flagrant disobedience of the orders of the court.
* * *"

Notwithstanding this challenge of defendants, plaintiffs waived their prayer for damages and pursued their motion for judgment on the pleadings, which, after consideration, the court granted, and thereupon gave its judgment in their favor and against defendants, among other things specifying therein as follows:

"* * * It appearing to the satisfaction of the court from said pleadings that the fee-simple title to said property is admitted to be in plaintiffs and that defendants are unlawfully in possession of said premises, and said defendants failed to set up in their answer an equity in and to said property hereinafter described or in and to any part thereof, and it being made to appear that defendants and cross-complainants are not entitled to plead a cross-complaint for a money judgment in an action of ejectment, and there being no issue to try, it is ordered, adjudged, and decreed that the plaintiffs are the owners in fee simple and entitled to possession of the premises described in said complaint herein, to wit, [describing the premises] * * * and that said plaintiffs have and recover possession thereof. * * *"

[1] The action of the court in granting judgment for plaintiffs on the pleadings is

clearly correct. We find no equity on the face of the answer.

It is a presumption of law from the legal title that the holder thereof is entitled to possession of the premises (*Willis v. Wozencraft*, 22 Cal. 607, 615) and possession by another is deemed to have been under and in subordination to the legal title (*Code Civ. Proc.* § 321).

[2] Where the legal title is admitted to be in plaintiffs, defendants can only prevail against them by setting up an equitable defense, "and the equity presented must be of such a character that it may be ripened by a decree into a legal right to the premises or such as will estop the plaintiff from the prosecution of the action." 9 Cal. Jur. p. 1000.

[3] It is elementary that, if a defendant wishes to avail himself of an equitable defense, he must set it up in his answer. *Dorn v. Baker*, 96 Cal. 206, 31 P. 37.

[4] Where a vendee in possession under a contract of purchase has failed to perform his part of the contract and is in default with respect thereto, without excuse he cannot maintain an equitable defense in an action of ejectment by the vendor. *Connolly v. Hingley*, 82 Cal. 642, 23 P. 273; *Howard v. Hewitt*, 139 Cal. 614, 73 P. 414. "A purchaser cannot remain in possession of lands under a contract and at the same time refuse to pay the purchase price. * * *" *Rhorer v. Bila*, 83 Cal. 54, 23 P. 275; *Gates v. McLean*, 70 Cal. 49, 11 P. 489; *Gervaise v. Brookins*, 156 Cal. 106, 103 P. 329. The essence of the rule is that, where the legal title to the property is in the plaintiff and that fact is admitted by the defendants, defendants cannot successfully defend against an action in ejectment unless they make out a complete equitable title in themselves with the right of possession thereunder. *Wallace v. Maples*, 79 Cal. 433, 21 P. 860; *Flint v. Conner*, 53 Cal. App. 279, 200 P. 37. The decisions of this court are replete with announcements of the above principles and we need not here pause for further citations.

[5] The answer to the cross-complaint in this action sets out the written contract between the parties as an exhibit thereto, from which it appears that, as to the monthly payments called for by said contract, forfeiture should not occur until expiration of the period of 90 days from and after the due date of such payment; but defendants have not by answer or by plea in abatement or otherwise attempted to assert the premature institution of the action, nor do they, either in the answer or cross-complaint, tender to plaintiffs any of the payments which were long overdue at the time of the filing of the answer herein. In other words, they have wholly failed to do equity under the circumstances. It is well settled that the plea that an action has been prematurely brought is in

the nature of a dilatory plea which must be specially pleaded in order to be available as a defense. *Realty & Rebuilding Co. v. Rea*, 184 Cal. 565, 573, 194 P. 1024; *Bemmerly v. Woodward*, 124 Cal. 568, 57 P. 561.

[6, 7] But the whole essence of defendants' astonishing claims lies in their attempt to call to their aid the provisions of the usury law. It is now well settled that, in a case where the usury is established, the obligation to pay interest is void and the maturity date of the principal cannot be accelerated on account of the nonpayment of interest. *Haines v. Commercial Mortgage Co.* (Cal. Sup.) 254 P. 956. The claim of defendants seems to be that the obligation set up in their answer is in the nature of a loan and that as such it is usurious. The obligation to pay the principal sum is therefore deferred by operation of law until the expiration of the 15-year period and as a consequence they may not be said to be in default under their contract of purchase. Inasmuch as there is no way of separating the interest payments from the payments on the principal, there might be substance in this contention if indeed the transaction is usurious (*Haines v. Commercial Mortgage Co.*, supra), for it is undoubtedly the law that under certain circumstances a contract tainted with usury may be a proper subject for the interference of a court of equity to prevent a declaration of a forfeiture. But we have no hesitancy whatsoever in declaring that the transaction set up in the answer and cross-complaint is not in any sense a loan within the meaning of said usury law. The contract is admittedly a bona fide one of sale and purchase of real property where the title is retained by the vendor. The purchase price is therein named and the terms of sale are fixed and certain deferred payments are provided for. There is in the transaction no element of a loan. The parties were unfettered; dealt with each other at arm's length and in apparent good faith. The transaction was not a subterfuge devised to conceal what was in fact a loan. In view of this conclusion there is no room whatsoever for the contention that the usury law will intervene to give equitable relief to defendants or to penalize the plaintiffs. This holding was foreshadowed by what was said in *Re Washer* (Cal. Sup.) 254 P. 951, to the effect that sale by a corporation of securities of its own issue of stock or securities was not a violation of the usury law. If the sale by a corporation of its stock or securities of its own issue is not a loan within the usury law, how much more certain must be the conclusion that the sale of one's own property is not a loan whatever be the terms or conditions of purchase. This principle is announced as follows in 39 Cyc. p. 926:

"It is manifest that any person owning property may sell it at such price and on such terms

as to time and mode of payment as he may see fit, and such a sale, if bona fide, cannot be usurious, however unconscionable it may be."

The principle is stated in 27 R. C. L. pp. 213, 215, §§ 14, 15, as follows:

"The first element of a usurious transaction is that there be a loan or forbearance of money, for, if there is neither, there can be no usury, unless a statute has given some definition of usury inconsistent with that of the common law. * * * On principle and authority, the owner of property, whether real or personal, has a perfect right to name the price on which he is willing to sell, and to refuse to accede to any other. He may offer to sell at a designated price for cash or at a much higher price on credit, and a credit sale will not constitute usury however great the difference between the two prices, unless the buying and selling was a mere pretense; and it has been held that it is not material that the agreement for the purchase price in the future, instead of specifying the whole sum then to be paid, names a particular sum as principal, and declares that it shall draw interest at a rate which, were the transaction a borrowing and lending, would clearly be usurious. * * *"

In the case of *Holland-O'Neal Milling Co. v. Rawlings*, 217 Mo. App. 466, 479, 268 S. W. 683, 686, the court said:

"The owner of property, whether real or personal, has a right to name the price at which he is willing to sell. He may offer to sell at a designated price for cash, or at a much higher price on a credit, and a credit sale will not constitute usury, however great the difference between the cash price and the credit price, unless the whole transaction was in fact a mere pretense and a sham in order to camouflage the real facts."

See, to the same effect, *General Motors Acc. Cor. v. Weinrich*, 218 Mo. App. 68, 262 S. W. 425. An exact parallel of the case at bar is *Edwards v. Wiley*, 150 Ark. 480, 483, 235 S. W. 54, 55, where the court said:

"The complaint alleged that on March 20, 1910, appellant, John B. Edwards, was the owner of lot 5, in block 65, in the city of Ft. Smith, and that its then value was \$1,500; that, in order to obtain an exorbitant rate of interest, Edwards fixed the price of the lot at \$2,250, and contracted to sell it to William Wiley at that price, payments to be made at the rate of \$20 per month, payable quarterly, with interest at 8 per cent., and that this price was fixed as a subterfuge whereby usurious interest might be collected. This branch of the case may be disposed of by saying that all the testimony shows that the transaction between Edwards and Wiley was one for the sale of the lot. Neither of the parties intended or contemplated a loan of money, and it was not such in fact. This was a sale, and was so intended, and the exaction of a price, however exorbitant, cannot import into the transaction the characteristics of usury, as the element of lending and borrowing money is absent. Such was the express holding of *Ellenbogen v. Griffey*, 55 Ark. 268, 18 S. W. 126, and reaffirmed in the case of *Blake Bros. v. Askew & Brummett*, 112 Ark. 514, 166 S. W.

965, and the more recent case of *Smith v. Kaufman*, 145 Ark. 548, 224 S. W. 978."

This holding also disposes of the cross-complaint which prays for a judgment in treble the amount of the item designated as interest and renders unnecessary a consideration of any of the many other attacks made upon the legal sufficiency thereof as well as the propriety thereof under our rules of pleading.

The fact that we do not further discuss the matter is by no means to be taken as an indication that we do not think the contentions meritorious.

Judgment affirmed.

We concur: CURTIS, J.; SEAWELL, J.

87 Cal. App. 218

VANONI v. ROOD. (Civ. 6060.)

District Court of Appeal, First District, Division 2, California. Dec. 1, 1927.

1. Assault and battery ☞35—Conflicting evidence held to sustain finding against claim of justification for assault.

In action for damages for assault, conflicting evidence held to sustain finding against defendant's claim of justification.

2. New trial ☞104(1)—New trial for newly discovered evidence, which was cumulative, held properly denied.

New trial for newly discovered evidence held properly denied, where evidence was cumulative, and it was doubtful whether it could have been produced, if new trial had been granted.

Appeal from Superior Court, Sonoma County; Ross Campbell, Judge.

Action by Clement Vanoni against W. F. Rood. Judgment for plaintiff, and defendant appeals. Affirmed.

W. F. Cowan and A. W. Hollingsworth, both of Santa Rosa, for appellant.

J. L. Royle, of Berkeley, for respondent.

STURTEVANT, J. The plaintiff commenced an action to recover damages caused by the assault on him of the defendant. The defendant appeared and answered, and a trial was had before the trial court sitting without a jury. The trial court made its findings, and caused a judgment thereon to be entered in favor of the plaintiff. The defendant made a motion for a new trial, the motion was denied, and he has appealed from the judgment under section 953a of the Code of Civil Procedure.

In his answer the defendant denied the material allegations of the complaint, and pleaded affirmatively his justification for the alleged assault. On the issue of justification the trial court made several findings against the defendant, and the defendant attacks

those findings, claiming that they are not supported by the evidence. The plaintiff replies that the evidence was conflicting, and that there was substantial evidence supporting all of the findings made by the trial court. To that reply the defendant answers that, since the repeal of section 1835 of the Code of Civil Procedure, the trial courts must be governed by section 1826 and section 2061 of the Code of Civil Procedure. That answer is quite interesting, and may be of much importance in a case which supports it; but we think the case at bar does not present facts which call for a ruling on the contention. In his opening brief the defendant says:

"The appellant has not at any time contended that he did not strike the respondent with his fist or that the respondent did not suffer the injuries complained of as a result of the blow, and the appellant concedes that he struck the first blow, but urges that he was justified in his own defense according to the circumstances as they appeared to him at the time, and as they would have appeared to a reasonable man under the circumstances."

[1] It becomes necessary, therefore, to recite the "circumstances" as shown to the trial court. Miss Helen Stockham resides at Geyserville. The defendant, W. F. Rood, operates a general merchandise store at that place, and there is some evidence that he is "going with" Miss Stockham, and employs her as his bookkeeper, and also employs other members of her family. Clement Vanoni is a young man 22 years of age, who, since boyhood, has been acquainted with Miss Stockham, and there is some evidence that he is also "going with" her. Some time prior to the 10th day of July, 1924, Miss Stockham and a girl friend, together with Clement Vanoni and his friend Veral Gore, had taken an automobile ride. On that ride something occurred which prompted Miss Stockham to report to the defendant that she would not have anything more to do with that "bunch," because the plaintiff and his associate had used vulgar language. Thereupon the defendant took the position, when talking to his neighbors, that Vanoni and Gore should apologize to Miss Stockham. To many persons in Geyserville he so stated. Thereafter Vanoni and Gore heard of the defendant's statement, and they took the position that the defendant should apologize to them, or he would be hurt, or words to that effect. They so stated to different persons in Geyserville and some of those persons reported the statements to the defendant. Various conversations were had until on the 10th day of July, 1924, at about 9 o'clock in the morning, Vanoni and Gore went to the defendant's store, and held a conversation with the defendant. When they stated to the defendant what reports they had heard, the defendant replied

that he had not made the statements charged to him. Thereupon he stated to the plaintiff and his associate, Gore, that they had used vulgar language in the presence of Miss Stockham, and that they should apologize to her. Thereupon all three turned in their tracks, and stepped to another part of the store, where she was engaged in her work, and discussed with her what had occurred on the automobile ride, and what was said. That conversation having come to an end, the defendant said to the plaintiff and his associate, "I heard around town that you were coming in to punch my nose—is that right?" The plaintiff replied, "I believe that is right." Gore said, "Yes; it's a damn good place for it." Almost immediately following the conversation just delineated the defendant struck the first blow, and knocked Vanoni down. The plaintiff and his associate, Gore, testified that, before that blow was struck, neither one had made any move or gesture indicating any present intention of striking or injuring the defendant. The defendant and his employee Miss Stockham testified that the plaintiff stood in front of the defendant with his fist clenched, and was quarreling with the defendant. There was evidence of threats made by Vanoni and Gore against the defendant, and that some of those threats had been communicated to the defendant. Before those threats could be used in evidence against the party making them, it has been held in this state, in homicide cases, that there should be evidence of the commission of some overt act indicating a present intention of such party to carry his threats into execution. *People v. Wright*, 45 Cal. 260; *People v. Taing*, 53 Cal. 602, 603; *People v. Campbell*, 59 Cal. 243, 247, 43 Am. Rep. 257; *People v. Westlake*, 62 Cal. 303, 305; *People v. Gonzales*, 33 Cal. App. 340, 342, 164 P. 1131. No decision of this state has been cited to us which holds that the same rule applies in a criminal or civil action based on a simple assault. The authorities in other jurisdictions, however, are to that effect. 5 C. J. 683, § 126; *Stockham v. Malcolm*, 111 Md. 615, 74 A. 569, 572, 19 Ann. Cas. 759; *Cooke v. State*, 18 Ala. App. 416, 93 So. 86, 88; *Cooke v. Wilbanks*, 208 Ala. 486, 94 So. 725. The case last cited is the civil action, and the case preceding it is the criminal action growing out of one and the same state of facts. In the case at bar the trial court saw all of the actors, heard all of the witnesses, saw the manner in which each testified, and had a full opportunity to determine on which side right and justice should prevail. It is clear that the record is such that much could be said in favor of the contention of the plaintiff that the assault was a cowardly assault by the defendant, through jealousy, on a young boy who was chiefly guilty of talking too much, and that the assault was made at a time when the defendant was not at all in danger. It is equally clear that

much could be said to the effect that the plaintiff and his associate entered the castle of the defendant for the purpose of quarreling with him, and in that place did quarrel with him and assault him. However, it is equally clear that by no means may it properly be said that the evidence was all one way, and that it was against the findings made by the trial court on the issue of justification. *Patton v. Klemmer*, 15 Cal. App. 459, 115 P. 62.

[2] In moving for a new trial, the defendant presented affidavits showing or tending to show newly discovered evidence. That evidence consisted of other threats made to other persons at or about the time of the threats hereinabove mentioned. The evidence was cumulative. Furthermore, the reply affidavits brought forward by the plaintiff rendered it quite doubtful whether the newly discovered evidence could have been produced if a new trial had been granted. No error appears to have been committed by the trial court in denying the motion.

The judgment appealed from is affirmed.

We concur: KOFORD, P. J., NOURSE, J.

HILTON v. OLIVER et al. (Civ. 3311.)★

District Court of Appeal, Third District, California. Dec. 5, 1927.

Rehearing Denied Jan. 4, 1928. Hearing Granted by Supreme Court Feb. 2, 1928.

1. Appeal and error ⇐236(2)—Defendants, not having moved that plaintiff specify particulars of negligence, could not first urge objection to complaint on appeal.

Where complaint alleged that on named date defendants negligently and carelessly maintained a ditch so that waters overflowed plaintiff's growing crops, since defendants did not move that plaintiff specify exact particulars of negligence they could not urge such objection for the first time on appeal.

2. Drains ⇐60—Whether defendants' negligence caused water to overflow drainage ditches and damage plaintiff's crop held, under evidence, for jury.

Where plaintiff alleged reclamation district and trustees negligently maintained drainage ditch so that water overflowed and destroyed barley crop, evidence that district's employees cut vegetation in drains and threw it on banks thereof, so that during high water it clogged culvert and caused overflow to plaintiff's land, held to make prima facie case of negligence, and hence denial of defendants' motion for nonsuit and motion for directed verdict at completion of testimony was proper.

3. Drains ⇐60—Instruction in action for negligence that person acting in official capacity is individually liable for negligent discharge of duties held not error (Pol. Code, § 3464).

In action against reclamation district and trustees for negligently maintaining drainage ditch which overflowed and destroyed barley

crop, instruction that a person acting in his official capacity is individually liable for negligent discharge of his duties *held* proper, as law applicable to case at time of injury; rule thereof having been modified by Pol. Code, § 3464.

4. Drains $\Leftrightarrow$ 60—Instruction that negligence consisted in failing to control cause of injury held not error, in view of further instructions.

In action against reclamation district and trustees for negligent maintenance of drainage ditch which overflowed and destroyed barley crop, instruction that negligence was not simply in originating that which may be cause of injury, but consists also in failing to control such cause so as to prevent inflicting injury, was not error, in view of further instructions.

5. Trial $\Leftrightarrow$ 252(7), 260(7)—In action for negligent maintenance of ditch, refusal of instructions covered by instructions given or on matters unsupported by evidence held not error.

In action against reclamation district and trustees for negligence in maintenance of ditch which overflowed and damaged plaintiff's barley crop, refusal of defendants' instructions which were covered by given instructions or were as to matters on which no evidence was presented in the record was not error.

Appeal from Superior Court, Sacramento County; John F. Pullen, Judge.

Action by F. A. Hilton against Emery Oliver and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Charles W. Slack and Edgar T. Zook, both of San Francisco, and C. F. Metteer, of Sacramento, for appellants.

Martin I. Welsh and Robert Schwab, both of Sacramento, for respondent.

WEYAND, Justice pro tem. Plaintiff and respondent, during the spring of 1922, was growing a crop of barley on lands of one Jessee, which said lands were situated within reclamation district No. 1000, in Sacramento county. The defendants and appellants Oliver, Martin, and Kiesel were the trustees of said district at said time.

Plaintiff by his complaint avers that said above-named defendants so carelessly and negligently maintained and operated a drainage ditch, a part of said reclamation district system, that the same overflowed plaintiff's land and destroyed a crop of barley valued at \$3,390. The damage claimed was for the plaintiff's share of the crop, and for an assigned claim of the landlord, Jessee, for his rental share of said crop.

At the trial the defendant reclamation district was, upon motion of plaintiff, dismissed as a party defendant. Upon trial a jury awarded plaintiff damages in the sum of \$1,000. This appeal is from the judgment and from an order denying a motion for a new trial.

At the close of plaintiff's testimony a mo-

tion for nonsuit was made by defendants and denied. Upon the completion of the testimony a motion for a directed verdict was made, upon substantially the same grounds, and was likewise denied. Denial of these requests are assigned as errors. Two instructions given at request of plaintiff were excepted to and three instructions requested by defendants, and which were not given, are likewise assigned as error of the trial court.

[1] The complaint in general terms alleged:

"That on or about the 12th day of February, 1922, said defendants so negligently and carelessly maintained and operated" a certain ditch "that the waters therein overflowed said ditch on the premises herein described, and on and over the crops therein planted and growing."

There was no specific statement of what the alleged negligence consisted. A general demurrer only was interposed by the defendant trustees. In the briefs of appellants much is said as to the failure of plaintiff to acquaint defendants of the particulars of the claim of negligence. While we are not attempting to decide whether or not a more specific statement of the particulars of the claim herein should have been made, it is sufficient to say that had the defendants felt that they should have a more detailed statement of these particulars; that criticism of the complaint should have been pointed out by a demurrer for ambiguity or unintelligibility. Even after the pleadings were settled, had defendants that criticism in mind, they might have by motion asked the court to direct that plaintiff specify the exact particulars of the alleged negligence. Not doing either of these things, it is now too late to insist upon that objection.

[2] The motion for nonsuit and the motion for a directed verdict will be considered together. While the motion for a directed verdict was specific, yet the general aspect of both motions were the same.

The testimony disclosed that shortly before a heavy rain on or about February 12, 1922, the reclamation district by its employees had cut the vegetation, tules, and other growth, in the drains above the lands plaintiff was farming. Much of this growth had been thrown upon the banks of the drains and placed so that when the drains filled with water it was carried down the drains by the flood waters therein. At a point near to the lands the plaintiff was farming the loose tules and other matter so cut from the drains clogged up a culvert so that the waters could not pass through the same, and said flood waters overflowed the banks of the drain ditch and onto the adjacent lands farmed by plaintiff. The testimony was sufficient to support a verdict in the amount assessed by the jury. There was some dispute as to what caused the clogging of the culvert. Defendants claimed, and therein were supported by

testimony, that the tules alone could not have caused the clogging of this culvert. The testimony of plaintiff's witnesses was to the effect that this clogging was caused by tules. The jury heard the testimony, as did the trial court, and we are not now permitted to say that their finding in this matter should be disturbed. It is true that, if boards, oil drums, etc., placed in the ditch by farmers living along the line thereof caused the blocking of the drain, as some witnesses testified, defendants would not be liable for the overflow caused thereby. Taking all the testimony presented to the jury, either before the motion for a nonsuit, or upon the completion of defendants' case, sufficient is presented to make out a prima facie case.

[3, 4] At the request of the plaintiff the court gave the following instructions:

A. "You are instructed that a person acting in his official capacity is individually liable for the negligent discharge of his duties."

B. "Negligence is not simply in originating that which may be the cause of injury, but consists also in failing to control this cause, so as to prevent inflicting injury."

At the time of this injury and at the time of the trial instruction A properly stated the law applicable to this case. The rule has since been modified by section 3464, Political Code. These instructions were followed by instructions offered by the defendants to the effect that trustees of a reclamation district are not chargeable by law to personally perform the work of constructing and maintaining the works of the district, and that to hold the trustees liable the jury must find that said trustees had knowledge or means of knowledge of defects in the works and had failed to remedy the defective conditions. There was no direct proof of knowledge by the trustees of the conditions that caused the overflow, but under the law the trustees of the district were deemed to have done their duty, a part of which was to "exercise general supervision" over the works and the operation of the district. We cannot therefore hold that instruction B was in any way erroneous or prejudicial.

[5] The three instructions offered by the defendants and refused by the trial court are either partly covered by other instructions given at request of defendants, or are as to matters upon which no evidence is present in the record. The first instruction complained of offered by defendants and which the court refused to give was as follows:

"I instruct you that a trustee of a reclamation district is not responsible for the acts or omission of subordinates properly employed by or under him, if such subordinates are not in his private service, but are themselves servants of the reclamation district, unless such trustee has directed such acts to be done or has personally co-operated therein."

The court, at the instance of defendant, had previously told the jury that the trustees could engage engineers and employees to do the general planning and work of caring for the operation of the district, and that, if the trustees did use ordinary care in the selection of employees, they could not be held liable, unless after knowledge of the failure of the drain. The two further requested instructions relate to the giving of instructions to the employees by the trustees of the district. The testimony does not disclose that the defendant trustees did give any instructions to engineers or employees. No testimony was offered as to the care taken in the selection of engineers or employees, and, while in a proper case it would be proper to give such offered instructions, it does not appear that any evidence was before the court to which such instructions were applicable.

The judgment and the order of the lower court are affirmed.

We concur: HART, acting P. J.; PLUMMER, J.

BRENGLE et al. v. STEEN et al. (Civ. 5636.)★

District Court of Appeal, First District, Division 1, California. Nov. 30, 1927.

Rehearing Denied Dec. 30, 1927. Hearing Granted by Supreme Court Jan. 26, 1928.

1. Appeal and error $\S$ 1041(3)—Permitting trial amendment of answer to correct denial, defective but sufficient to put on notice, held not ground for complaint.

That an amendment of answer was permitted at the trial to correct a denial of allegation of employee's act being within scope of his employment is not ground for complaint; the original denial, while defective, being sufficient to put plaintiffs on notice, and it not appearing they suffered any disadvantage from the amendment.

2. Master and servant $\S$ 302(1)—Employer is not liable for acts of employee not in course of employment.

An employer is not chargeable for acts of an employee done either to satisfy his own curiosity, or at the instance of some one else, and not in the course of his employment.

3. Master and servant $\S$ 330(3)—Conclusion that one of crew installing oven was acting within scope of authority in turning on gas held not warranted by evidence.

Conclusion that, if one of the crew, sent to take down an old oven and install a new one, turned on the gas, causing explosion, resulting in death of an occupant of the premises, he was acting within the scope of employment held unwarranted by the evidence.

4. Gas ~~Co~~20(4)—Whether gas company was negligent in placing meter without order, letting gas into room when turned on by mistake, held jury question.

Whether gas company, being dealer in dangerous commodity, was negligent in installing, without order, a meter which when turned on would let gas into a room where it was not used, the meter being beside three others, furnishing gas for other rooms, and being by accident turned on by some one, causing an explosion, held question for jury.

Appeal from Superior Court, Los Angeles County; Victor R. McLucas, Judge.

Consolidated actions by Helen L. Brengle and others against Robert I. Steen and others. From a judgment of nonsuit, plaintiffs appeal. Reversed in part, and in part affirmed.

Vernon Brydolf, of Pasadena, and Jennings & Belcher, of Los Angeles, for appellants.

O'Melveny, Millikin, Tuller & Macneil and Thomas J. Reynolds, all of Los Angeles, for respondents.

STROTHER, Justice pro tem. Plaintiffs brought two actions to recover damages for the death of the husband of one of the plaintiffs—the father of the other plaintiff. The two actions were consolidated for the purpose of trial, and at the conclusion of the plaintiffs' evidence judgments of nonsuit were on motion entered in favor of the several defendants. From this judgment plaintiffs appeal.

The deceased, Brengle, was killed by an explosion of gas alleged to have been allowed to escape by the negligent acts of the several defendants. The building in which the explosion took place consisted of four rooms. One, extending from the street line the full depth of the building, was occupied by Fawkes, a baker; the next room on the street was used as a butcher shop; the third was used as a confectionery and tobacco shop; the fourth room, which lay behind the butcher and tobacco shops, was used by Hooper, Brengle's employer, as an automobile accessories storeroom in connection with a service station which he conducted on the lot adjacent to the building. Hooper had been the lessee of the building from the time of the first construction, the other occupants being his subtenants. All of the rooms in the building were equipped with house pipes for gas. The one leading into Hooper's accessories room was not occupied and had not been from the time of its installation. The front end of the bakeshop was partitioned off from the rear and was used as a display and salesroom. On either side of the entrance door was a show window, which was glazed in from the room and was entered by glass doors. Under the show window next the butcher shop was a compartment in which the gas house pipes of all the other rooms

headed for the installation of meters. The baker's meter was larger than any of the others, as he used gas for his cooking. The other two subtenants used gas for other purposes. Hooper, the lessee, had never used it for any purpose, and had never ordered the installation of a meter to connect with the accessories store, nor does it appear that any one had ever ordered such an installation. A meter connecting with that store was installed by the defendant gas company at a later time than the others, and remained unused up to the time of the explosion. Just before the day of the explosion Fawkes, the baker, contracted with the defendant Steen for the removal of an old bake oven and the purchase and installation of a new one. On the morning of that day Woodruff, Redfern & Geisler, employees of Steen, went to the bakeshop for the purpose of doing the job, taking the new oven with them. Woodruff was the foreman on the job, and Redfern was his assistant. Geisler seems to have been taken along as a general roustabout and to help in lifting and carrying the ovens. In order to remove the old oven and put in the new one, it was necessary to have the gas turned off at the meter. This was done by Fawkes at the request of Woodruff. Geisler went with Fawkes to the front of the shop and was seen on the floor of the meter compartment after Fawkes had turned off the meter cock. Upon being told by Fawkes that the gas had been turned off, Woodruff and Redfern took down the old oven and set up the new one. They made no connection of the oven with the house pipe and did not go near the meters. The job was finished between 1 and 2 in the afternoon, and the three men went away. About 4:30 that afternoon Brengle started into the accessories storeroom to get some article for a customer and immediately there was an explosion from within. Brengle received burns from which he died the following day. An examination of the meter connected with the accessories room house pipe showed that 4,500 feet of gas had passed through it.

[1] Appellant contends that the court erred in permitting an amendment of Steen's answer at the time of the trial to correct an attempted denial of the allegation that Geisler was acting within the scope of his employment. The denial in the original answer was defective, but it was sufficient to put plaintiffs upon notice, and it is not shown that they suffered any disadvantage from the amendment.

A number of questions were asked by defendants' counsel on cross-examination to which plaintiffs objected as not referring to matters brought out by the direct examination, but relating to matters of defense. Most of these objections were not well taken, and the statements elicited by the questions

which should have been ruled out are not set forth here and are not considered.

From the evidence adduced, the jury might reasonably have drawn the inference that Steen's employee, Geisler, turned the cock which admitted the gas to the accessories room house pipe.

[2, 3] It is contended by respondents that the evidence does not justify the conclusion that if Geisler did turn the gas on he was acting within the scope of his employment when he did so. The evidence indicates that Geisler's employment was limited to the work of lifting and carrying the ovens. He had, in fact, no part in taking down the old oven or setting up the new one. Woodruff, who as foreman was in charge of the job, gave him no orders to turn off the gas at the meter, but addressed himself to Fawkes, who turned it off. If Geisler then did anything to the meters the first time he went to them, he did it without any order and knowing that the only meter that concerned his employer had been attended to. His second visit to the meter was at the direction of Fawkes. An employer cannot be charged with responsibility for the acts of his employee done either to satisfy his own curiosity, or at the instance of some one else, and not in the course of his employment. We conclude, therefore, that if the case had been submitted to the jury they would not have been warranted in concluding that Geisler was acting within the scope of his employment.

[4] The situation as to the respondent Southern California Gas Company is entirely different. Briefly stated, it presents the question whether or not a dealer in a commodity dangerous in itself can, particularly under the circumstances appearing in this case, provide a means for its introduction into the premises of one who has not ordered it without becoming liable for whatever damages may result from its introduction. The house pipe connecting with the accessories room was, of course, appurtenant to the room and under the control of its lawful possessor. With three meters, identical in appearance, placed in a row, it might easily happen that some person properly having the right to turn off and on one of the two in use, would by mistake turn the cock of the third. While it cannot be said that the placing of a meter in that way, was, as matter of law, an act of negligence, nevertheless it was within the province of the jury to say whether, under the circumstances, it was negligent. It may

even be that the placing of the meter was a trespass from the beginning, and that it was incumbent upon the defendant to exercise more than ordinary care to avoid any possible injury to those lawfully upon the premises. But this is not urged by the appellants, and we shall not pass upon it. It is conceded by both sides that ordinary care was required of respondents in handling this commodity, and the question therefore is on the construction of the admitted facts.

For the reasons stated in the foregoing, the judgment of nonsuit as to the defendant Steen is affirmed, and the judgment reversed as to the defendant Southern California Gas Company.

We concur: TYLER, P. J.; CASHIN, J.

96 Cal. App. 784

Fred H. SAWYER, Plaintiff and Appellant, v.
SOUTHERN CALIFORNIA GAS CO.,
Defendant and Respondent.

Fred H. SAWYER, Plaintiff and Appellant, v.
Robert I. STEEN et al., Defendants and
Respondents.*

(Civ. 5506.)

District Court of Appeal, First District, Division 1, California. Nov. 30, 1927.

Rehearing Denied Dec. 30, 1927. Hearing
Granted by Supreme Court Jan. 26, 1928.

Appeals by plaintiff from judgments of the Superior Court of Los Angeles County, Charles Monroe, Judge, in actions for damages for personal injuries. Reversed and affirmed.

Earle M. Daniels and Julius V. Patrosso, both of Los Angeles, for appellant.

O'Melveny, Millikin, Tuller & Macneil and Thomas J. Reynolds, all of Los Angeles, for respondent Southern California Gas Co.

E. W. Forgy and W. S. Taylor, both of Los Angeles, for respondent Steen.

STROTHER, Justice pro tem. The facts in the above-entitled cases were in all essential elements the same as in the case *Helen L. Brengle et al. v. Robert I. Steen et al.* (Civil No. 5636) 261 P. 1023, this day decided by this court. A nonsuit was granted as to the defendant Southern California Gas Company, but the case against Steen went to the jury, which returned a verdict in his favor. For the reasons stated in the case above referred to, the judgment of nonsuit in favor of the Southern California Gas Company is reversed, and the judgment in favor of defendant Steen is affirmed.

We concur: TYLER, P. J.; CASHIN, J.

RUPRECHT et al. v. NICHOLSON.
(Civ. 5952.)★

District Court of Appeal, First District, Division 2, California. Nov. 21, 1927.

Rehearing Granted Dec. 13, 1927.

1. Covenants ☞51(2)—Chicken houses and barns used in conducting chicken ranch held not "outbuildings" within meaning of restriction in deed.

Under limitations in deed restricting buildings to dwelling houses and garages or other outbuildings, held that chicken houses and barns used in conducting a chicken ranch were not "outbuildings" within meaning of such restriction.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Outbuilding.]

2. Injunction ☞128—Finding of diligence in seeking to restrain violation of restrictions in deed held supported by evidence.

Finding that plaintiffs seeking to restrain erection and maintenance of chicken houses and barns as being in violation of restrictions in deed exercised reasonable diligence in making their protest held supported by the evidence.

3. Appeal and error ☞954(1)—Injunction ☞1—Application for injunction rests primarily in chancellor's discretion, which will not be disturbed by appellate court in absence of clear abuse.

An application for injunctive relief rests primarily in discretion of chancellor, and appellate court may not exercise its discretion upon the equities alone, unless it is evident that there has been a clear abuse of discretion.

Appeal from Superior Court, Los Angeles County; Paul Burks, Judge.

Action by Pauline Ruprecht and others against S. L. Nicholson. Judgment for plaintiffs, and defendant appeals. Affirmed.

T. C. Gould, of Los Angeles, for appellant. Mitchell, Silberberg & Davis, of Los Angeles, for respondents.

NOURSE, J. Plaintiff sued to restrain defendant from erecting or maintaining upon defendant's premises buildings other than residences and outhouses permitted by the deeds of conveyance under which both parties held. Plaintiff had judgment as prayed, and defendant has appealed upon a bill of exceptions.

The covenant under which plaintiff sued was included in all the deeds of conveyance to all the lots of a large tract of land owned and subdivided by the common grantor. The provision which plaintiff claimed was breached reads:

"Buildings restricted to dwelling houses and the buyer shall not construct any dwelling house upon said tracts to cost less than \$3,000,

* * * provided that the buyer may erect a garage or other outbuildings, the same to be built and located at the proper point on said tract for such buildings."

The complaint alleged that the defendant, disregarding this restriction, had erected on one of the lots purchased by him "unsightly chicken houses and barns for use in conducting a chicken ranch and ever since has maintained and operated said chicken houses and barns on said property in conducting a chicken ranch." The trial court found that this allegation was true, that the buildings were used only in the business of raising chickens for commercial purposes, that they were not appurtenant or subservient to a dwelling-house, and that they were not "outbuildings" within the meaning of the term as used in the deed.

On this appeal the appellant urges that the trial court misinterpreted the language of the deed and that respondents were estopped from complaining because they permitted appellant to construct the buildings at a large outlay of expense without protest.

[1] The clear purpose of the limitations in the deeds was to restrict the use of the lots in the tract to residential purposes and to prevent the erection of buildings for commercial purposes. In permitting the erection of "a garage or other outbuildings," the grantor used the term as applying to other buildings, like a garage, appurtenant and subservient to the dwelling house and to be used in connection with the use of the dwelling. This is the common use of the term. 20 A. L. R. note, page 234; 3 Bouv. Law Dict. p. 2433; *Firth v. Marovich*, 160 Cal. 257, 262, 116 P. 729, Ann. Cas. 1912D, 1190. The finding of the trial court that the buildings complained of were not appurtenant or subservient to the dwelling house and were not to be used in connection with the dwelling is supported by the evidence and not attacked on this appeal. Under the authorities above noted the buildings could not, therefore, be classed as "outbuildings" within the meaning of the restriction.

[2] Respondents testified that they had been infrequent visitors to the tract during the time appellant was constructing the chicken houses on his lot, had seen one of them completed, and had seen other chicken houses on other lots all of which they were led to believe were either to be removed or to be used for housing a small number of chickens for the use of the owner only. It was shown that appellant erected the chicken houses on his lot before he built his dwelling house and that the chicken houses occupied about three-fourths of the area of his lot, with space sufficient to house 1,500 chickens. When respondents learned the extent of the appellant's plans they entered their protests and testified that they had not protested

sooner because they thought appellant was merely erecting a chicken house for home use. The trial court found that respondents made their protest with reasonable diligence and within a reasonable time after they had noticed that he was erecting buildings which violated the restrictions. This finding is supported by some evidence, and it disposes of the defense of estoppel and waiver.

[3] Appellant directs our attention to the inequity of the judgment, pointing out that before he purchased his lots he was assured by the agent of the owners that the premises could be used for the raising of chickens commercially, that three other lot owners were conducting such businesses in the tract at the time, and that he incurred a large expense in good faith, relying upon these facts. The agent of the owners took the stand as a witness and admitted that he had assured appellant that the premises could be used for a chicken ranch; other lot owners testified that they had purchased lots on the same assurances and had erected chicken houses on them; the protests against the maintenance of the houses by appellant were originated by a lot owner who was engaged in the same business. On the record presented here the equities appear to be wholly with the appellant; but an application for injunctive relief rests primarily in the discretion of the chancellor, and an appellate court may not exercise its discretion upon the equities alone unless it is evident that there has been a clear abuse of discretion. Appellant does not contend that such is the case here, but merely argues the equities as though we were hearing the cause in the first instance.

Upon the grounds urged, the judgment must be affirmed.

We concur: KOFORD, P. J.; STURTEVANT, J.

87 Cal. App. 231

HAMMOND LUMBER CO. v. HENRY.★
(Civ. 3378.)

District Court of Appeals, Third District, California. Dec. 1, 1927.

Rehearing Denied Dec. 31, 1927. Hearing Denied by Supreme Court Jan. 30, 1928.

1. Appeal and error ⇨728(3)—Facts in offer of proof excluded by trial court should be set forth in specification of error.

In order to secure review of ruling of trial court on excluded offer of proof, the facts offered to be proved should be set forth in specification of error, in order that it may be determined whether such proof was competent or material or relevant to any issue.

2. Payment ⇨33(4)—Contractor directing application of payments for materials had no right thereafter to direct different application.

If contractor, purchasing material for different jobs, had right to direct application of moneys paid to seller, he would have no right or authority, after such application was right-

fully made, to direct a different application of same funds.

3. Payment ⇨38(1)—Contractor had no right to direct application of payment on accounts kept separately merely for convenience and constituting one debt (Civ. Code, § 1479, subd. 1).

Where accounts between materialman and contractor for lumber and material on different jobs were kept separately merely for convenience and constituted but one debt, for which contractor was primarily obligated, contractor had no right under Civ. Code, § 1479, subd. 1, to require payment to be applied towards extinction of one of obligations in preference to others.

4. Appeal and error ⇨1071(1)—Judgment will not be reversed because findings were signed less than five days after service (Code Civ. Proc. § 634).

Judgment will not be reversed because findings were signed by trial court prior to expiration of period of time prescribed by Code Civ. Proc. § 634, since such section is merely directory, and, even though findings were signed less than five days after proposed findings were served, validity of judgment would not be impaired thereby.

5. Mechanics' liens ⇨277(2)—Proof of ownership of property is unnecessary, where answer in action to foreclose mechanics' lien did not deny allegation of ownership.

Where answer in action to foreclose mechanics' lien did not deny allegation of ownership of property, ownership was thereby admitted, and no proof was necessary.

Appeal from Superior Court, Los Angeles County; G. C. De Garmo, Judge pro tem.

Two separate actions by the Hammond Lumber Company against Louis Henry, tried together by stipulation. Judgments for plaintiff, and defendant appeals. Affirmed.

Ray Howard, of Los Angeles, for appellant.
R. L. Horton, of Los Angeles, for respondent.

PRESTON, Justice pro tem. This is an appeal by the defendant, Louis Henry, from two judgments entered against him in favor of the plaintiff and respondent, Hammond Lumber Company.

Respondent, Hammond Lumber Company, brought an action against appellant on February 23, 1922, to foreclose a mechanic's lien for the sum of \$868.63. Respondent, on June 15, 1922, brought another action against appellant seeking to recover the sum of \$3,614.96, which sum also includes the amount claimed in the mechanic's lien case.

The complaint in the last action is set forth in three causes of action—the first for goods sold and delivered; the second on an open book account; and the third on an account stated between the parties.

The answer in the last case, as originally filed, did not constitute a denial at all, and

the court permitted an amendment to the answer during the trial, which constituted, in effect, a general denial by appellant that any sum whatever was due to the plaintiff.

Appellant also filed a cross-complaint in the second case, alleging that he had been damaged on account of respondent's failure to deliver the lumber and materials promptly, etc.

By stipulation of the parties, both cases were tried together by a judge pro tempore, sitting without a jury, but separate findings and judgments were made and entered in each case.

In the mechanic's lien case, judgment was entered for plaintiff in the sum of \$558.73 and costs, but provided as follows:

"That all sums recovered herein shall also be applied as credit on said judgment in action No. 107402 when paid."

In the other case, which is numbered 107402, judgment was entered in favor of plaintiff in the sum of \$2,167.80 and costs.

Appellant made a motion for a new trial before Hon. F. C. Valentine, judge of the superior court of Los Angeles county, which was denied.

The bill of exceptions, which purports to set forth the material testimony adduced at the trial, is so incomplete, ambiguous, and unintelligible that we find it extremely difficult, if not impossible, to obtain a clear understanding of the facts. Only a few disjointed excerpts of the testimony are set out in the bill of exceptions, and nothing is therein contained from which we can determine what amount was due respondent at any time—no basis for any calculation at all.

Appellant assigns nine errors, in which he claims that the evidence is insufficient to justify the findings, but no particulars in which he claims the evidence is insufficient to justify any particular finding are pointed out in the assignment of error, or set forth anywhere in the record. If the specifications in the assignments of error were considered sufficient, still we have no bill of exceptions from which we can intelligently review the evidence. Notwithstanding this faulty condition of the record, we have endeavored to consider the case upon its merits, and pass upon all the points raised by appellant for a reversal.

It appears that the appellant was a general contractor and builder, engaged in the construction of a number of houses in and near Los Angeles, and had bought a great deal of building material at different times, such as lumber, cement, lime, etc., from the respondent, and that it was the custom of appellant and respondent to keep a separate account for each building; for example, all material that was purchased by appellant and used in the construction of a building at 209 Cypress avenue was charged by respondent to Louis Henry, 209 Cypress avenue job.

Appellant, while apparently conceding that he is indebted to respondent in some amount,

complains that the court limited the proof to three different building jobs, and that an account has been stated on these three buildings; that respondent could only recover on this stated account, and, if the credits had been properly applied, there would be nothing due plaintiff on these "jobs." In the so-called bill of exceptions we find this noted:

"Defendant offered to prove *certain facts* relating to the delivery of lumber by plaintiff to defendant at addresses other than 837 (including 845) West avenue, 741 West avenue, and 209 Cypress avenue, and the court thereupon stated that the evidence introduced by plaintiff and the issues involved in said action were limited to lumber furnished to defendant at those three addresses, and that the proof which should be received should be limited to said issues, and the court on plaintiff's objection refused to admit any other evidence, and the case was tried on the theory that those issues only were involved."

[1] From this specification of error we are unable to review the ruling of the trial court, for the reason that it merely says that the defendant offered to prove "certain facts." The facts offered to be proved are not set forth, and we are unable to say whether the proposed proof was competent or material or relevant to any issue in the case. If appellant desired to have this ruling of the trial court reviewed, he should have made an offer of what he expected to prove and have it inserted in the record. The findings, however, show that respondent has proven each and all of the three causes of action as set forth in the second case.

[2] Appellant also contends that certain payments made by him to respondent were not credited as he directed. The record contains considerable correspondence between appellant and respondent as to the proper application of the various remittances made by appellant to respondent, and it appears that the respondent applied these moneys as directed by appellant at the time of payment, and also thereafter made a number of transfers of credits from one job to another at appellant's request, but finally refused to make any further transfers of credits as requested by appellant. If it be conceded that appellant had the right to direct the application of the moneys paid to respondent to any particular job, certainly, after such application had been rightly made, as directed by appellant, he would have no right or authority to thereafter direct a different application of the same funds. *Cardinell v. O'Dowd*, 43 Cal. 589. See, also, *Flynn v. Seale*, 2 Cal. App. 665, 84 P. 263; *Ray v. Borgfeldt*, 169 Cal. 253, 146 P. 679; *Hammond Lumber Co. v. Fanta*, 179 Cal. 652, 178 P. 503; *Hanson v. Cardano*, 96 Cal. 441, 31 P. 457.

[3] We are, however, of the opinion that the principle contended for by appellant, and provided for in section 1479, subd. 1, Civil Code, to the effect that one who is indebted to the

same person on several obligations may. In making a payment, require that it be applied towards the extinction of one of the obligations in preference to the others, has no application to the facts in the case at bar, for the reason that the appellant Henry was indebted to the respondent Hammond Lumber Company, on but *one obligation* for lumber and building material of all kinds sold and delivered to him, and not upon several obligations. The accounts were kept separate merely for convenience, and constituted one debt, which Henry was primarily obligated to pay. *Pacific A. Corp. v. Bank of Italy*, 59 Cal. App. 76, 209 P. 1024. If, in making the various payments, he had stated to respondent that the money came from a certain owner of a certain building, or was the money of another person against whom a lien might be filed, then the situation would be entirely different, but no such statements appear in the record.

[4] Appellant further contends that the judgment should be reversed because the findings were signed by the trial court prior to the expiration of the period of time prescribed by section 634, Code of Civil Procedure. There is no merit whatever in this contention. Section 634 of the Code of Civil Procedure is merely directory, and, even if the facts be as contended by appellant, that the trial court directed findings, and that the findings were signed less than five days after the proposed findings were served on the defendant, nevertheless the validity of the judgment would not be impaired thereby. *Sadicoff v. Jackson*, 48 Cal. App. 256, 189 P. 111; *Amundson v. Shafer*, 36 Cal. App. 398, 172 P. 173; *First National Bank v. Williams*, 54 Cal. App. 537, 202 P. 164.

[5] Appellant also contends that there is no evidence to sustain the finding as to the ownership of the property involved in the mechanic's lien case. An inspection of the answer of appellant shows that he never at any time denied the allegation of ownership of the property. The ownership of the property was therefore admitted, and no proof was necessary.

We are of the opinion that the judgments should both be affirmed, and it is so ordered.

We concur: FINCH, P. J.; PLUMMER, J.

87 Cal. App. 127

AGMAR et al. v. SOLOMON et al.*
(Civ. 6037.)

District Court of Appeal, First District, Division 1, California. Nov. 25, 1927.

Hearing Denied by Supreme Court Jan. 23, 1928.

1. Appeal and error $\S$ 194(6)—Defendant introducing evidence on allegations of cross-complaint cannot, for first time on appeal, object that allegations were admitted by failure to deny them.

Defendant may not lull plaintiff into repose by introducing evidence on allegations in his

cross-complaint and by failing to object to plaintiff's controverting evidence thereon, and on appeal for first time object that allegations of cross-complaint were admitted by plaintiff's failure specifically to deny them in his pleadings, and that therefore they could not be controverted by evidence or findings.

2. Appeal and error $\S$ 410(1)—Trial court's finding, supported by evidence, will not be disturbed on appeal.

Finding of trial court, supported by sufficient evidence in record, will not be disturbed on appeal.

3. Boundaries $\S$ 37(5)—Evidence held to warrant finding that defendants' grantor was not induced to encroach on plaintiffs' lot by acts or silence of plaintiffs so as to estop plaintiffs.

Evidence in ejectment action held to warrant finding that defendants' grantor was not induced to encroach on plaintiffs' adjoining lot in constructing apartment house by any acts or conduct of plaintiffs nor by their silence so as to estop plaintiffs from claiming strip encroached on, but showed that encroachment was caused by mistake of defendants' surveyor in establishing line.

4. Boundaries $\S$ 46(1)—Validity of agreement locating boundary rests on parties' understanding that they are establishing true line, and proof of agreed location must be clear.

Validity of agreement locating boundary line rests on the belief or understanding of the parties that they are establishing the true dividing line agreed to be established because they are uncertain as to its actual location, and proof of such agreed location must be clear.

5. Boundaries $\S$ 48(7)—Mere acquiescence in wrong boundary, if true one can be ascertained from deed, is mistake which does not constitute agreement fixing boundary or estop either party.

The mere acquiescence in the existence of a fence or other improvement and the occupancy of the land does not amount to an agreement that such fence or improvement is on an accepted boundary line, but, where there is an acquiescence in a wrong boundary when the true boundary may be ascertained by the deed, it is treated both in law and equity as a mistake, and neither party is estopped from claiming the true line.

6. Injunction $\S$ 5—If encroachment is intentional, absence of present damage to owner of land encroached on does not defeat his right to mandatory injunction.

Though owner will ordinarily be left to his legal remedy where encroachment on his property is slight and cost of removing it will be great and corresponding benefit to adjoining owner small or compensable by damages, if the encroachment is intentional the absence of present damage to owner of land encroached on will not defeat his right to a mandatory injunction requiring removal of encroachment.

7. Injunction — Facts held to entitle plaintiffs to mandatory injunction requiring defendants to remove 4½-inch encroachment of apartment house.

Where defendants' grantor built apartment house encroaching 4½ inches on plaintiffs' adjoining lot without leaving any space between the building and wall of plaintiffs' house, though his own erroneous survey showed ¾-inch space between his line and plaintiffs' house, and though plaintiffs' rain gutter extended about 4 inches over line of his survey, *held*, that plaintiffs were entitled to mandatory injunction requiring removal of the encroachment as being intentional and not result of accident or innocent mistake, and absence of damage to plaintiffs and great cost of removing encroachment did not defeat plaintiffs' right thereto.

Appeal from Superior Court, City and County of San Francisco; Louis H. Ward, Judge.

Action by Paul Agmar and others against Aaron Solomon and others. From a judgment for plaintiffs, and from an order denying a new trial, defendants appeal. Affirmed.

P. L. Benjamin, of San Francisco, for appellants.

Wright, Wright & Stetson, of San Francisco (Randell Larson, of San Francisco, of counsel), for respondents.

CAMPBELL, Justice pro tem. Plaintiffs brought an action in ejectment to recover the possession of a lot of land having a frontage of 25 feet and 6 inches on Washington street, San Francisco. The defendants filed an answer denying the material allegations of the complaint, and by way of cross-complaint defendants Aaron Solomon and Hazel Solomon, his wife, prayed the court for a decree quieting their title to a strip of land 4½ inches wide by 102 feet in depth, and it is the ownership of this strip of land that is in dispute. The remaining defendants have no interest in the land, being only tenants of defendants Aaron Solomon and Hazel Solomon.

It is conceded that the plaintiffs established the record title to the whole of the lot of land described in the complaint, including the land in dispute, to be in themselves, such title antedating the acquirement by Koenig—grantor of defendants Aaron Solomon and Hazel Solomon—of the land adjoining on the west the land of plaintiffs, and that such record title continued in plaintiffs up to and including the rendition of judgment herein. Koenig after acquiring title to the lot of land adjoining plaintiffs on the west, which record title did not include the strip of land in dispute, had his lot surveyed. This survey of Koenig's lot included in the survey the strip in dispute and which was a part of plaintiffs' lot, and it is conceded that this survey was incorrect in including within the boundaries of Koenig's lot such strip of land. Koenig

built an apartment house according to the lines of this survey, building it upon his lot and over and upon this strip of land in dispute, which was in the possession of plaintiffs and to which they held the record title. The judgment adjudges that:

"The said defendants Aaron Solomon and Hazel Solomon, and their grantees and successors, remove at once from said described piece or parcel of land (the strip in dispute) the portion of the building now situate thereon and all obstructions of any sort now situate thereon."

From the judgment entered herein and from the order denying a new trial, the defendants have appealed.

Appellants urge in support of their appeal that the admissions of the answer to the cross-complaint are conclusive as to the matters thus admitted, and cannot be controverted by the evidence or the findings; that the plaintiffs by their acts and conduct are estopped from claiming the possession of the land in dispute, and the court erred in awarding the plaintiffs relief by mandatory injunction.

[1] As to the first point urged, that "the admissions of the answer to the cross-complaint are conclusive as to the matters thus admitted, and cannot be controverted by the evidence or the findings," it may be said that at the trial of the case counsel for appellants assumed that all the material allegations of the cross-complaint were denied. Not a suggestion was made in the trial court as to the allegations of the cross-complaint being admitted, and no objection was made to the introduction of evidence to controvert such allegations. This objection cannot therefore be urged for the first time on appeal. "This court does not look with approval upon the practice of trying a case in the lower court upon the theory that the pleadings are sufficient, and, without making any objection to them or to the evidence, raising the point here for the first time that some of the issues were in fact admitted. The plaintiff should not be allowed to lull the defendant into repose by introducing evidence upon each and every issue, and allowing the defendant to do the same, and then, if the verdict or decision is against him, to say for the first time in this court that some of the allegations of the complaint were not denied." *Weidenmueller v. Stearns Ranchos Co.*, 128 Cal. 623, 625, 61 P. 374, 375. "It is well settled that where the parties have proceeded to trial upon a pleading, without objection to its sufficiency to raise a particular issue, and evidence has been received as to the fact, and the issue found upon, the party whose duty it was to object will not be heard in this court to say that the finding is not within the issues." *Illinois Trust & Savings Bank v. Pacific Railway Co.*, 115 Cal. 285, 297, 47 P. 60, 63. This has been the rule in this

state since the earliest cases. In *Tulley v. Tranor*, 53 Cal. 274, we find this language:

"We have repeatedly held that where a cause has been tried in the court below upon the theory of an issue joined, a plaintiff cannot here for the first time demand judgment upon the admissions of defendant's plea."

In contravention of the rule quoted from the foregoing cases, appellants cite a number of decisions, and particularly direct our attention to *White v. Douglass*, 71 Cal. 119, 11 P. 860, *McKee v. Title Ins. & Trust Co.*, 159 Cal. 207, 113 P. 140, and *Estate of Cover*, 188 Cal. 147, 204 P. 583. In *White v. Douglass* the court uses this language:

"Where a complaint in an action contains an allegation of fact which is distinctly and unqualifiedly admitted by the answer, there is no issue as to the fact. The allegation of the fact being admitted is conclusive. A finding against the admission is therefore outside the issues, and a judgment based upon such a finding, or upon a finding, which is not justified by or is contrary to the evidence, cannot be sustained."

In that case the cross-complaint of the defendant contains the allegation:

"That pursuant to his (defendant's) application, the land agent of the university filed in the United States Land Office at Stockton, California, an application to have said land located as part of the agricultural college grant—said application being made for the use and benefit of the defendant."

That allegation is not denied. The plaintiff answered it in the following words:

"Further answering, plaintiff admits that the land agent, upon the application of defendant, filed in the United States Land Office at Stockton an application to have the land located as a part of the agricultural college grant, and that the application was made for the use of the defendant."

In the present case a different situation is presented. Most of the facts alleged in the cross-complaint are controverted, leaving, however, a few alleged facts, which it is claimed are admitted by reason of a failure to specifically deny them. This failure to deny was evidently caused by oversight on the part of plaintiff's counsel, and, as no objection was made and no question raised in the trial court, we conclude that it was likewise an oversight on the part of defendant's counsel. He evidently thought all the material allegations of the cross-complaint were denied; otherwise he would not have offered evidence to sustain such allegations. In *White v. Douglass*, supra, it will be noted that the allegations of fact were "distinctly and unqualifiedly admitted by the answer," and the court there says:

"Where a complaint in an action contains an allegation of fact which is distinctly and unqualifiedly admitted by the answer, there is no issue as to the fact. The allegation of the fact

being admitted is conclusive, * * * and a judgment based upon such a finding, or upon a finding, which is not justified by or is contrary to the evidence, cannot be sustained."

To the same effect is *McKee v. Title Ins., etc., Co.*, cited. There the complaint avers that the hotel company is and has been ever since April 12, 1906, a corporation, existing under the laws of Arizona, which allegation is admitted by the answer. In view of this direct admission the court, as it did in *White v. Douglass*, supra, says:

"This is a conclusive admission, not to be controverted either by the evidence or the findings."

Appellants in their brief quote the following from *Estate of Cover*, supra:

"It is the rule that an admitted fact must be treated as 'found,' and if the court in this case had found adversely to the admitted fact that the deceased left estate in Los Angeles county we would be compelled to ignore such finding on this appeal."

In that case the allegation that the deceased left estate in Los Angeles county is distinctly and unqualifiedly admitted, as was the case in *White v. Douglass*, from which we have quoted.

The cases cited by appellants are not, in our opinion, in conflict with the rule laid down in *Weidenmueller v. Stearns*, supra, that a party to an action should not be allowed to lull the adverse party into repose by introducing evidence upon issues not denied and allowing the opposing party to do the same, and, if the verdict or decision is against him, to say for the first time on appeal (as in the case here) that some of the allegations of the cross-complaint were not denied.

[2, 3] There is no merit in appellants' second point, that "the plaintiffs by their acts and conduct are estopped from claiming the land in dispute." The trial court found "that said Koenig was not caused to construct the said apartment house in the manner or place in which the same had been constructed as stated in the cross-complaint, or to construct said fence as therein stated by reason of the act or acts or conduct of plaintiffs as alleged in the cross-complaint"; and, there being sufficient evidence in the record to support such findings, the finding will not be disturbed on appeal.

The facts are briefly these: Koenig first talked to the senior Agmar in the latter's home. Agmar, a man of 87 years of age, was at the time sick. Koenig informed Agmar that he had purchased the property adjoining his property, had had it surveyed, and was going to erect a building. Koenig testified as to his conversation with Agmar:

"I said, 'The survey shows it is clear, it is almost clear, the survey, well it shows one-eighth or one-fourth of an inch, some sort,

from Mr. Agmar's residence—and then, I guess that is all he received as to that."

Nothing was said about the rain gutter until Koenig's building had been erected to the point where the rain gutter on the Agmar house stood in the way. Koenig also admitted that he said nothing about the fence in his conversation with Agmar. Koenig "believed" he showed Agmar his survey, but was not sure when he did so, while Agmar stated he did not see it. Not a thing was said about surveyor's stakes or marks. Then Koenig began to excavate for his building. It also appears from the record that Koenig moved a division fence to the line shown by this incorrect survey.

The following is the testimony to which appellants have directed our attention as establishing their contention that plaintiffs are estopped from claiming possession of the strip of land in dispute.

Charles J. U. Koenig, who constructed the apartment house, testified that while he was engaged in excavating his lot, he spoke to the plaintiffs about the necessity of deepening the foundation of the Agmar residence, and that as soon as plaintiffs deepened their foundation, he put in the foundation of the apartment house and built it close up against the foundation of the Agmar house, the Koenig foundation extending from the front of the Koenig lot a distance of 80 feet toward the rear of such lot, and that, during the entire time that he was engaged in the construction of the apartment house, none of the plaintiffs ever made any suggestion to him that he was building on the Agmar lot, and that he believed during all of such time that he was building the apartment house on his own lot.

Paul Agmar, one of the plaintiffs, and the father of the other plaintiffs, testified that he lived in the Agmar residence and had lived there continuously from 1912; that from the time of the acquirement of the Agmar property by the plaintiffs he had had the management of the property entirely in his own hands; that he bought the Agmar property in 1890, and that before he bought the property he had had a survey made of the property; and that he had retained the map of such survey ever since, and he produced the map in court. The map very plainly shows plaintiffs' lot to be 25 feet and 6 inches in frontage and to include the strip of land in dispute in this action. The witness further testified that when Koenig built the apartment house, he built it right up close against the Agmar residence, and that the apartment house is still in such position. The witness further testified that before Koenig started any work whatever on the Koenig lot, Koenig called on the witness and told him that he, Koenig, was going to build an apartment house on the adjoining Koenig lot, and that he had had a survey made of the Koenig lot,

and that, according to such survey, the Agmar residence was over on the Koenig lot. The witness stated nothing to Koenig as to where the line of the Agmar property ran. Before such conversation the witness had believed that the Agmar residence was entirely on the Agmar lot and fully 4 inches from the boundary line between the two lots. Subsequently and before Koenig began any work on his lot Koenig told the witness that he was going to grade the Koenig lot, and that it would be necessary for the witness to build the foundation of the Agmar house further down than it then was. Later Koenig graded the Koenig lot, but left 4 inches of soil adjoining the Agmar foundation undisturbed so as to protect the Agmar foundation. Subsequently Koenig sent a building inspector to the Agmar house, who notified the witness that he must deepen the Agmar foundation so as to protect the Agmar building. The son of the witness then sought to have Koenig do the work of deepening the foundation of the Agmar house, offering to pay Koenig for doing the work, but Koenig declined to do the work.

Paul Harold Agmar, one of the plaintiffs, and a son of the plaintiff Paul Agmar, testified that his father had always had the management of the Agmar property; that Koenig built the apartment house right up against the Agmar residence, and left no space whatever between the two buildings; that while Koenig was excavating the Koenig lot, he spoke to the witness in the presence of the latter's father about the necessity of the father deepening the foundation of the Agmar house and told the witness that he, Koenig, could not go any further with the work on the Koenig lot until the Agmar foundation was deepened, and the witness then stated that he would take care of the Agmar foundation. Accordingly the foundation of the Agmar building was deepened before Koenig started work on putting in of the foundation of the apartment house. As soon as the work on the Agmar foundation was completed, Koenig started to build the foundation for the apartment house. The construction of the apartment house took several months, and during that time the witness lived in the Agmar house and observed the work of construction.

Albert R. Agmar, likewise a plaintiff and a son of the plaintiff Paul Agmar, testified that his father had always had the management of the Agmar property, and that while he, the witness, lived in the Agmar residence during the time Koenig was constructing the apartment house he never spoke to Koenig except to say, "How do you do."

These facts do not call for the application of the general rule of estoppel. *Biddle Boggs v. Merced Mining Co.*, 14 Cal. 279; *Lux v. Haggin*, 69 Cal. 255, 4 P. 919, 10 P. 674. Appellants have cited us to *Dolbeer v. Living-*

ston, 100 Cal. 621, 35 P. 328, and Cummings v. Kearney, 141 Cal. 160, 74 P. 759, as authority for their contention that the general principles of estoppel are applicable to this case. The rule announced in the Dolbeer Case is:

"That 'where a person by word or conduct induces another to act on a belief in the existence of a certain state of facts he will be estopped as against him to allege a different state of facts.' * * * 'Estoppel in pais may be defined to be a right arising from acts, admissions, or conduct which have induced a change of position in accordance with the real or apparent intention of the party against whom they are alleged.' * * * 'Where a person tacitly encourages an act to be done he cannot afterwards exercise his legal right in opposition to such consent.'"

And the Cummings Case, while the court holds "Where a man has been silent when in conscience he ought to have spoken he will not be allowed to speak when conscience requires him to be silent," it also says that "his silence was not the only culpable thing, but the direct acts and requests evidenced by the writings herein set forth," and that "his acts and conduct, if allowed now to be questioned, would work a fraud upon the owner of the bond."

In the present case Koenig was not induced by the acts, admissions, or conduct of respondents to construct the apartment house so that the east wall rests upon the $4\frac{1}{2}$ inches of land in dispute and which in fact belongs to respondents, but it was placed there by Koenig through a mistake made by the surveyor employed by him, nor was Koenig misled by the silence of respondents. It was not respondents' silence, but the mistake in the survey, and which mistake cannot be charged to respondents, that controlled Koenig's action.

[4] Appellants contend that the rule of law as laid down in *Loustalot v. McKeel*, 157 Cal. 634, 640, 103 P. 707, and a number of other cases cited by them to the same effect is applicable to this case. That rule is stated as follows:

"Where the boundary line between the lands of contiguous owners is doubtful or uncertain, and they by parol agreement fix and determine a dividing line between their respective tracts, said line being marked by the erection or maintenance of a fence or other equivalent structure along it, and thereafter the parties hold and occupy their respective lands to the boundary as so agreed on, the accuracy of such boundary line cannot be subsequently questioned by the parties establishing it, or by those claiming under either of them."

Here it is not claimed nor does the evidence admit of the claim that the false line established by Koenig, the grantor of appellants Aaron Solomon and Hazel Solomon, was acquiesced in for a period equal to the statutory period of limitations, it being contended

that the boundary line shown by the incorrect survey made for Koenig was agreed to. Even the testimony summarized by appellants and upon which they base their claim does not establish an agreed boundary line.

The court found the following facts which find support in the evidence: That plaintiffs did not nor did either of them at any time state or agree with Koenig that the survey of Koenig's lot of land was true and correct or truly or exactly stated the exact location of the easterly boundary line of Koenig's land, or that the rain gutter encroached upon Koenig's land for a distance of $4\frac{1}{4}$ inches or any distance; that plaintiffs did not, nor did either of them, agree with Koenig to remove any rain gutter, or that any fence should be set back into plaintiffs' land for a distance of $4\frac{1}{2}$ inches or for any distance, or that Koenig might or should erect said apartment house so that the easterly side thereof be built up to the boundary line as shown by said survey; that plaintiffs did not, nor did either of them, ever acquiesce in the truth or correctness of said survey or enter into any agreement that said survey truly or correctly stated the location of the dividing line, or that Koenig might build the said apartment house up to said easterly line of said Koenig's lot as shown by said survey; that the construction of said apartment house was not commenced with the consent of plaintiffs or either of them, or was not continuously proceeded with until its completion with their, or either of their, consent; and that said fence was not moved from its former location with the consent of plaintiffs or either of them.

The recent case of *Wilder v. Nicolaus*, 50 Cal. App. 776, 195 P. 1068, holds that the construction of a fence between adjoining landowners and acquiescence in its existence for many years does not establish the true boundary line in the absence of an agreement that the fence was on the true line. The court, quoting from *Grants Pass Land & Water Co. v. Brown*, 168 Cal. 456, 143 P. 754, says:

"When such owners, being *uncertain* of the true position of the boundary so described, *agree* upon its true location, mark it upon the ground, or build up to it, occupy on each side up to the place thus fixed and acquiesce in such location for a period equal to the statute of limitations, or under such circumstances that substantial loss would be caused by a change of its position, such line becomes, in law, the true line. * * * And if the line is located and agreed to, not for the purpose of settling an uncertainty in the minds of the parties as to the position of the true line upon the ground, * * * or *without the intent* to fix the true line, such agreement is invalid and does not change the legal boundary nor affect the title of either party to the land he previously owned."

See, also, *Clapp v. Churchill*, 164 Cal. 741, 745, 130 P. 1061; *Wheatley v. San Pedro, etc.*, R. R. Co., 169 Cal. 505, 514, 147 P. 135. This

doctrine can only be invoked where adjoining owners, being uncertain of the actual position of the boundary, agree upon its true location. The validity of such agreement rests upon the belief and understanding of both parties that they are establishing the true dividing line. *Friedman v. Southern Cal. Trust Co.*, 179 Cal. 266, 176 P. 442. The proof of such agreed location should be clear. *Marcone v. Dowell*, 178 Cal. 396, 405, 173 P. 465.

[5] The mere acquiescence in the existence of the fence or other improvement and the occupancy of the land would not amount to an agreement that such fence or improvement was on an accepted boundary line. *Staniford v. Trombly*, 181 Cal. 372, 375, 186 P. 599. "Where there is an acquiescence in a wrong boundary, when the true boundary may be ascertained by the deed, it is treated, both in law and equity, as a mistake, and neither party is estopped from claiming to the true line. The boundary is considered definite and certain when by survey it can be made certain from the deed." *Janke v. McMahon*, 21 Cal. App. 781, 788, 133 P. 21, 24.

[6] The final objection that the court erred in awarding plaintiffs relief by mandatory injunction presents the most serious question. The authorities upon this point are collected in the notes under *Pradelt v. Lewis*, 297 Ill. 374, 130 N. E. 785, 14 A. L. R. 828, in which case the Supreme Court of Illinois holds:

"A mandatory injunction will ordinarily issue against the maintenance by a landowner of an encroachment on the land of an adjoining owner to compel the removal of such encroachment." 1 R. C. L. 378. The doctrine thus laid down by this authority finds support in the decisions [citing authorities]. It is true, as argued by counsel for appellants, that the courts have held that where the encroachment is slight and the cost of removing it will be great and the corresponding benefit to the adjoining owner small, or compensation and damages can be had, the court will ordinarily decline to compel a removal and will leave the complaining party to his remedy at law. 1 *Corpus Juris*, 1209. This last rule is sometimes stated as applying only when the encroachment is slight and unintentional. In such cases the owner will ordinarily be left to his legal remedy, and the extraordinary remedy by injunction will be allowable only when strong reasons therefor are shown; but if the encroachment was intentional, the absence of present damage to the owner of the land encroached on will not defeat his right to an injunction."

While there is some authority to the contrary, the rule stated is generally supported by the decisions and is, we think, the correct rule.

In *Blake v. McCarthy* (Sup. Ct.) 115 N. Y. S. 1014, 1015, the court in discussing the question uses this language:

"Plaintiff is entitled to the removal of this encroachment. It cannot be removed by execu-

tion, because of the damage to the remainder of defendant's property. By taking down the wall, it would impose a risk of damage upon the sheriff which he is not bound to incur in an execution. * * * Plaintiff is entitled in a single action to both legal and equitable relief in a case like this. He has enforced his legal right. The jury rendered their verdict for him. He is now seeking his equitable remedy by asking the interposition of the court to remove the encroachment. To this he is entitled."

Our attention has been called to but two California cases bearing upon this question. Respondents cite us to *Felsenthal v. Warring*, 40 Cal. App. 119, 129, 180 P. 67, and the appellants cite *Rothaermel v. Amerige*, 55 Cal. App. 273, 203 P. 833. In the *Felsenthal* Case the court says:

"To justify the issuance of an injunction there must be substantial injury. Substantial 'injury,' however, does not necessarily involve substantial 'damage.' * * * The rule that a chancellor will refuse to enjoin when greater injury will result from granting than from refusing an injunction has no application where the act complained of is in itself, as well as in its incidents, tortious. In such case it cannot be said that injury would result from an injunction, for no man can be heard to say that he is injured by being prevented from doing to the hurt of another that which he has no right to do. When a suitor has brought his cause clearly within the rules of equity jurisprudence, the relief he asks is demandable *ex debito justitiæ*, and needs not to be implored *ex gratia*. There can be no balancing of conveniences when such balancing involves the preservation of an established right which will be extinguished if relief be not granted against one who would destroy it—yea, though the right be but that of a peasant to but a part of his small tenement. [Citing cases.] The obvious distinction between *injury* and *damage*—a distinction not always observed when dealing with the question before us—is emphasized by Mr. Wood, who, speaking of a man's right of dominion over his property and the jealous care with which the courts have ever guarded this sacred right, says: 'Whatever invades this right is a *legal* injury, whether damages ensue or not.' Wood on Nuisances, § 783—see, also, sections 376, 782. As is said in *Learned v. Castle* [78 Cal. 454, 18 P. 872, 21 P. 11], *supra*, speaking of an injury to another's land that is a nuisance *per se*: 'It is an injury to the *right*, and it cannot be continued because other persons (whether jurors or not) might have a low estimate of the damage which it causes. And especially is this so when the continuance of the wrongful act might ripen into a right in the nature of an easement or servitude. * * * The right to an injunction, therefore, in such a case does not depend upon the extent of the damage measured by a money standard—the maxim, *de minimis*, etc., does not apply.' Though dissenting from the majority decision in *Sullivan v. Jones & L. Steel Co.* [208 Pa. 540, 57 A. 1065, 66 L. R. A. 712], *supra*, Justice Mitchell was constrained to say that 'Where a clear legal right is being infringed, I agree that the remedy in equity is as mandatory as in law.'"

The Rothaermel Case, cited by appellants, is distinguishable from the present case. There plaintiffs' predecessor brought ejectment and obtained nominal damages in the sum of \$1, and directing the issuance of a writ of assistance without further proceedings. Thereupon plaintiffs came into the ownership of the property and brought an action for a mandatory injunction, pleading the former judgment as establishing the right of ownership and possession in plaintiffs' predecessor, and praying that a mandatory injunction issue compelling defendant to remove a concrete foundation extending an inch and one-half on plaintiffs' land and also to remove a brick wall situated thereon, which, however, did not extend over and upon plaintiffs' land. The appellate court denied the remedy sought, holding it was a case where there was a bare legal right unsupported by any damage shown in which the plaintiff was without right to claim equitable relief. Here the circumstances are different. Defendants invoked the equity jurisdiction of the court through the allegations of their cross-complaint. The trial judge, sitting as a chancellor, found against their contentions and granted equitable relief to plaintiffs. The court was not passing upon a "bare legal right," but was determining the rights of the parties upon equitable principles. It would be a strange interpretation of the law that would permit one party to an action to beseech equity, and, when the court found his prayer for equitable relief unwarranted, to deny that court the application of equitable principles to the other party to the action. The appellants having asked equity cannot complain of equity merely because the court found the equities to be against them.

[7] In determining the relief to be granted the court had a clear understanding of the relative merits of the claims put forth by the respective parties. Koenig purchased the property adjoining that of respondents. His own survey showed that there was a space of but three-quarters of an inch between his line and the wall of the Agmar house. A cursory inspection would have shown him that the rain gutter of the Agmar house extended over his line about 4 inches. If he noticed this—and he probably did—he remained silent. This rain gutter standing out beyond the line shown on his own survey was an open and notorious notice to him and to all the world that the Agmars were claiming title beyond the line claimed by him. According to his own testimony, Koenig told

Agmar that the Agmar house was "clear" of his line. Koenig erected his building up against the Agmar house in disregard of the space shown by his own survey. He ignored the fact that the rain gutter of the Agmar house extended out beyond the line of his survey. Koenig was the aggressor. Agmar was not asked to agree to anything or to acquiesce in anything. As to the expense of moving appellants' building the court had before it Koenig's own estimate of the cost, which was given as \$1,500 to \$2,000. But as the encroachment was intentional and was not the result of accident or innocent mistake, the cost of removing it or the absence of damage to the owner of the land encroached on will not defeat the right of such owner to a mandatory injunction. *Pradelt v. Lewis*, supra.

In the recent case of *Owenson v. Bradley*, 50 N. D. 741, 197 N. W. 885, 31 A. L. R. 1296, decided by the Supreme Court of North Dakota, the law on mandatory injunctions is discussed at some length. In that case a mandatory injunction was denied, but the reason for such denial was clearly stated and the power of courts to grant such relief definitely announced. There the relief was denied because of the fact that defendant in placing a concrete foundation and brick wall forming a part of a building 16¼ inches wide at one end and 3 inches wide at the other on plaintiff's lot, which was vacant and likely to remain so for a long period of time, was so placed through an innocent mistake. The authorities collected in the *Owenson Case*, where mandatory injunction was denied, all turn on the fact of an innocent mistake, but the rule is otherwise where the encroachment is not due to accident or innocent mistake. In the present case the court may well have concluded, and the granting of injunctive relief evidences that it did conclude, that the encroachment upon the land of respondents was not the result of accident or mistake, but was placed there with knowledge of respondents' claim of ownership—that Koenig had actual knowledge of such claim, or if he did not have actual knowledge, by the exercise of ordinary diligence he would have acquired such knowledge.

We think that, under the facts and circumstances here presented, the judgment entered was proper.

The judgment and order are affirmed.

We concur: TYLER, P. J.; CASHIN, J.

87 Cal. App. 193

BLEY v. BOARD OF DENTAL EXAMINERS OF CALIFORNIA et al. (Civ. 3341.)

District Court of Appeal, Third District, California, Nov. 30, 1927.

1. Physicians and surgeons ⇨11(3)—Testimony that witness, whom dentist was accused of aiding to practice unlawfully, had previously pleaded guilty to practicing without license held inadmissible.

Testimony that witness, whom dentist was accused of having aided and abetted in unlawfully practicing dentistry, had pleaded guilty to practicing without a license 18 months after time alleged in accusation held inadmissible, in proceedings before the board of dental examiners for purpose of revoking license.

2. Physicians and surgeons ⇨11(3)—Evidence improperly admitted in proceeding before board of dental examiners will be disregarded on certiorari.

Although in original proceeding in certiorari to review an order of the board of dental examiners revoking license to practice dentistry, order cannot be annulled on mere ground that evidence was improperly admitted, yet such evidence is to be disregarded in determining whether there was sufficient evidence to support order.

3. Physicians and surgeons ⇨11(3)—Evidence held insufficient to establish that dentist aided another to unlawfully practice dentistry; "manage or conduct" (Dental Act, § 11).

On certiorari to review an order of the board of dental examiners revoking license to practice dentistry, evidence held insufficient to establish that dentist, whom petitioner was alleged to have unlawfully aided and abetted as unlicensed person, practiced dentistry during period of time alleged in accusation, within meaning of Dental Act (St. 1921, p. 236), § 11, providing that any person should be understood to be practicing dentistry within meaning of act who manages or conducts as manager, proprietor, conductor, or otherwise a place where dental operations are performed; to "manage or conduct a place of business" meaning to exercise control and direction thereof.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Manage.]

4. Physicians and surgeons ⇨11(2)—Right to practice dentistry may not be taken away on mere suspicion or conjecture.

The right to practice dentistry, acquired by several years of study and training, is a property right which is not to be taken away by mere suspicion or conjecture.

Original application for a writ of certiorari by Frederic A. Bley to review an order of the Board of Dental Examiners of California revoking the petitioner's license to practice dentistry. Order annulled.

Levinisky & Jones, of Stockton, for petitioner.

Frank J. Burke, of Petaluma, and Jesse W. Carter, of Redding, for respondents.

FINCH, P. J. This is an original application for a writ of certiorari to review an order of the respondent board, hereinafter referred to as respondent, revoking petitioner's license to practice dentistry.

The accusation upon which such order is based charges that:

The petitioner herein "did aid and abet an unlicensed person, to wit, J. P. McEnroe, to practice dentistry unlawfully in the state of California, in that the said Frederic A. Bley did during the period embraced between the 20th day of December, 1925, and the 10th day of January, 1926, practice dentistry in an office known and designated as 913 Fulton street, in the city of Fresno, state of California, and which said office was owned and conducted by the said J. P. McEnroe, * * * and that in so practicing dentistry at the said office, the said accused was under contract of employment to the said J. P. McEnroe; that the said 913 Fulton street * * * was a place where dental operations were performed; and that during all of said times the said J. P. McEnroe was and now is not entitled to practice dentistry in the state of California."

[1, 2] Respondent's return sets forth all the evidence taken at the hearing on the charge. It fairly appears therefrom that the petitioner practiced dentistry at the place and during the time alleged in the accusation. McEnroe testified that during the time alleged he and petitioner "owned the equipment in that office"; that each bought and owned one-half thereof; that the office sign read, "Dr. F. A. Bley, Using Progressive Dentists' System"; that the witness had no license to practice dentistry; that the receipts of the office during the period of time covered by the accusation were deposited in petitioner's name, and that the witness was paid a salary out of such receipts; that no profits were derived from the business, but that if there had been any profits they would have been divided equally between the witness and petitioner; and that the office equipment was purchased in petitioner's name because the witness was not a licensed dentist and therefore could not buy it in his own name. The foregoing is, in substance, all of the evidence tending to prove the charge against petitioner. Over petitioner's objection, McEnroe, who was a witness for the prosecution, was permitted to testify as follows:

"Q. You were charged with * * * practicing dentistry without a license in Fresno, recently, were you not? A. Yes, sir. * * *

"Q. And upon that charge you pleaded guilty? A. Yes, sir."

This testimony was given June 23, 1927, about 18 months after the time alleged in the accusation. It was clearly inadmissible, and the objections thereto should have been sustained. While it is not permissible in this proceeding to annul the order on the

mere ground that evidence was improperly admitted, such evidence is to be disregarded in determining whether there is sufficient evidence to support the order. *Thrasher v. Board of Medical Examiners*, 44 Cal. App. 26, 28, 185 P. 1006. It may be said further that no connection of any character was shown between the offense of which McEnroe pleaded guilty and that with which the petitioner was charged. It does not tend in the slightest degree to prove the charge, and it need not be further considered.

[3] It was incumbent on the prosecution to prove that McEnroe practiced dentistry unlawfully during the period of time alleged in the accusation. In this respect the proof entirely fails. Considering the evidence in the light most favorable to the respondent, it merely shows that McEnroe owned a half interest in the office equipment, received a salary, in an amount not stated, for undisclosed services, and would have received half the profits if there had been any. Section 11 of the Dental Act (St. 1921, p. 236) provides:

"Any person shall be understood to be practicing dentistry within the meaning of this act * * * (5) who manages or conducts as manager, proprietor, conductor, or otherwise a place where dental operations are performed."

[4] There is no evidence to justify the inference that McEnroe managed or conducted "as manager, proprietor, conductor, or otherwise a place where dental operations are performed." To manage or conduct a place or business is to exercise control and direction thereof. *Gordon v. Industrial Acc. Co.*, 199 Cal. 420, 426, 249 P. 849; *E. Clemens Horst Co. v. Industrial Acc. Com.*, 184 Cal. 180, 190, 193 P. 105, 16 A. L. R. 611. The evidence does not show that McEnroe had or exercised any voice whatever, either directly or indirectly, in the management or control of the place in question or the operations conducted therein. The right to practice dentistry, acquired by several years of study and training, is a property right which is not to be taken away on mere suspicion or conjecture. In *Hewitt v. Board of Medical Examiners*, 148 Cal. 590, 592, 84 P. 39, 40 (3 L. R. A. [N. S.] 896, 113 Am. St. Rep. 315, 7 Ann. Cas. 750), it is said:

"The right to practice medicine is, like the right to practice any other profession, a valuable property right, in which, under the Constitution and laws of the state, one is entitled to be protected and secured."

There being no evidence to prove the charge against the petitioner, he is entitled to have the order revoking his license annulled. *Garvin v. Chambers*, 195 Cal. 212, 223, 232 P. 696; *Osborne v. Baughman* (Cal. App.) 259 P. 70.

The demurrer to the petition is overruled,

and the order revoking petitioner's license is annulled.

We concur: PLUMMER, J.; HART, J.

87 Cal. App. 197

MEAGHER v. BOARD OF DENTAL EXAMINERS OF CALIFORNIA et al.
(Civ. 3344.)

District Court of Appeal, Third District, California. Nov. 30, 1927.

1. Physicians and surgeons ⇨11(3)—Evidence held insufficient to sustain order revoking license to practice dentistry.

Evidence in proceeding before board of dental examiners held insufficient to sustain order revoking license to practice dentistry.

2. Physicians and surgeons ⇨11(2)—Dentist, to have aided or abetted unlicensed person to practice, must have had knowledge of such person's connection with office.

Dentist, in order to have aided or abetted an unlicensed person to practice dentistry unlawfully, must have had knowledge of such person's connection with dental office wherein dentist was working.

Original application for certiorari by C. E. Meagher to review an order of the Board of Dental Examiners of California revoking the petitioner's license to practice dentistry. Order annulled.

Schweitzer & Hutton, of Los Angeles, for petitioner.

Frank J. Burke, of Petaluma, and Jesse W. Carter, of Redding, for respondents.

FINCH, P. J. This is an original application for a writ of review by which the petitioner seeks the annulment of an order of respondent board, hereinafter referred to as respondent, revoking his license to practice dentistry in this state.

The accusation upon which the petitioner was tried alleges that between December 1, 1925, and January 31, 1926, he "did aid and abet an unlicensed person, to wit, J. P. McEnroe, to practice dentistry unlawfully in the state of California, in that the said C. E. Meagher did" during that period "practice dentistry in an office" which "was owned and conducted by the said J. P. McEnroe, * * * and that in so practicing dentistry at the said office, the said accused was under contract of employment to the said J. P. McEnroe;" that said office "was a place where dental operations were performed"; and that McEnroe was not, during said time, "entitled to practice dentistry in the state of California."

McEnroe, as a witness for the prosecution, testified as follows:

"Q. What was your business, Mr. McEnroe, during the period embraced between the 1st day of December, 1925, and the 31st day of

January, 1926? A. I was associated with Dr. Bley * * * at Fresno.

"Q. Were you in business with him at Porterville? * * * A. Yes, sir. Now, as far as Dr. Meagher is concerned, * * * he knew nothing about the connection of that office, and as far as he is concerned, he thought that Dr. Bley owned the office. * * *

"Q. Did you have connection with this office in Porterville during the period embraced between the 1st day of December, 1925, and the 31st day of January, 1926? A. Yes, sir. * * * I practically owned the office. * * *

"Q. Did you own the equipment in the office? A. Yes, sir. * * *

"Q. Was Dr. Meagher employed in that office during that time? A. Yes, sir. * * *

"Q. Dr. Bley was in charge of the office, was he? A. Yes, sir.

"Q. And was Dr. Bley associated with you in the ownership of it? A. Yes, sir. * * *

"Q. Do you recall any lettering or wording that appeared on that office at all? A. Dr. Bley's name. * * *

"Q. You are not licensed to practice dentistry, are you, Mr. McEnroe? A. No, sir. * * *

"Q. What was the purpose of the employment of Dr. Meagher in the office during that period of time? A. He was acting as manager for Dr. Bley."

The accused testified as follows:

"On the 30th of November, 1925, I was introduced to Mr. McEnroe through one of the supply men here in town (Los Angeles). Mr. McEnroe informed me that he wanted me to go to work in the Porterville office of Dr. Bley. He represented himself to me as being a messenger from Dr. Bley down here to get a man, and I accepted the employment and went to Porterville. While I was there, Mr. McEnroe did not come in the office and neither did Dr. Bley. My money there in the Porterville office was banked to the credit of Dr. Bley as dentist, and my checks, my pay checks, came from Fresno the same way. I left Porterville January 19th, having been there 6 weeks. * * * My pay checks were mailed to me from the Fresno office, * * * signed by Dr. Bley.

"Q. Did you ever see Dr. Bley while you were at the office? A. No, sir.

"Q. Did you ever have any conversation with him during the time that you were employed there? A. No, sir.

"Q. Did you ever get any instructions from him? A. Only indirectly, * * * from what Mr. McEnroe told me. * * *

"Q. Did you know where Dr. Bley was all during that time? A. In Fresno.

"Q. Did you ever make an endeavor to get in touch with him there? A. I did; yes, sir. * * * I drove to Fresno on two different occasions in the evening. * * *

"Q. And you did not find him? A. No, sir."

[1, 2] The evidence produced by the prosecution and the testimony of the accused show without conflict that he had no knowledge of McEnroe's connection with the dental office in question. Such "knowledge is necessary before it can be said that a dentist has aided

or abetted an unlicensed person to practice dentistry unlawfully." *Osborne v. Baughman* (Cal. App.) 259 P. 70, hearing denied by Supreme Court October 21, 1927. This point being decisive of the cause, other objections made by petitioner need not be considered.

The demurrer to the petition is overruled, and the order revoking petitioner's license is annulled.

We concur: PLUMMER, J.; HART, J.

87 Cal. App. 260

ANGELUS LEASING CO. v. STEPHENS. (Civ. 4778.)

District Court of Appeal, Second District, Division 2, California. Dec. 2, 1927.

Frauds, statute of § 139(1)—Oral agreement to permit assignment of lease held not within statute, where lessor performed (Civ. Code, § 1624, subd. 5).

In action for money due as consideration for oral agreement permitting assignment of lease, lessee could not defeat liability on ground that agreement was void under Civ. Code § 1624, subd. 5, requiring agreements for leasing or transfer of interest in realty to be in writing, where lessor performed part of his agreement.

Appeal from Superior Court, Los Angeles County; Walton J. Wood, Judge.

Action by the Angelus Leasing Company against Ivan O. Stephens or I. O. Stephens. Judgment for plaintiff, and defendant appeals. Affirmed.

Earl E. Moss, of Los Angeles, for appellant.
Geo. H. Shellenberger, of Los Angeles, for respondent.

STEPHENS, Justice pro tem. Defendant, the appellant herein, leased a store from plaintiff, the respondent herein. The lease contained a provision that it could not be assigned without the written consent of the lessor. The parties entered into an oral agreement whereby plaintiff permitted the assignment for a consideration which the trial court found to be \$225. The written consent was given, and defendant refuses to pay any part of the consideration, resting his refusal upon the claim that the agreement is void under subdivision 5 of section 1624 of the Civil Code.

That this claim is without foundation is well answered by quoting from the opinion in the case of *Pearsall v. Henry*, 153 Cal. 314, 95 P. 159:

"When it is clearly and unequivocally made to appear that there has been a performance by a party of his part of an oral agreement required by the statute * * * to be in writing, under such circumstances as to make it inequitable to allow the other party receiving the benefit thereof to repudiate it on the ground that it was not in writing, he is estopped from doing so."

To the same effect are the following cases, to which many others could be added: *McMenomy v. Talbot*, 84 Cal. 279, 23 P. 1099; *Hefferman v. Davis*, 24 Cal. App. 295, 140 P. 716; *Leavens v. Pinkham*, etc., 164 Cal. 243, 128 P. 399; *Bates v. Babcock*, 95 Cal. 479, 30 P. 605, 16 L. R. A. 745, 29 Am. St. Rep. 133; *Mills v. Jackson*, 19 Cal. App. 695, 127 P. 655; *Colon v. Tosetti*, 14 Cal. App. 693, 113 P. 365, 366.

Judgment affirmed.

We concur: CRAIG, Acting P. J.; THOMPSON, J.

87 Cal. App. 278

CHAN YO CHOW et al. v. LIM SING.
(Civ. 5698.)

District Court of Appeal, First District, Division 1, California. Dec. 5, 1927.

1. Parties —80(6)—Though personnel of plaintiff partnership was not same as when defendant bought goods, defendant waived objection by not pleading defect of parties by demurrer or answer (Code Civ. Proc. §§ 382, 430, 433, 434).

Although personnel of partnership bringing action against defendant for price of goods sold and delivered had changed since defendant bought goods, and certain of the then partners were not joined and others who were not then partners were joined, plaintiff waived objection under Code Civ. Proc. § 382, providing that parties united in interest must be joined as plaintiffs or defendants, by not pleading defect of parties by demurrer or answer, under Code Civ. Proc. §§ 430, 433, 434.

2. Parties —80(1)—Where defendant did not plead defect of parties, objection was waived notwithstanding contention that defendant could not maintain counterclaim, where counterclaim was not pleaded (Code Civ. Proc. §§ 382, 430, 433, 434).

Where defendant, in action for goods sold and delivered, did not plead defect of parties under Code Civ. Proc. §§ 382, 430, 433, the defect was waived, in view of Code Civ. Proc. § 434, notwithstanding defendant's contention that he was unable to obtain benefit of counterclaim against plaintiffs bringing action, where defendant did not plead counterclaim, and consequently trial court had no opportunity to rule on question of whether it would have been good against plaintiffs' bringing the action.

3. Action —1—Plaintiff's right of action is not affected by or dependent on defendant's right to counterclaim.

The right of a plaintiff to maintain an action against a defendant is not affected by or dependent on the right of a defendant to assert a counterclaim.

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by Chan Yo Chow and others, doing business under the firm name and style of Quong Lee & Co., against Lim Sing. Judgment for plaintiffs, and defendant appeals. Affirmed.

Jesse A. Mueller, of San Francisco, for appellant.

Robert L. Levy, of San Francisco, for respondents.

KNIGHT, J. Plaintiffs brought this action to recover the purchase price of goods sold and delivered. The complaint contained two counts, one declaring on an open account and the other on an account stated. The allegations were in the usual form; it being alleged among other things that plaintiffs were copartners and that they had duly filed and published a certificate of copartnership to do business under the fictitious name of Quong Lee & Co. Judgment was rendered in plaintiffs' favor, and the defendant appeals.

During the trial, defendant admitted the sale and delivery of the goods to him, but claimed there, as here, that plaintiffs were not the vendors, and that, since they had neither alleged nor proved an assignment to them of the indebtedness sued upon, they were not entitled to a judgment based thereon.

The facts are as follows: For several years preceding the commencement of the action a number of Chinese conducted a copartnership business under the fictitious name of Quong Lee & Co., the personnel of the partners having changed from time to time. Defendant purchased the goods in question from said copartnership during the years 1922 and 1923, at which time it consisted of forty members. In 1925, and prior to the commencement of this action, thirty-two members thereof retired, but the business continued to be operated under the partnership name by the remaining eight partners and two others who are joined with said eight remaining members as plaintiffs herein. The evidence does not show, however, when the two new partners entered the firm, nor whether they acquired their interests by purchase from retiring members or bought in after the retirement of the latter.

[1] In view of the foregoing facts defendant makes the legal contention that the retirement from the firm of the thirty-two members in 1925 operated as a dissolution of the then existing copartnership, and the establishment of a new one consisting of those remaining, and that therefore, in the absence of an assignment of the account to those continuing in the operation of the business, the original forty members alone were entitled to maintain an action thereon. How-

ever, defendant did not plead a defect of parties plaintiff either by demurrer or answer; his demurrer being based upon the grounds of insufficiency of facts and that the allegations relating to the contents of the partnership certificate were uncertain and unintelligible, and his answer consisting merely of denials of the material averments of the complaint. We are therefore of the opinion that under the rule established by numerous decisions he is deemed to have waived the point now urged by him. As said in *Williams v. Southern Pacific R. R. Co.*, 110 Cal. 457, 42 P. 974:

"Our legislation provides that of the parties to an action, those who are united in interest, must be joined as plaintiffs or defendants (Code Civ. Proc. § 382); that the defendant may demur to a complaint for defect of parties plaintiff (section 430); that, if the defect does not appear on the face of the complaint the objection may be taken by answer (section 433); and that, if objection on that ground be not taken by demurrer or answer the defendant is deemed to have waived the same (section 434)."

And, after reviewing a number of cases from this jurisdiction and others, the court concludes:

"We are of the opinion, following the incontestable trend of authority, that the absence as parties of some of the partners from a complaint by one or more of them on a partnership demand does not, strictly speaking, affect the merits, and in order to be considered must be pleaded by the defendant."

The foregoing rule was later approved and followed in the case of *Ah Tong v. Earle Fruit Co.*, 112 Cal. 679, 45 P. 7, which is closely analogous in principle to the present case. There the language of the court was as follows:

"It is argued that plaintiff should not recover because the evidence shows he had a partner who was interested with him in the demand sued upon, and who is not joined as a party to the action; conceding that such was the evidence, yet, as the objection was not raised by the pleadings, it was waived. *Williams v. Southern Pacific R. Co.*, 110 Cal. 457 [42 P. 974]."

The case of *Russ v. Tuttle*, 158 Cal. 226, 110 P. 813, adheres to the same doctrine, holding as follows:

"Where the complaint shows upon its face that the plaintiff has not legal capacity to sue, or that there is a defect of parties plaintiff, the defendant may demur (Code Civ. Proc. § 430), or, if the ground does not appear upon the face of the complaint, the objection may be taken by answer (Code Civ. Proc. § 433). But if the objection is not taken either by demurrer or answer, the defendant is deemed to have waived it (Code Civ. Proc. § 434). In the absence of a plea of defect of necessary parties plaintiff, one of several parties jointly interested in a claim may recover the whole amount due"—citing *Wendt v. Ross*, 33 Cal. 650; *Trenor v. Central Pac. R. Co.*, 50 Cal. 222; *Williams v. Southern Pac. R. Co.*, supra; *Ah Tong v. Earle Fruit Co.*, supra.

To the same effect are *Ahlers v. Smiley*, 163 Cal. 200, 124 P. 827, and *Baker & Hamilton v. Lambert*, 5 Cal. App. 708, 91 P. 340.

From the authorities cited, we conclude that, irrespective of the merits of the legal question presented as to whether or not the retirement of the thirty-two members in 1925 had the effect of dissolving the copartnership of forty members, and even assuming, as defendant contends, that it did have such effect, and that consequently, in the absence of an assignment of the debt, the present action should properly have been commenced jointly in the names of the original forty members, the judgment rendered herein is not erroneous because, as said in *Russ v. Tuttle*, supra, in the absence of a plea of defect of necessary parties plaintiff, any number of the parties jointly interested in the claim may recover the whole amount due.

The cases of *Weinreich v. Johnston*, 78 Cal. 255, 20 P. 556, and *McCord v. Seale*, 56 Cal. 262, upon which defendant relies, are not controlling here, for as said in *Ahlers v. Smiley*, supra:

"Those cases merely hold that a variance arises when persons are described as individuals in the caption and as partners in the body of a pleading and that proof of partnership liability or credit will not sustain a personal judgment or vice versa. It is to be noticed that the doctrine announced in these cases has been somewhat modified in the later cases of *Williams v. Southern Pacific R. Co.*, 110 Cal. 461 [42 P. 974], and *Grangers' Union v. Ashe*, 12 Cal. App. 757 [108 P. 533]."

[2, 3] Defendant further contends that, because the action was not brought jointly by the original forty copartners from whom he purchased the goods, he was unable to obtain the benefit of a counterclaim for commissions due him from them, amounting to a sum greater than that sued for. But defendant did not plead the counterclaim, and consequently afforded the trial court no opportunity to rule upon the question of whether or not, in view of the defect in parties plaintiff, the same would have constituted a valid counterclaim to the demand upon which these plaintiffs were suing. We are therefore of the opinion that the assumption of an adverse ruling does not entitle the defendant to claim error. Furthermore, and in any event, the right of a plaintiff to maintain an action against a defendant is not affected by nor dependent upon the right of the defendant to assert a counterclaim. The cause of action of each is separate and distinct from the other, and the plaintiff's cause of action is not subject to defeat merely because as against it the defendant's counterclaim is not maintainable.

For the reasons given, we believe the judgment should be affirmed, and it is so ordered.

We concur: TYLER, P. J.; CASHIN, J.

86 Cal. App. 553

**GALLAGHER v. J. W. WRIGHT & SONS
INV. CO. (Civ. 6006.)★**

District Court of Appeal, First District, Division 1, California. Nov. 3, 1927.

Hearing Denied by Supreme Court Dec. 29, 1927.

1. Municipal corporations ☞446—Improvement assessment held not void because of extension of time for performance of work.

Street improvement assessment *held* not void because supervisors had extended time for the contractor to complete the improvements, after the original time for the completion of the contract had expired, as against contention that an extension must be granted, if at all, before the expiration of the original time stated, under the theory that supervisors could not, under city ordinances, extend a contract no longer in existence.

2. Municipal corporations ☞446—Ordinance permitting supervisors to extend time for completion of contract for street improvement held valid.

Where, in an action to foreclose a public contract street improvement lien, defense was made that the street assessment was void, since the contract providing for the original improvement had been unlawfully extended under power allegedly conferred by ordinance, after the time for contract's completion had expired, ordinance *held* valid, since it was not a usurpation of authority by such legislative body, and consequently assessment was valid.

3. Trial ☞389—Findings held waived under stipulation constituting the entire trial, eliminating controverted facts.

In action to foreclose public contract street improvement lien, findings *held* waived under stipulation made in open court constituting the entire trial, since there were no controverted facts on which court should have found.

Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action by E. J. Gallagher against J. W. Wright & Sons Investment Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Sawyer & Sawyer and F. W. Sawyer, all of San Francisco, for appellant.

Oscar Samuels and Jacob Samuels, both of San Francisco, for respondent.

CAMPBELL, Justice pro tem. This action is one to foreclose a public contract street improvement lien under San Francisco street improvement ordinance of 1918. The contract was entered into under date of October 20, 1923. It provided that the work should be done within 90 days. This time expired January 18, 1924. On January 9, 1924, prior to the expiration of the time within which the work was to be completed, pursuant to a previous request by the contractor, the board of public works recommended to the board of

supervisors the granting of the desired extension, and on January 21, 1924, three days after the expiration of the original time called for by the contract for the completion of the work, the board of supervisors granted the desired extension, and the work was completed on February 19, 1924, within the life of the extension.

This appeal is limited to two points—both of law. The first point urged is that "this street assessment is void, as the work was not done within the time fixed by contract, and the extension was not granted within the life of the contract," and the second that "findings were not waived, and there are no findings the basis of any judgment."

The ordinance of 1918 under which the work was performed, in so far as it affects the question here presented, provides, quoting from section 18:

"Upon the recommendation of the board of public works, the supervisors may by resolution passed by a majority vote thereof, grant extensions of time within which to complete the said work. No recommendation for an extension of time beyond the expiration of the time of the first extension shall be made by the board of public works unless the application of the contractor therefor, in each instance, is supported by a certificate from the city engineer certifying that at least the major part of the work contracted for has actually been done, or by evidence satisfactory to the said board that the failure to have done the required measure of work was not due to lack of diligence in the prosecution of the work on the part of the contractor. All applications for such extensions of time must be filed in the office of the board of public works before the expiration of the original time fixed in the contract, or of the time granted by extension, as the case may be. In case an extension of time be granted by the supervisors after the expiration of the time originally fixed in the contract for the work, or after the expiration of the time granted in any further extension therefor, the time so granted shall be deemed to commence and be effective from the date of such expiration."

Quoting from section 27:

"No assessment, warrant, diagram, or affidavit of demand and nonpayment after the issue of the same, and no proceedings prior to the assessment, shall be held invalid by any court for any error, informality or other defect in the same, where the resolution of intention of the board of public works to recommend to the supervisors the ordering of the improvements has been actually published and the notices of improvement posted as in this ordinance provided."

Section 47:

"The provisions of this ordinance shall be liberally construed to promote the objects thereof, and no error, omission, or irregularity in connection with the proceedings thereunder not affecting a substantial right of a party interested shall invalidate any of such proceedings."

Appellant urges that recovery is denied respondent because he was tardy in securing from the board of supervisors an extension of time—that “legislative bodies cannot, nor can courts, re-create, restore to life an act or thing that has ceased to live. When the time fixed in the contract has expired, jurisdiction is lost. The act is dead.” In support of this contention appellant relies upon certain California cases dealing with extension of time to prepare a bill of exceptions or statement of the case or to file a notice of motion for a new trial. Each of these cases is predicated upon a particular Code section held to qualify the jurisdiction of the *nisi prius* court.

Appellant also advances certain street assessment cases, commencing with *Mahoney v. Braverman*, 54 Cal. 569, and concluding with *Kelso v. Cole*, 121 Cal. 121, 53 P. 353. The cases cited are all considered in *Oakland Paving Co. v. Whittle Realty Co.*, 185 Cal. 113, 195 P. 1058, and *City Street Imp. Co. v. Watson*, 50 Cal. App. 687, 195 P. 967. In the *Oakland Paving Co.* case it is recognized that the decision in each of the cases cited by appellant was based upon the wording of the particular statute involved without regard to the effect of any saving clause, and there it is said:

“In view of the foregoing, we have no hesitation in saying that the failure of the contractor to secure his extension of time until the day after the contract period had expired, even if the work was then uncompleted, was an ‘informality’ in the prior proceedings which was cured by the provisions of section 26.”

[1] The ordinance of 1918 in the quoted portion of section 27 is in the identical words of the curative clause of the Improvement Act of 1911 before the court in the *Oakland Paving Co.* Case, and therefore in affirming this judgment we do not have to rely upon analogy, but upon a complete parallelism. It may further be said that in the present case section 18 of the ordinance *ex industria* provides that an extension given under the very conditions here existing may be granted.

[2] With respect to the power of the Legislature—in this case the board of supervisors—to enact such a provision as section 18 of the ordinance under consideration, the court, in *City Street Imp. Co. v. Watson*, supra, quoting from *Chase v. Trout*, 146 Cal. 350, 80 P. 81, uses this language:

“The Legislature undoubtedly could have enacted a valid law, which would have authorized the extension of the contract after the time first fixed had expired.”

And again:

“It may be conceded that it is a ‘jurisdictional’ requirement that the time must be extended within the time limit of the contract, but it is not one of the jurisdictional requirements necessary to constitute due process of law, and hence is cured.”

There the Act of 1911 (Stats. 1911, p. 730) was under consideration containing two curative clauses identical with those appearing in sections 27 and 47 of the improvement ordinance of 1918, quoted, on which sole reliance was placed. The act of 1911, however, did not contain the additional provision that an extension granted after the expiration of the original time should relate back to the date of expiration of such time.

Further, with reference to this point, appellant urges that:

“If there was any justification for any such claim (that the ordinance of 1918 authorizes the board of supervisors to extend the original time after its expiration) such ordinance in that respect would be void and unconstitutional.”

In support of this contention appellant cites *Fanning v. Schammel*, 68 Cal. 428, 9 P. 427. There the Legislature passed a statute attempting “to vitalize a dead contract and validate a void assessment for street work,” and the statute was held unconstitutional. Appellant also refers to *Flinn v. Shafter Realty Co.*, 190 Cal. 316, 212 P. 194. That case and the present case are distinguishable upon the ground that the 1913 ordinance under consideration in the *Flinn* Case specifies that “the contract shall be void if the work is not completed within the time prescribed and that no assessment shall issue.”

[3] As to appellant’s second point that the court made no findings, and, findings not being waived, they were essential, it may be said that a stipulation made in open court constituted the entire trial. After stipulating to the date of the contract, the original time within which the work should be completed, the date of recommendation by the board of public works to the board of supervisors that the extension be granted, the date of the passage by the latter board of its resolution granting the extension, the date of signing by the mayor and the date of the completion of the work, there follows:

“With that stipulation otherwise all the facts alleged in the complaint are admitted.”

Consequently, there were no controverted facts upon which the court should have found. There was an agreed statement of facts, not evidence.

In support of this latter contention appellant relies principally upon *Monteverde v. Superior Court*, 60 Cal. App. 252, 212 P. 690. In that case, by stipulation, evidence was introduced from which different inferences could be drawn requiring findings thereon indicating the inference drawn by the court. Here ultimate facts were agreed upon, and the following excerpt from the *Monteverde* Case, quoted from *Gregory v. Gregory*, 102 Cal. 50, 36 P. 364, is applicable:

“There have been several rulings by this court to the effect that the want of findings affords no ground for reversing a judgment where the facts have been agreed upon.”

This principle is so firmly grounded that it is thus referred to in *Fernandez v. Watt*, 26 Cal. App. 89, 146 P. 47:

"It needs no citation of authority to support the proposition that findings upon admitted facts are not required."

In our opinion, there is no merit in the appeal.

The judgment is affirmed.

We concur: TYLER, P. J.; CASHIN, J.

86 Cal. App. 800

**L. J. GALLAGHER, Plaintiff and Respondent,
v. J. W. WRIGHT & SONS INVESTMENT
COMPANY (a Corporation), Defendant and
Appellant. (Civ. 6097.)**

District Court of Appeals, First District, Division 1, California. Nov. 3, 1927.

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Sawyer & Sawyer and F. W. Sawyer, all of San Francisco, for appellant.

Oscar Samuels and Jacob Samuels, both of San Francisco, for respondent.

CAMPBELL, Justice pro tem. This is an action to foreclose a public contract street improvement lien under San Francisco street improvement ordinance of 1918.

The action was tried upon the following facts stipulated in evidence: The contract mentioned in each count of the complaint was entered into on the 20th day of October, 1923, and it provided the work called for thereby should be completed within 90 days from such date, and that the work was not completed within that time. Upon the request of the contractor, the board of public works did, on the 9th day of January, 1924, transmit to the board of supervisors its recommendation that an extension of 90 days be granted unto the contractor to complete the work. The board of supervisors on the 21st day of January, 1924, 3 days after the expiration of the original time prescribed by the contract for the completion of the work, passed its resolution granting the application for an extension of time of 90 days to perform the work, which resolution was approved by the mayor of the city and county of San Francisco on February 1, 1924. The work called for by the contract was not completed until February 19, 1924. Judgment went for plaintiff, and from this judgment defendant has appealed.

The question here presented is passed upon in *E. J. Gallagher v. J. W. Wright & Sons Investment Co.* (No. 6006), 261 P. 1041, this day decided by this court, and on the authority of that case the judgment is affirmed.

We concur: TYLER, P. J.; CASHIN, J.

**GALLAGHER v. J. W. WRIGHT & SONS INV.
CO. (Civ. 6098.)**

District Court of Appeal, First District, Division 1, California. Nov. 3, 1927.

Appeal and error $\S$ 757(3) — Where stipulated evidence was not touched on in briefs, reviewing court will assume no point was raised in respect thereto.

Where an action was tried on stipulated evidence, but on appeal a part of such evidence was not touched on in the briefs, *held* that the reviewing court would assume that no point was raised in respect thereto.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by E. J. Gallagher against J. W. Wright & Sons Investment Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Sawyer & Sawyer and F. W. Sawyer, all of San Francisco, for appellant.

Oscar Samuels and Jacob Samuels, both of San Francisco, for respondent.

CAMPBELL, Justice pro tem. This is an action to foreclose a public contract street improvement lien under San Francisco street improvement ordinance of 1918.

The action was tried upon the following facts stipulated in evidence: The contract mentioned in the complaint was entered into on July 22, 1920, and provided that the work called for thereby should be completed within 150 days from such date, and it was not completed within that time. Upon request of the contractor, the board of public works did, on December 13, 1920, transmit to the board of supervisors its recommendation that an extension of 90 days be granted the contractor to complete the work. The board of supervisors, on December 20, 1920, one day after the expiration of the original time prescribed for the completion of the work, passed its resolution granting the application for the extension of time for a period of 90 days, and the resolution was approved by the mayor of the city and county of San Francisco December 23, 1920. A further extension of time was granted from and after March 19, 1921, and the work was completed within the life of such second extension. There also appears in the stipulated evidence the fact that no assessment or lien was made, entered, recorded, or imposed upon the roadbed, rolling stock, or property pertaining to the municipal car system, for the payment of any portion of the expense of such improvement, but, as this fact is not touched upon in the briefs on file in *E. J. Gallagher v. J. W. Wright & Sons Investment Co.*, upon which this case is

submitted, we assume no point is made because of the failure to assess the property of the municipal car system.

The question here presented is passed upon in *E. J. Gallagher v. J. W. Wright & Sons Investment Co.* (No. 6006), 261 P. 1041, this day decided by this court, and on the authority of that case the judgment is affirmed.

We concur: TYLER, P. J.; CASHIN, J.

87 Cal. App. 80

In re BRIGHTMAN'S ESTATE.
DESMOND et al. v. BRIGHTMAN.
(Civ. No. 5837.)

District Court of Appeal, Second District, Division 2, California. Nov. 21, 1927.

Executors and administrators ~~C~~216(2)—\$4,000 allowed attorneys for extraordinary services in defending will held not abuse of discretion.

\$4,000 allowed attorneys for extraordinary services in defending contested will held not an abuse of discretion, where facts showed that counsel prepared motion to strike contest, and amended contest to probate of will, examined large amounts of correspondence, traced accumulation of the property and family relations for years, and whether testator had delusions, conducted search of precedent law applicable, and held many conferences, and witnesses testified that value of services to estate was \$5,000.

Appeal from Superior Court, Los Angeles County; C. S. Crail, Judge.

In the matter of the estate of Latham H. Brightman, deceased. From an order allowing Walter J. Desmond and others attorney's fees for extraordinary services, Mary C. Brightman, as executrix, appeals. Affirmed.

Denio, Hart, Taubman & Simpson, of Long Beach, for appellant.

Henry G. Bodkin, of Los Angeles, for respondent.

THOMPSON, J. This appeal is from an order allowing the sum of \$4,000 to the respondents, \$1,000 of which had already been paid, as attorney's fees for extraordinary services. The facts are briefly: That appellant is the widow of decedent, and the sole legatee under and executrix of the last will and testament of deceased, except that \$4,000 was willed to the daughters of deceased by a former marriage; that, after the admission to probate of the will, a contest was filed by Clarence E. Brightman, a son of the deceased by a former marriage, in which the contestant alleged unsoundness of mind on the part of the testator and un-

due influence exerted upon the testator by appellant as grounds for the revocation of the order admitting the will to probate, and also averred that, by reason of undue influence by appellant upon deceased, and with a preconceived plan to defraud the heirs of the deceased, she had through a course of years secured to be placed in her name property belonging to deceased, of great value. The estate which was inventoried amounted at appraised values to the sum of \$23,240. Respondents prepared and filed a demurrer and motion to strike, and upon argument the demurrer was sustained. An amended contest was filed, to which respondents also interposed a demurrer and motion to strike. The demurrer to the count on undue influence was sustained without leave to amend, and an answer was prepared, served, and filed responsive to the count alleging unsoundness of mind. On March 2, 1925, when the case was called for trial, and respondents were ready to proceed, with their witnesses in court, the contest was dismissed. While it appears from the evidence that Mrs. Brightman was possessed of considerable property, title to which might have been open to attack had the will been set aside, and which she was bound to inherit, if in fact it belonged to the estate, if the will stood, yet we are of the opinion that this is beside the question. If services were rendered to Mrs. Brightman in this respect, it was to her individually, and not to the estate. It also appears, however, and this bears upon the question at issue, that, in addition to the work done and already recited, counsel examined large amounts of correspondence, traced the accumulation of the property and the family relations for years, and whether the deceased had any delusion concerning the relation of the sons to him; conducted a search of the precedent law applicable to the case; and held many conferences. Two witnesses testified that the value of the services in their opinion was \$25,000, and that of this sum the value of the services rendered to the estate was \$5,000.

Counsel for appellant argue that the court should not have taken into consideration the amount of property standing in the name of Mary C. Brightman, title to which was indirectly protected against possible litigation by the defense to the contest. However, it does not appear that the court did consider this element. In fact, in addition to the presumption which we must indulge in favor of the order in this respect, the evidence of the two witnesses that \$25,000 was a reasonable fee for the services rendered, of which \$5,000 was a reasonable charge against the estate, would seem to indicate that the distinction was well in the mind of counsel and the trial judge. The fee allowed for the services rendered is considerably less than that testi-

fied to by the witnesses. It does not appear to have been arbitrarily assessed, nor does it appear, after a consideration of the character of the effort put forth, that there was an abuse of discretion by the trial court in arriving at the amount. As conceded by appellant, the rule is that "the order of the lower court as to attorneys' fees will not be interfered with except in case of a plain abuse of discretion." *Freese v. Pennie*, 110 Cal. 470, 42 P. 978; *Estate of Adams*, 131 Cal. 415, 418, 63 P. 838. See, also, *Estate of Duffill*, 188 Cal. 536, 206 P. 42.

Order affirmed.

We concur: WORKS, P. J.; COLLIER, Justice pro tem.

87 Cal. App. 181

PEOPLE v. DARDEN. (Cr. 996.)

District Court of Appeal, Third District, California. Nov. 29, 1927.

1. Criminal law § 410—Tacit admission of counsel in running argument does not rise to dignity of specific admission.

Tacit admission of state's counsel, disclosed by record as occurring in running argument, does not rise to dignity of specific admission.

2. Indictment and information § 196(5)—Defendant, who proceeded to trial under information charging maintenance of liquor nuisance "to the present time," waived objection that information covered time subsequent to filing original complaint (Pen. Code, §§ 995, 996).

Defendant, charged by information with maintaining liquor nuisance continuously "to the present time," waived objection to time covered by information and testimony thereunder as to sales of liquor after date of filing original criminal complaint in magistrate's court, under Pen. Code, §§ 995, 996, where defendant went to trial on charge as contained in information.

3. Indictment and information § 196(5)—Objection to information charging offense at period subsequent to original complaint must be presented on arraignment (Pen. Code, §§ 995, 996).

Objection to information on ground that it charges commission of offense over period subsequent to that covered by original criminal complaint must be presented on arraignment; otherwise, it is waived, under Pen. Code, §§ 995, 996.

4. Criminal law § 373—Evidence of common practice immediately before or after date alleged is admissible to prove continuing offense.

Evidence of common practice of defendant immediately before or after date charged is properly received in evidence to sustain charge of continuing offense, where matters testified to are sufficiently near time charged to indicate intent, plan, and purpose.

5. Criminal law § 373—Testimony as to sales made within reasonable period after filing original criminal complaint, where supplementing evidence of prior sales, is admissible to prove liquor nuisance.

In prosecution for maintaining common nuisance by keeping place for sale of liquors, where testimony showed large numbers of sales over period alleged in information and prior to filing of criminal complaint in magistrate's court, testimony as to other sales, made after filing of complaint, but within period of information, was admissible to show intent, even if date of filing complaint could be considered.

6. Criminal law § 373—Determination of what constitutes reasonable period before or after time charged, within which evidence of continuing offense is admissible, is for trial court.

What constitutes reasonable period before or after time alleged in information, within which evidence of continuing offense may be admitted, is for trial court's determination.

Appeal from Superior Court, El Dorado County; George H. Thompson, Judge.

Edwin Darden was convicted of maintaining a common nuisance by keeping a place for the sale of intoxicating liquors, and he appeals. Affirmed.

Hale Day, of Los Angeles, E. Fitzgerald, of Placerville, and Donald McKisick, of Sacramento, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

WEYAND, Justice pro tem. The defendant was convicted in the county of El Dorado of the crime of maintaining a common nuisance in the town of Diamond in said county, in that he kept a place where intoxicating liquors were bartered and sold. The information charged that said nuisance was maintained from November 1, 1926, continuously "to the present time." This information was filed June 10, 1927. The defendant entered a plea to this information without interposing any motion to set aside the same on the grounds specified in section 995 of the Penal Code, as said section then stood. Trial was had under this information on the 6th, 7th, and 8th of July, 1927. Upon a conviction of the defendant, he moved for a new trial, and upon denial of that motion, and subsequent sentence by the court, defendant appealed from the order of the court denying said motion and from the judgment of conviction herein.

[1-3] In appellant's brief but one point is urged for the reversal of the judgment and order of the trial court. Appellant claims that, as the original criminal complaint herein was filed in the magistrate's court on "May 31, 1927," it was error on the part of the trial court to admit testimony of sales of intoxicating liquors after "May 31, 1927." The record before us does not disclose the

date upon which the original criminal complaint herein was filed in the justice's court. It is quite true that the record discloses a tacit admission of the district attorney that such was the date of said filing, but it is only so shown in a running argument, and does not rise to the dignity of a specific admission. There is no direct proof as to when the complaint was originally filed.

It is now too late to question the information in that respect. Defendant went to trial upon the charge as contained in the information. Had defendant even attempted during the trial to introduce testimony of the date of the filing of the original criminal complaint, for any purpose in the way of challenge to that pleading, such testimony would have been subject to objection. There was a time and a place when it might have been proper to question this information. That time was upon arraignment, and the grounds of objection are laid down in said section 995 of the Penal Code. Section 996 of the Penal Code specifically provides that, if the objections permitted by section 995 are not made, the defendant is deemed to have waived them. See *People v. Knight*, 63 Cal. App. 65 and 66, 218 P. 79.

[4-6] Conceding that an objection was before the trial court as to testimony of sales, either before or after the time covered by the criminal complaint, as the same was claimed to have been in the magistrate's court, or under the information as filed, we are of the opinion that, if sufficient testimony was given of such illegal sales within the dates from November 1, 1926, until May 31, 1927, testimony could then be properly received of such sales both before and after these dates, but within a reasonable period either before or after, to be determined by the trial court. The gist of the offense charged was its continuing character. It must have been proven to have been "common" or "habitual," and evidence of a common practice, even at dates immedi-

ately before the date charged, and after, are properly received in evidence to sustain such charge, providing they are sufficiently near the time charged to evidence intent, plan, and purpose.

As we construe the testimony given, it was relevant to prove the habitual doing of the illegal acts. A large number of sales within the period described were given in evidence. A few related to times before the period covered by the charge, and a few after the 31st day of May, 1927. It is apparent from the evidence at the trial that, while some witnesses did say sales occurred along in the first of June, or along the last part of May or first of June, none testified to a positive date after June 10th. In section 382 of *Wigmore on Evidence* it is said:

"The prior or the subsequent existence of such a fact (a course of human conduct) is always evidential to show its existence at a time in issue, upon the general experience that such facts involve a human attitude more or less continuous and permanent. The probability of continuance depends much, of course, on the nature of the specific fact and the circumstances of each case, and therefore, in setting a limit of time for the range of the evidence, the discretion of the trial court should control. The principle is illustrated by many sorts of facts. Such evidence is receivable to show the mode of conducting a business, the keeping of liquors illegally. * * * The occasional repudiation of such evidence in some of the above precedents is not to be taken as a negation of the general principle, but only as a determination that in the case at hand the contingencies of change were too many to allow the prior or the subsequent condition of things to be of probative value, or that no presumption of continuity (post, section 2530), in the strict sense, will be enforced."

The order of the trial court denying defendant's motion for a new trial and the judgment of conviction herein are affirmed.

We concur: HART, Acting P. J.; PLUMMER, J.

87 Cal. App. 185

MILLER et al. v. NATHAN et al. (Civ. 5474.)★

District Court of Appeal, First District, Division 1, California. Nov. 30, 1927.

Hearing Denied by Supreme Court Jan. 26, 1928.

1. Landlord and tenant ⇨172(1)—Lessees held justified in quitting premises in view of demands to quit and attachment, and so entitled to maintain eviction action.

Lessees held justified in quitting premises and entitled to maintain action for damages for eviction, where lessors' agent served peremptory notice, subsequently issued attachment for debt not due which was levied on lessees' personal property, and repeatedly demanded that lessees quit possession and avoid lawsuit.

2. Appeal and error ⇨1004(2)—Award of damages on conflicting evidence will not be disturbed as not sustained by evidence.

Where evidence as to damages suffered by plaintiffs is conflicting, award of jury will not be disturbed as not sustained by evidence.

Appeal from Superior Court, Mendocino County; H. L. Preston, Judge.

Action for damages for eviction by Otto Miller and others against Mrs. Miriam Nathan and others. Judgment for plaintiffs, and defendants appeal. Affirmed.

Charles Kasch, of Ukiah, for appellants.

Keith C. Eversole, of Ukiah, for respondents.

STROTHER, Justice pro tem. Plaintiffs entered into possession of lands in Mendocino county under a lease from the defendants for a period of five years from May 16, 1922. The rent reserved by the lease was the sum of \$40 per month, beginning June 1, 1922, and payable on the 1st day of each month thereafter, except that on October 1 of each year the sum of \$800 was payable. The lessees made the monthly payments of rental up to the first October payment. In the month of September a large stack of hay belonging to them was burned and they received \$432 insurance thereon, which was paid by them to the defendants on account of the \$800 October installment. The defendants Locke and Mason live outside of Mendocino county, and their co-owner and lessor, Mrs. Nathan, resided in that county and received all payments and transacted all business connected with the leased premises. At the time of the payment of the insurance money the plaintiffs notified Mrs. Nathan that they would not be able to pay the balance of the October installment and offered to give her a note for it. After some negotiations between the parties a note was given and accepted by defendants payable twelve months after date, with the agreement that when the grain crop was planted on the premises a new note would be given secured by a mortgage on the crop. The monthly in-

stalments of rent falling due thereafter were paid by plaintiffs and accepted by defendants up to and including the one due January 1, 1923. On January 27 a constable and deputy sheriff served upon plaintiffs a notice signed by defendants, by Mrs. Nathan, informing plaintiffs that unless they vacated the premises action for possession would be begun immediately, and setting forth as the reason that a breach of the lease had been committed in not paying the installment of rent due in October, and other alleged breaches. This notice began with a "scare head" in large letters and equally large words, and directed plaintiffs to deliver possession to one E. M. Whitney as defendants' agent. It was accompanied by a letter from Whitney on his letterhead as "United States Commissioner, Justice of the Peace, Notary Public, Insurance," in which they were told that, "While I do not want to commence a suit against you for possession of the property I will have to do so unless everything can be arranged satisfactory immediately." Within a few days after the service of this notice and letter the plaintiff Miller had several meetings with Whitney, at which the latter urged Miller to vacate the premises and avoid a lawsuit. Within a week after the service of the notice defendants filed an action in Whitney's court for \$299 on account of the October installment, and attached wood on the leased premises belonging to plaintiffs. It appears that plaintiffs were ignorant and inexperienced in the law and did not know what their rights were in relation to the controversy between them and the defendants. Plaintiffs vacated the premises a few days later, and thereafter brought this action for damages for eviction.

The case was tried before a jury which found for plaintiffs and assessed their damages at \$2,500. Judgment was entered in accordance with the verdict, from which defendants appeal.

[1] Upon the conclusion of the plaintiffs' case defendants made a motion for a nonsuit upon the specific ground that the evidence was not sufficient to sustain the charge of eviction. The motion was denied. The questions raised by this appeal are in effect the same as in the motion for nonsuit. Appellants rely in support of their position on the case of *Black v. Knight*, 176 Cal. 722, 169 P. 382, L. R. A. 1918C, 319. In that case the plaintiff surrendered possession of the leased premises after entry of judgment in an action of unlawful detainer brought against him by the defendant, which judgment was finally reversed by the Supreme Court. No execution had been issued upon the judgment and no demand for possession thereunder had been made. The court held that there was no disturbance of the plaintiff's possession which would support a charge of eviction. The court, however, disclaimed making any defini-

tion of what facts would constitute an eviction.

We think the plaintiffs were under all the circumstances justified in quitting the premises. The service upon them of an imposing and peremptory notice by defendants' agent with his many and magniloquent titles, the agent's subsequent issuance in his capacity of justice of the peace of an attachment for a debt admittedly not due which was levied upon their personal property, his repeated urgent demands that they quit possession and avoid another lawsuit, all within the space of a few days, constituted an intensive campaign against which the plaintiffs in their state of general apparent ignorance could not, and evidently were not expected to, stand. The evidence was sufficient to justify the judgment as to the eviction.

[2] The further contention is made that the amount of the verdict is not sustained by the evidence. It is enough to say that the evidence as to the damages suffered by plaintiffs was conflicting, and the finding of the jury will not be disturbed.

Judgment affirmed.

We concur: TYLER, P. J.; CASHIN, J.

87 Cal. App. 36

Ex parte STEIGER. (Cr. 1571.)

District Court of Appeal, Second District, Division 1, California. Nov. 19, 1927.

1. Intoxicating liquors ☞132—Offense of unlawful possession of liquor held governed by state law and not federal law (Pen. Code Cal. § 17; Pen. Code U. S. § 335 [18 USCA § 541]).

Offense of unlawful possession of intoxicating liquor in violation of the Wright Act (Deering's Gen. Laws 1923, Act 3784), which adopted the Volstead Act, considered as an offense against state law, is governed by Penal Code Cal. § 17, and not by Penal Code U. S. § 335 (18 USCA § 541).

2. Criminal law ☞90(2)—Unlawful possession of liquor held "misdemeanor" within jurisdiction of municipal court of Los Angeles (Pen. Code, § 17).

Considered as an offense against state law, unlawful possession of liquor is "misdemeanor" under Pen. Code, § 17, and is within jurisdiction of municipal court of the city of Los Angeles.

[Ed. Note.—For other definitions, see Words and Phrases, First and second Series, Misdemeanor.]

3. Criminal law ☞1188—Pronouncement of sentence after 12 o'clock noon on Saturday would only require remand of prisoner for sentence.

That sentence of conviction was pronounced after 12 o'clock noon on a Saturday, which time is a legal holiday, would only require that prisoner be remanded for sentence.

4. Criminal law ☞1144(17)—On record showing pronouncement of sentences on Saturday, it is presumed that it was before noon.

Where record shows that sentences were pronounced on a stated date, which was a Saturday, it was presumptively before noon, and appellate court cannot go outside of record for evidence to the contrary.

5. Criminal law ☞991(1)—Court had jurisdiction to order sentences to be made consecutive, where convictions were of record before any sentence was pronounced.

Where three convictions were of record before any sentence was pronounced, court did not exceed its jurisdiction in ordering sentences to be made consecutive rather than concurrent.

6. Habeas corpus ☞50—Habeas corpus is not available because court exceeded its jurisdiction in ordering sentences to be made consecutive, until expiration of first period of sentence.

That court exceeded its jurisdiction in ordering sentences to be made consecutive instead of running concurrently, furnishes no ground for writ of habeas corpus prior to expiration of first period of sentence.

Application by Louis A. Steiger for writ of habeas corpus prayed to be directed to the Chief of Police of the City of Los Angeles. Writ denied.

Cooper & Collings, of Los Angeles, for petitioner.

CONREY, P. J. Petitioner is in jail pursuant to three sentences for violation of the "unlawful possession" provisions of the Wright Act, all within the city of Los Angeles. In each case the charge states and the conviction establishes two prior convictions of like offenses.

The statutory provisions involved are Wright Act (Deering's General Laws, 1923 Edition, p. 1396); Volstead Act (Barnes' Federal Code, 1919-1924 Supplement, pp. 848, 849, and 858).

[1, 2] First point: That the municipal court was without jurisdiction; that under section 335 of United States Penal Code (18 USCA § 541) the alleged offenses were felonies, because they were subject to imprisonment for a term exceeding one year. We think that the character of the offense, considered as an offense against a state law, is governed by the Penal Code of the state and not by the Penal Code of the United States. Under section 17 of the Penal Code of California, the several offenses charged are misdemeanors. It is true that they are what are commonly called "high-grade" misdemeanors, but they are within the jurisdiction of the municipal court of the city of Los Angeles. In re Luna (Cal Sup.) 257 P. 76; People v. Daault (Cal. App.) 253 P. 151.

[3, 4] The second point is that the judg-

ments are void because each of them was pronounced after 12 o'clock noon on a Saturday, which time is a legal holiday. If the fact as to the hour of the sentence may be inquired into in this proceeding, as against the presumption of regularity on the face of the record, it would appear that this point is well taken. In *re Dal Porte*, 198 Cal. 216, 244 P. 355. At most, however, this would only require that the prisoner be remanded for sentence. But as the record shows sentences pronounced on the 19th day of March, 1927 (which was a Saturday), this presumptively was before noon, and we cannot go outside of that record for evidence to the contrary. In *re Selowsky*, 189 Cal. 331, 208 P. 99.

[5, 6] The third point is that the sentences should run concurrently and that the court exceeded its jurisdiction in ordering that they be made consecutive. The cases cited are In *re Cohen*, 198 Cal. 226, 244 P. 359, and *Ex parte Casey*, 160 Cal. 357, 116 P. 1104. There is no merit in the point stated. So far as appears (and the petition so alleges), the convictions were of record in all of the cases before any sentence was pronounced. In *re Mann*, 192 Cal. 393, 220 P. 305. Besides, even if the point were well taken, it would not furnish ground for a writ of habeas corpus prior to expiration of the first period of sentence.

The petition is denied.

I concur: HOUSER, J.

87 Cal. App. 99

SHARKEY et al. v. SHEETS et al.*
(Civ. 5951.)

District Court of Appeal, First District, Division 2, California. Nov. 23, 1927.

Hearing Denied by Supreme Court Jan. 16, 1928.

1. Municipal corporations $\S$ 706(5) — That driver of truck colliding with automobile might have avoided collision does not prove negligence.

In action for death of plaintiff's intestate while driving as guest in automobile which was struck by defendant's truck when car in which deceased was driving negligently attempted left turn, fact that truck driver might have performed or omitted certain acts which would have avoided collision does not prove that failure to do so was negligence, and does not establish that any such acts or omission would constitute proximate cause of death of deceased.

2. Trial $\S$ 108½ — In proper case, counsel may question jurors on interest in defendant's insurer.

In action for damages for death growing out of automobile collision, though it is improper for counsel to unnecessarily bring before jury claim that casualty company has undertaken to reimburse defendant for damages that may be

awarded, counsel in proper case may ascertain by examination of jurors whether any of them are so interested in any such casualty company as to make them interested in litigation.

3. Appeal and error $\S$ 688(2) — Exception to refusal to question jurors concerning interest in defendant's insurer held entitled to consideration on merits under record showing court examining jurors rejected question.

Record showing that court conducting examination of jurors refused to ask requested question whether any jurors were stockholders in insurance company indemnifying defendant, and instructed that question of insurance could not be brought before jury, held to entitle plaintiffs to consideration of exception to refusal to submit question of interest on its merits; it being error to allow jurors to sit in case in which they are financially interested.

4. Appeal and error $\S$ 1170(6) — Refusal to question jurors as to interest in defendant's insurer if error, was not prejudicial, where affidavit on motion for new trial showed no jurors were interested; "entire cause" (Const. art. 6, $\S$ 4½).

In action for damages for death growing out of automobile collision, refusal of request to question jurors as to interest in defendants' insurance carrier, if error, was not prejudicial, where affidavit by officer of insurer on motion for new trial, which constituted part of "entire cause" within Const. art. 6, $\S$ 4½, showed that none of jurors who tried case were interested in insurer, since verdict could not have been affected though questions were asked of jurors.

5. Jury $\S$ 131(6) — Refusal to permit jurors to state whether they were acquainted with truck drivers other than defendant held not error.

In action for damages for death of plaintiff's intestate riding in automobile struck by defendant's truck, refusal to permit jurors to state whether they were acquainted with any truck drivers or certain truck drivers other than defendant driver was not error.

6. Municipal corporations $\S$ 705(10) — Charge that truck driver's duty to avoid collision commenced when he saw peril, not when automobile was cutting corner, held proper.

In suit for damages for death of plaintiff's intestate riding in automobile struck by defendant's truck, instruction that truck driver's duty to stop and avoid accident, if possible, commenced when he saw occupants of automobile were in peril, and not necessarily when he saw automobile was going to cut corner, held proper.

Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

Action by Charlotte Sharkey and Clara Sharkey and others, minors, by Charlotte Sharkey, guardian ad litem, against C. L. Sheets and another. Judgment for defendants, and plaintiffs appeal. Affirmed.

Bertrand J. Wellman, of Los Angeles, for appellants.

H. T. Morrow and Henry L. Knoop, both of Los Angeles, for respondents.

KOFORD, P. J. In this action a jury trial resulted in a verdict for the defendants. The action was commenced by the surviving widow and minor children of Thomas Sharkey, deceased, for the alleged wrongful death of said deceased, claimed to have been caused by the negligent operation of a truck owned and operated by the defendants and respondents. The deceased was riding as a guest in a Ford touring car in the city of Los Angeles. The Ford, proceeding easterly on Whittier street, made a left-hand turn into Hillvale street and, in doing so, cut the corner. The truck was proceeding westerly on Whittier street and collided with the Ford at a point west of the center of Hillvale and north of the center line of Whittier. In cutting the corner while making the turn, the driver of the Ford car was negligent, but the deceased, being a guest, and in this case having no control over the operation of the car, was not guilty of contributory negligence. The jury by its verdict decided that the driver of the truck was not negligent in any way contributing to the injury or death of the deceased.

[1] Appellants contend that the verdict is contrary to the evidence in that it must necessarily be true that the driver of the truck was guilty of at least some negligence. They contend that had the truck driver stopped a little sooner, checked his speed a little more, or swerved his truck a very little more a collision would not have occurred and therefore his failure to do some one of these things must be accounted as actionable negligence in this case. The fact that the truck driver might have performed or omitted certain acts which would have avoided the collision does not prove that his failure to do so was negligent and neither does it establish that any such acts or omissions would constitute a proximate cause of the injury and death of the deceased. The evidence convinces us that it was entirely a matter within the province of the jury to decide in this case that the truck driver was guilty of no actionable negligence.

[2] The appellants claim reversible error in the action of the court in prohibiting counsel for the plaintiff from asking the jurors, when examining them on their voir dire, whether they were interested as stockholders or otherwise in the Individual Indemnity Insurance Company. The authorities hold that while it is improper for counsel unnecessarily to bring before the jury the claim or fact that a casualty company had undertaken to reimburse the defendant for such damages as may be awarded in the action, nevertheless, in a proper case and in a proper manner, counsel is entitled to ascertain by an examination of the jurors whether any of them are so interested in any such casualty company as to make them interested in the litigation. *Pierce v. United Gas & Electric Co.*, 161 Cal. 176, 118 P. 700; *Arnold v. California*

Portland Cement Co., 41 Cal. App. 420, 183 P. 171; *Baldarachi v. Leach*, 44 Cal. App. 603, 186 P. 1060; *Williamson v. Hardy*, 47 Cal. App. 377, 190 P. 646; *Murphy v. Shaffer*, 58 Cal. App. 453, 208 P. 1003.

In the trial of this case the examination of the jurors seems to have been largely conducted by the court. After the trial judge had asked the jurors in the box collectively certain questions, he then appears to have become the interlocutor for the attorneys, who suggested the questions that they wished to ask the jurors, and the judge put them to the jurymen collectively in his own language. When this opportunity came to counsel for plaintiffs he stated, "I would like to know if any of the jurors are stockholders or interested in the Individual Indemnity Insurance Company." Whereupon the court responded, "I won't ask that. I will say to the jurors now that the question of insurance must not enter into this case. You will conclusively presume that there is no insurance and try the case as between plaintiffs and defendants without reference to any insurance." The court also stated, a few moments later, that insurance was not a matter that ought to be brought before the jury, and then asked counsel for plaintiffs to suggest further questions. Counsel for plaintiffs duly took exception to the ruling of the court.

[3] Respondents challenge the sufficiency of this record to show error in the ruling. Plaintiffs' counsel referred to the insurance carrier by a misnomer and also failed to pursue the inquiry vigorously and state the object and purpose of his question. Considering the manner in which the examination was conducted as a whole as shown by the record, we think appellants were not permitted to inquire concerning the interest or bias of the jurors in this respect and are entitled to a consideration of this exception upon its merits. To allow jurors to sit in a case in the outcome of which they are financially interested would be an error too grave to be excused for any slight cause.

[4] Respondents claim the error was not prejudicial because it has not been made to appear that any of the jurors finally selected to try the case were in fact interested in the insurance carrier of the defendants. This appears from the affidavit of the vice president of the Individual Underwriting Corporation, which was the corporate attorney in fact for the Pacific Automobile Indemnity Exchange, the insurance carrier of the defendants. According to this affidavit, none of the jurors who tried the case were members of the corporation nor of the exchange. This affidavit was used in opposition to the appellants' motion for a new trial. The affidavit used in support of the motion for a new trial contained nothing to the contrary. These affidavits constitute a part of the "entire cause" within the meaning of article 6, § 4½ of the Constitution. *People v. Piero* (Cal.

App.) 249 P. 541. Under these circumstances we are obliged to say that had the question been permitted the jurors under examination would have answered that they were not interested in the insurance carrier of the defendants. The error therefore cannot be said to have resulted in a miscarriage of justice. The same verdict would have resulted, and by the same jurors, even though the jurors had been permitted to respond to this question. None of them would have been excused for bias on this account.

[5] We see no error in the court's refusing to permit the jurors to state whether they were acquainted with any truck drivers or certain truck drivers other than the defendant.

Appellants complain of the refusal of the court to give plaintiffs' requested instructions numbers 1, 2, 4, 6, and 8. No argument is advanced to support the claim, although respondents have well pointed out the vice of the requested instructions refused by the court, and have pointed out where the valid parts of those refused were given by the court in substance in other parts of the instructions. Our examination discloses no error in the refusing of these instructions.

[6] The court properly stated in its instructions that the truck driver's duty to stop and avoid the accident, if he had time and could do so, commenced when he saw that the occupants of the Ford were in peril, and not necessarily when he saw the Ford was going to cut the corner. His duty arose from the obligation to avoid the injurious results of the Ford driver's negligence in cutting the corner if he could do so. This was not due to any rule of the road requiring him to yield the right of way to one making a left-hand turn at an unauthorized place, but due to considerations of humanity and ordinary care. The situation was like a case where the last clear chance doctrine applies despite negligence of the one injured.

The judgment is affirmed.

We concur: STURTEVANT, J.; NOURSE, J.

87 Cal. App. 169

STRONG et al. v. MORRISON. (Civ. 5511.)

District Court of Appeal, First District, Division 1, California. Nov. 29, 1927.

1. Appeal and error $\S$ 1071(5)—In landlord's action for lease rescission, court's finding on lease rules held not error, because not required since lease provided lessor might change rules at will.

Where a landlord sued for rescission of a lease trial court's finding relative to landlord's rules affecting tenancy was not error, since such finding was not required at all as the lease pro-

vided the lessor might change the rules as he willed.

2. Appeal and error $\S$ 1011(1)—Reviewing court will not disturb trial court's finding where evidence conflicted.

A reviewing court will not disturb the trial court's finding where the basic evidence was conflicting.

3. Landlord and tenant $\S$ 48(1/2)—Tenant having exclusive grocery selling concession under lease could not hold landlord liable for damage from other tenants' infringement before informing landlord so condition could be corrected.

Where, in a landlord's action for rescission of a lease of space in a market house for grocery selling purposes, the tenant counterclaimed for damages for breach of the lease in that the landlord had permitted others to sell groceries in violation of the agreement for exclusive selling privileges, *held*, that the landlord was not liable for other tenants' infringement, in the absence of the tenant's having informed landlord of such infringement and given him a chance to correct the condition.

4. Landlord and tenant $\S$ 34(5)—In action for lease rescission, held that evidence not supporting counterclaim for damages would not support cross-complaint for rescission.

Where, in a landlord's action to rescind a contract leasing space in a market house with an exclusive grocery selling concession, the tenant filed a cross-complaint for rescission and also a counterclaim for damages, *held*, that evidence not supporting a counterclaim for damages would not support cross-complaint for rescission.

Appeal from Superior Court, Los Angeles County; Percy S. King, Judge.

Action by Frank R. Strong and others, doing business under the fictitious name of the Beverly Western Public Market, against E. A. Morrison. From the judgment, defendant appeals. Affirmed.

Edward M. Selby, of Los Angeles, for appellant.

Kemp, Partridge & Kemp and Mitchell, Silberberg & Davis, all of Los Angeles, for respondents.

STROTHER, Justice pro tem. This is an action to recover rent for space in a market house leased by plaintiffs to defendant. The complaint is in two counts, one for rent reserved in a written lease, the other for the reasonable rental value of the premises. In each count there are, in addition, claims for advertising of defendant's business, and furnishing refrigeration in accordance with the provisions of the lease. Defendant counterclaimed for damages for breach of the lease, and filed a cross-complaint for rescission and for damages.

The court found for plaintiffs on all of the issues except the claim for advertising, and defendant appeals from the judgment.

All of the provisions of the rather lengthy lease, which was introduced in evidence, were for the benefit of the lessors except the covenant that the lessee should have "the exclusive grocery privilege in this market as represented by our catalog issued monthly," and the agreement of the lessors to "maintain and conduct a public market in the above-mentioned building." The lease also contained a provision that the lessee should "comply with the rules and regulations of the lessor as printed hereon now in force or which may hereafter be adopted."

On May 8, 1922, the defendant gave notice to plaintiffs of rescission of the contract of lease for failure to comply with the agreements to maintain a public market and to reserve to him the exclusive grocery privilege and other alleged breaches of the agreement. On August 19 plaintiffs gave notice to defendant to pay the sums due under the contract within 3 days or quit. On August 23 defendant surrendered possession of the leased premises.

[1] Appellant specifies in the bill of exceptions a number of particulars in which he claims the findings of the court are not sustained by the evidence, but all of the findings to which he objects, except those relating to the exclusive grocery privilege and lessors' agreement to conduct a public market, are findings as to "rules and regulations" of the lessors, not covenants on their part. It was not necessary for the court to find at all as to those, which were evidently to be observed by the lessee, and which he expressly agreed might be changed at any time at the will of the lessors.

[2] The term "public market," is used in the lease, manifestly in a sense which is not its common or ordinary significance. Both parties recognized this, as each introduced evidence to show its meaning in the locality.

This evidence was conflicting and the finding of the court will not be disturbed.

[3] The defendant wrote several letters to the plaintiffs complaining of violations of his exclusive grocery privilege, and had one or more conversations with them in regard to it, but it does not appear that the defendant ever made any specific statement to the lessors of more than a few articles of groceries which were being handled by other lessees. On the day on which he gave notice of rescission, he made an extended list of such articles, which was introduced in evidence. He did not at that time or later, although they had requested a specific statement, communicate it to the lessors. The nature and extent of infringement by other lessees of defendant's exclusive rights were matters which he was especially in a position to determine. The defendant himself admitted, on his cross-examination at the trial, that there were many articles as to which he complained which it was perfectly proper that other concessionaires should handle. In this indefinite state of his own mind as to the exact limits of his exclusive privilege, it was certainly his duty to point out to the lessors the specific articles and give them an opportunity to correct the condition. *Sieber v. Blanc*, 76 Cal. 173, 18 P. 260. Not having done so, he cannot hold them liable for the damages he suffered by reason of the infringement.

[4] The defendant's claim of right to rescind the lease was based upon the same facts as those contained in his counterclaim. As the evidence did not support the latter, the trial court properly found against him on his cross-complaint for rescission.

The judgment is affirmed.

We concur: TYLER, P. J.; CASHIN, J.

87 Cal. App. 222

PEOPLE v. BLACKMORE. (Cr. 1546.)

District Court of Appeal, Second District, Division 2, California. Dec. 1, 1927.

1. Embezzlement ⇨23—Defendant retaining possession and selling automobile to corporation, which executed back conditional sales contract, was estopped, in embezzlement prosecution, to deny corporation's title.

Where defendant sold automobile to corporation, which executed back to him conditional contract of sale, car remaining in defendant's possession, and defendant promised when contract was delivered to deliver slip transferring title, but thereafter repeatedly put off officers of corporation with same promise, defendant was estopped, in prosecution for embezzlement, in which automobile was subject of the crime, to deny corporation's title.

2. Estoppel ⇨52—Doctrine of estoppel applies in criminal cases.

Doctrine of estoppel may be applied in criminal cases.

Appeal from Superior Court, Los Angeles County; Carlos S. Hardy, Judge.

D. M. Blackmore was convicted of embezzlement, and he appeals. Affirmed.

Hugh L. Dickson, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., John M. Flynn, Deputy Atty. Gen., and John D. Richer, of Los Angeles, for the People.

WORKS, P. J. Defendant was convicted of the crime of embezzlement, and appeals from the judgment.

The property which was the subject of the crime was an automobile. Appellant sold the car to a certain corporation for the sum of \$1,675 and the corporation executed back to him a conditional contract of sale, the car remaining in appellant's possession. Thereafter the alleged embezzlement occurred. Appellant's sole contention is that at the time he sold the car to the corporation no delivery of possession was made, and this point is based upon the single ground that appellant, at the time of the sale, never delivered to the corporation a certain "pink slip" of paper. This slip is referred to continually in the testimony, and the evidence is undisputed that it was never, either at the time of the sale or afterward, delivered.

[1, 2] In his brief appellant does not acquaint us with the nature of the "pink slip," but his entire argument is based upon the idea that, if it had been delivered, the corporation would have been vested with the title to the car. It is possible that the slip was the certificate of registration referred to in sections 41 and 45 of the Motor Vehicle Act (Act 5128, Deering's Gen. Laws 1923), but, whether it was or not, we repeat that

appellant treats it as if it were an all-sufficient muniment of title to the automobile. We think appellant is estopped to assert that the paper was not delivered to the corporation. Not only did he take from the organization the conditional contract of sale, which necessarily was based upon the idea that the corporation was the owner of the car, but the evidence showed that at the time the contract was delivered to him appellant promised to make delivery of the pink slip, and that he repeatedly put off the officers of the corporation afterward with the same promise. Under such circumstances he cannot be heard to deny the corporation's title. The doctrine of estoppel has often been applied in criminal cases, notably in *People v. Royce*, 106 Cal. 173, 37 P. 630, 39 P. 524, and in *People v. Leonard*, 106 Cal. 302, 39 P. 617. We think it has a ready application here.

Judgment affirmed.

We concur: CRAIG, J.; THOMPSON, J.

TELEGRAPH AVE. CORPORATION v. RAENTSCH et al. (Civ. 5733.)★

District Court of Appeal, First District, Division 2, California. Nov. 28, 1927.

Rehearing Denied Dec. 28, 1927. Hearing Granted by Supreme Court Jan. 26, 1928.

1. Statutes ⇨181(2)—Statute capable of reasonable and certain interpretation without straining will not be given unreasonable and uncertain interpretation.

A statute capable of a reasonable and certain interpretation without being strained will not be given an unreasonable and uncertain interpretation.

2. Landlord and tenant ⇨290(1)—Statute held to authorize action in unlawful detainer for possession of building leased for "term" exceeding tenant's life expectancy (Code Civ. Proc. § 1161; Civ. Code, § 761).

Code Civ. Proc. § 1161, providing that "tenant of real property, for a term less than life, is guilty of unlawful detainer," held applicable to estates for years and at will, which are classified in Civ. Code, § 761, as estates for less than life, so as to authorize action in unlawful detainer for possession of building leased for 99 years, as against contention that act applies only to tenancy for term of years less than tenant's life expectancy, as word "term" may well refer to "duration of enjoyment" of estate.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Term.]

3. Constitutional law ⇨249—Landlord and tenant ⇨289—Unlawful detainer statute held not unconstitutional as depriving lessee of equal protection in denying right to set-off, counterclaim, or cross-complaint (Code Civ. Proc. § 1161).

Code Civ. Proc. § 1161, which provides uniform, though special and summary, proceeding

in unlawful detainer for quick and ready determination of forfeiture of lease, is not unconstitutional as depriving lessee of equal protection of law in denying him right to set-off, counterclaim, or cross-complaint; classification being based on natural and reasonable distinction between such cases, which require prompt hearing and particular form of judgment, and ordinary cases at law or in equity.

4. Landlord and tenant ⇨291(8)—Complaint in unlawful detainer held not demurrable for failure to plead service of notice to pay rent or quit on subtenants not shown to be in default.

Lessor's failure to plead in unlawful detainer that it had served notice to pay rent or quit on all subtenants, who were not shown to be in default, held not ground for demurrer.

5. Landlord and tenant ⇨291(6)—Subtenants not in default need not be made defendants in unlawful detainer against tenant.

Subtenants not shown to be in default need not be joined as parties defendant in lessor's action of unlawful detainer against tenant.

6. Landlord and tenant ⇨291(1)—Premature service of notice to pay rent or quit premises did not affect lessor's right to proceed in unlawful detainer under later notice.

That notice to pay July rent or quit premises was served on same day as notice of default, whereas lease authorized lessor to claim forfeiture if rent was not paid within 5 days from service of notice on lessee and 20 days after service of notice on leasehold mortgagee, and another claim of forfeiture for nonpayment of August rent was later served, did not affect lessor's right to proceed in unlawful detainer under subsequent notice served over 20 days after service of claim of default for nonpayment of July rent.

7. Landlord and tenant ⇨291(1)—Validity of lessor's notice to pay rent or quit held not affected by disputed claim of offset for amount owed by lessor as subtenant.

Validity of landlord's notice to pay rent or quit premises was not affected by lessee's disputed claim of offset, based on theory that lessor owed amount, remitted by it, as lessee's subtenant under another name, in absence of showing of reason for remission.

8. Continuance ⇨26(3)—Refusal of continuance for absence of available witness held not abuse of discretion.

Refusal of continuance for absence of witness, who was available and could have been called by defendant during trial, held not abuse of discretion.

9. Landlord and tenant ⇨190(1)—Appointment of receiver in unlawful detainer, who assumes full possession and control of premises, is "eviction," relieving tenant from paying rent during receiver's occupancy.

Appointment of receiver in unlawful detainer, who assumes full possession and control of premises and collects rents from subtenants or removes them from possession, is eviction of tenant, and relieves him from payment of rent during receiver's occupancy; receiver being re-

ceiver of landlord as party entitled to possession.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Eviction (Of Tenant).]

10. Landlord and tenant ⇨190(1)—Any act of landlord dispossessing tenant amounts to "eviction," relieving him from paying "rent."

Any act of landlord which results in dispossessing tenant and depriving him of use, occupancy, and enjoyment of premises amounts to eviction, relieving tenant from payment of "rent," which is landlord's right to receive compensation from tenant for benefits accruing to him from his possession and enjoyment of land.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Rent.]

11. Landlord and tenant ⇨314—Defendants' right to redeem by depositing in court amount of judgment in unlawful detainer within five days is substantial one, of which they cannot be deprived by trial court (Code Civ. Proc. § 1174).

Privilege granted every defendant in unlawful detainer proceedings by Code Civ. Proc. § 1174, to redeem by depositing in court amount found due within five days from entry of judgment, is a substantial right, of which he cannot be deprived by any action of trial court.

12. Appeal and error ⇨1073(7)—Inclusion of rentals, accruing during receiver's occupancy, in unlawful detainer judgment, held not reversible error, where defendant failed to pay clerk of court sum admitted to be due (Code Civ. Proc. § 1174).

Erroneous inclusion of rentals accruing during receiver's occupancy of premises in judgment for lessor in unlawful detainer held not prejudicial, so as to justify reversal, where defendant did not pay to clerk of court sum admitted to be due under proper judgment, as authorized by Code Civ. Proc. § 1174.

Appeal from Superior Court, Alameda County; Warren V. Tryon, Judge.

Action in unlawful detainer by the Telegraph Avenue Corporation and others against Karl Raentsch and others. Judgment for plaintiffs, and named defendant Raentsch appeals. Modified, and affirmed as modified.

Marvin C. Hix, of San Francisco, for appellant.

Breed, Burpee & Robinson, of Oakland, for respondents.

Dunn, White & Aiken and Chapman, Trefethen & Chapman, all of Oakland, amici curiæ.

NOURSE, J. Plaintiff sued in unlawful detainer to recover possession of a block of property located in the city of Oakland. Trial was had before the court sitting without a jury and resulted in a judgment canceling the lease under which the property was held, awarding possession to the plaintiff and a money judgment against the defendant Raentsch in the sum of \$38,583.35. This de-

⇨For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

defendant has appealed from the judgment upon a typewritten record.

The lease in question was executed under date of December 31, 1923, and covered a term of 99 years which specified monthly rentals graduating from \$2,475 to \$5,000 each month. The lease specified, among other things, that in the event of a default in the payment of rent, continuing for a period of 5 days after written notice thereof served upon the lessee, and continuing for a period of 20 days after written notice thereof served upon any mortgagee of the lease who had given written notice of his mortgage, the lessor might, at his option, declare the term of the lease ended and re-enter the premises.

After the lessee had entered into possession under the lease he executed a mortgage of the lease to the defendant Bird and a second mortgage to the defendant Jensen. The latter gave written notice of his mortgage to the lessor entitling him to notice of nonpayment of rent within the provisions of the lease above noted. The premises were occupied as a public market and sublet to some 50 subtenants. On July 30, 1925, the lessor served upon the lessee and mortgagees a notice declaring a default in the payment of the July rent, amounting to \$3,850, and at the same time served upon them the statutory notice to pay the rent alleged to be due or to quit the premises within 3 days. On August 7, 1925, similar notices were served by the lessor touching the nonpayment of rent due for the month of August. On September 1, 1925, notice to pay the rentals for July and August or to quit the premises were served upon the lessee, the mortgagees, and eight of the subtenants. On September 10, 1925, this action was commenced against all these parties who had been served with the notice just mentioned. On September 18, 1925, at the instigation of the plaintiff in the action, a receiver was appointed ex parte who took possession and control of the premises, collected all rents from subtenants which were paid by them and remained in possession until the entry of judgment. After numerous delays the cause was brought to trial on April 19, 1926, and this resulted in a judgment for the plaintiff as above stated. The money judgment represented the sum of \$40,700, total rent claimed to have been due, less the sum of \$2,116.65, which was voluntarily remitted by plaintiff on defendant's claim that this was not due under a separate defense, which was stricken from the answer during the early course of the trial. Of the sum awarded \$29,150 represented the rent which accrued during the occupancy of the receiver.

[1, 2] On this appeal the lessee, who is the only defendant appealing, advances the argument that the court was without jurisdiction to try the action because the Code section relating to proceedings of this nature does not include a tenancy for a 99-year period. The argument is that section 1161,

Code of Civil Procedure, providing that "a tenant of real property, for a term less than life, is guilty of unlawful detainer," etc., uses the expression, "term less than life," as applying to a term of years less than the usual expectancy of a man's life. In support of the point it is argued that the expectancy of life being less than 61 years at all events for any male person at any age and less than 45 years for any male person capable of entering into a leasing contract, we must assume that the Legislature intended to apply the provisions of the unlawful detainer act to a tenancy for a term of years less than this term of expectancy. The argument is not sound, because it requires an unreasonable and uncertain interpretation of a statute which without being strained at all is capable of a reasonable and certain interpretation. The word "term" as applied to estates is frequently used as referring to the character of the estate as well as to the time or period of enjoyment. Blackstone, vol. 2, p. 144, says: "Thus the word term does not merely signify the time specified in the lease, but the estate also and the interest that passes by the lease; and therefore the term may expire during the continuance of the time." *Lang v. Pacific Brewing Co.*, 44 Cal. App. 618, 187 P. 81. Section 761 of the Civil Code defines estates in real property in respect to "the duration of their enjoyment" as including estates of inheritance, for life, for years, and at will. The word "term" as used in section 1161, Code of Civil Procedure, might well refer to the "duration of enjoyment" of the estate, and as so interpreted the section would become applicable to estates for years and estates at will, which are expressly classified in section 761 of the Civil Code as estates less than life. As so interpreted the section would have a reasonable and certain meaning and it is such an interpretation which should be put upon it.

[3] The argument is made that section 1161, Code of Civil Procedure, is unconstitutional because it deprives the lessee of equal protection of the law in that, as interpreted by the Supreme Court in *Arnold v. Krigbaum*, 169 Cal. 143, 146 P. 423, Ann. Cas. 1916D, 370, it denies a defendant in an unlawful detainer action to a set-off, counterclaim, or cross-complaint. The trend of the argument is that this is inequitable and unfair to defendants in proceedings of this character because, in an action by the landlord against the tenant for rent, as well as in an action by the tenant against the landlord for breach of covenant, the defendant may plead a set-off, counterclaim, or cross-complaint and that such defenses may be pleaded in other actions in equity and at law. The argument is without merit because the Code sections relating to unlawful detainer provide a uniform, though special and summary, proceeding for a quick and ready determination of the forfeiture of the lease, and these provisions relate to all

actions brought for that purpose. The classification which the Legislature has made cannot be said to be arbitrary or made for the mere purpose of classification, but it is based upon a natural and reasonable distinction between cases of this character, which require prompt hearing and a particular form of judgment, and the ordinary cases at law or in equity.

[4, 5] Failure of the respondent to plead that it had served notice on all the subtenants and to join them as parties to the action was raised by demurrer going to the sufficiency of the complaint. It does not appear that the subtenants were in default, and, if they were not, it would certainly have been futile to have given them notice to pay the rent or quit, and it would likewise have been unnecessary to join them as parties defendant in this action. *Tujague v. Superior Court*, 69 Cal. App. 35, 39, 230 P. 198.

[6, 7] It is argued that the notices given by the respondent to pay rent or to quit the premises were premature because they were served upon the same day as notice of default of the rent; that these were ineffective because they did not take into account a claim for money due the appellant from the respondent and therefore demanded the payment of rent in excess of the amount due; and that there was no proof that the individual who served the notices was authorized to act for the respondent in that particular. The argument is that inasmuch as the lease provided that the lessor might claim a forfeiture if the rent was not paid within 5 days from the service of notice upon the lessee and within 20 days after service of notice upon the mortgagee, that the lessor could not institute proceedings under the unlawful detainer statute until these respective periods had passed. There is little merit in the argument because, if we should assume that the notice to pay rent or quit served on July 28, 1925, was premature, the same could not be said as to the notice to the same purpose served on September 1, 1925. The claim of default for nonpayment of the July rent was sufficient in itself to justify a claim of forfeiture of the lease, and this was served more than 20 days before the service on September 1st of the notice to pay rent or quit the premises. The fact that in the interim another claim of forfeiture because of nonpayment of the August rent was served cannot affect the lessor's right to proceed under the September notice. It is equally clear that the validity of the notice to pay rent or quit the premises is not affected by the claim of offset against the lessor. The notice specified the rent which was due under the terms of the lease. The claim of offset was a disputed claim based upon appellant's theory that the respondent was in fact interested under another name as one of his subtenants and as such owed the appellant the sum of \$2,000. The validity of this claim was not tried because the trial court properly

ruled that a counterclaim was improper in an action of this nature, but the respondent voluntarily remitted from the judgment the sum of \$2,000 in addition to interest thereon. There is nothing, however, in the record to show the reason for the remission of this portion of the judgment, and it does not therefore appear that it should have been deducted from either the July or August rent due from the lessee.

[8] Criticism is made of the action of the trial court in refusing to give the appellant a continuance of the trial of the case on his motion made in open court on the day which had been set for the trial. The ground for the motion was the absence of a witness which appellant claimed to be material in the proof of his case, but it appears that this witness was available and could have been called by the appellant during the course of the trial. No effort was made to call the witness and we are satisfied that the trial court did not abuse its discretion in refusing appellant's motion.

[9] The more serious question is the propriety of that portion of the judgment which awarded to the respondent the full amount of rental claimed to be due under the lease during the period of occupancy by the receiver. The receiver was appointed upon the application of the respondent. The trial court found "that on the 18th day of September, 1925, said receiver did * * * enter into the control and possession of said premises as such receiver and ever since said date has been and now is in control of said premises, as such receiver, and has collected the rents from subtenants of said premises, but no part of said rents has been paid to either plaintiff or defendant. * * *" On the part of the appellant it is claimed that the action of the court in giving the receiver the sole possession and control of the premises was in effect an eviction of the tenant at the instance of the landlord, which automatically stopped the accrual of rental from the tenant under the lease. The facts are undisputed that the receiver did take and hold exclusive possession during the period found by the trial court and that he collected all rents that were paid by subtenants during that period and that he ousted or dispossessed other subtenants from the premises.

It is conceded by all parties that there is no liability on the part of the lessee to pay rent if he is evicted. 36 C. J. § 1113. The respondent argues that the appointment of the receiver was for the benefit of all parties and did not in itself oust the tenant from his right to possession, but the facts of this case, as found by the trial court, do not support the respondent. The jurisdiction of the court to appoint a receiver in proceedings of this nature was added to section 564, Code of Civil Procedure, by an amendment in 1919 (St. 1919, p. 251). There are no California cases which have come to our attention inter-

preting this amendment to the Code in so far as it relates to the question before us. The great weight of authority from other jurisdictions uniformly supports the doctrine that the appointment of a receiver who assumes full possession and control of the premises in a proceeding of this nature is an eviction of the tenant and relieves him from payment of the rent called for by the lease during the period of the receiver's occupancy. The respondent has not called to our attention any authorities in opposition to this rule, and our own examination satisfies us that the rule is practically uniform.

[10] The rule follows the general principle that any act of the landlord which results in dispossessing the tenant and which deprives him of the use, occupancy, and enjoyment of the premises amounts to an eviction. The reason for the rule is that rent is the landlord's right to receive from the tenant compensation for the benefits that are accruing to the tenant from his possession and enjoyment of the land, and that when the tenant is deprived of this right of possession and enjoyment by the action of the landlord, the right of the landlord to receive compensation automatically ceases. *Gilbert, Treatise on Rent*, p. 145; *Hoeverler v. Fleming*, 91 Pa. 322; *Palmtag v. Doutrick*, 59 Cal. 154, 167, 43 Am. Rep. 245; *Veysey v. Moriyama*, 184 Cal. 802, 805, 195 P. 662; 16 R. C. L. pp. 684, 948; 36 C. J. 255; 15 Cal. Jur. 679.

It is, of course, true that the appointment of a receiver is not in every instance an ousting of possession of the property over which the receiver exercises control, but where, as here, a receiver is appointed at the instance of the plaintiff in an action in unlawful detainer, the very nature of which is to terminate the tenancy and to place the plaintiff in possession of the property, the receiver in such a case must be treated as the receiver of the party entitled to the possession (*Sturgis v. Knapp*, 33 Vt. 487, 528), and where, as here, this receiver takes exclusive control and possession of the premises, all of which were occupied by subtenants under separate tenancies, and either collects the rents from such subtenants or removes them from possession, he must be treated as a receiver for the landlord, whose entry into possession is an eviction of the lessee. *Mariner v. Chamberlain*, 21 Wis. 253, 256.

[11, 12] It follows from what has been said that that portion of the judgment awarding the respondent the sum of \$29,150 rentals becoming due under the lease during the receiver's occupancy of the premises was error. The appellant insists that because of section 1174, Code of Civil Procedure, the error demands a reversal of the judgment. The Code section permits the tenant, after judgment adverse to him, to redeem by depositing in court the amount found in the judgment to be due within 5

days from the entry of the judgment, and the same privilege is accorded to any subtenant, mortgagee of the term, or other party interested. This is, of course, a privilege granted to every defendant brought in under proceedings of this nature, and it is a substantial right of which he cannot be deprived by any action of the trial court, but it does not follow from this that because the judgment was excessive in this respect it must be reversed. The appellant might have paid to the clerk of the court the sum which he admitted to be due and owing under a proper judgment, and respondent would then have been called upon to confess the error or take the consequences. Nothing of this kind was done, and it seems evident from an examination of the entire record that the appellant was not concerned in any stage of the proceedings with the protection of his rights under the lease, but that his entire course of action was to delay and hamper the respondent in the conduct of the proceedings. We are satisfied from our examination of the record that the judgment should be modified by striking therefrom the sum of \$29,150 and that the inclusion of this sum in the judgment, though error of a substantial kind, would not justify a reversal of the judgment under the facts of this case, because it appears from appellant's conduct that this error did not prejudice his rights in this litigation.

Judgment modified by striking \$29,150 therefrom, and, as so modified, affirmed, with costs to appellant.

We concur: STURTEVANT, J.; WARNE, Presiding Justice pro tem.

87 Cal. App. 177

PEOPLE v. GIBBS. (Cr. 993.)★

District Court of Appeal, Third District, California. Nov. 29, 1927.

Hearing Denied by Supreme Court Jan. 26, 1928.

1. Criminal law ☞742(2)—Whether witness was an accomplice held question for jury.

In prosecution for grand larceny, whether witness alleged to be an accomplice but who denied his complicity in commission of offense, was an accomplice, *held* a question for jury.

2. Criminal law ☞1144(13)—Record of conviction will be sustained on appeal on theory that jury found witness alleged to be accomplice was not accomplice.

Where, in larceny prosecution, alleged accomplice denied complicity in theft and jury found defendant guilty, appellate court will sustain record on theory that jury believed witness was not an accomplice.

3. Criminal law ☞511(1)—Corroboration of alleged accomplice in larceny prosecution held sufficient to sustain conviction.

In prosecution for grand larceny, evidence corroborating alleged accomplice *held* sufficient to sustain conviction.

Appeal from Superior Court, Lassen County; J. T. B. Warne, Judge.

Bud Gibbs was convicted of grand larceny, and he appeals. Affirmed.

R. M. Hardy, of Susanville, for appellant.
U. S. Webb, Atty. Gen., and J. Charles Jones, Dep. Atty. Gen., for the People.

WEYAND, Justice pro tem. The defendant was convicted in the superior court of the county of Lassen of the crime of grand larceny. He appeals from the judgment of conviction. The only alleged error of the trial court, claimed by the appellant, is that the conviction was had on the uncorroborated testimony of an accomplice, one Paul Hendron.

The question thus presented is properly severable into two parts: First, Was the witness, Paul Hendron, an accomplice? And second, If he were an accomplice in the commission of the crime, was there at the trial other evidence in corroboration of Hendron's testimony?

A conviction being had, we will not concern ourselves with a full recital of all the testimony. There are some disputes in the testimony as to certain facts, but we will content ourselves with stating so much of the evidence as could be said to support the judgment of conviction, and we will not concern ourselves with the disputed matters.

The testimony of witnesses, other than said Hendron, disclosed that the Susanville Country Club had a clubhouse some 14 miles distant from Susanville, in Lassen county. On October 25, 1926, in the nighttime, this clubhouse was entered by some one, and a number of blankets, comforters, sheets, and other like articles, a number of electric light globes, together with a radio and fixtures, were stolen therefrom. No one saw the perpetrator. The theft was accomplished by breaking into the clubhouse. At the time the clubhouse was closed for the winter season. Tracks disclosed that an automobile had been parked on the "top of the hill" near the clubhouse. Some electric light globes had been dropped where a machine had been parked "on the top of the hill," near the clubhouse, on a public road. Many of the stolen blankets, comforters, and like articles were found some months later in the house of one Susie A. Sorahan, in the town of Susanville. They were in some old trunks in a back room. Susie A. Sorahan was a cousin of defendant, and she ran a lodging house in Susanville, at which various people lodged. The defendant had roomed at the Sorahan house at times, about the date of the theft and thereafter. The radio and fixtures were traced some months later into the possession of the witness, Paul Hendron. Upon being arrested, defendant, Gibbs, asked to see the warrant of arrest, and then asked the arresting officer if he "had been down to Susie's." It was further proven as an independent fact that defendant had

been seen by various people, upon many occasions, with Susie A. Sorahan.

Paul Hendron, the alleged accomplice, gave testimony at the trial to the effect that he did assist the defendant in the following manner only: Hendron testified that on the night in question he was asked by the defendant, Gibbs, to take defendant out of town, to a place on the public road, near the said clubhouse, which Hendron did, in his (Hendron's) automobile. According to Hendron's version, he was to leave Gibbs near the clubhouse, and go back to town and return by a different route at a later hour. Hendron did take Gibbs to the place near the clubhouse and returned to town, going later in the night to about the same place, and was hailed, by Gibbs at a point on the road near the clubhouse. Gibbs then told Hendron to drive a short distance further along the road, saying: "I got some stuff to take in." On going a short distance to the "top of the hill," Gibbs requested Hendron to stop his machine. At this place Gibbs and Hendron got out of the car and loaded therein three bundles wrapped in blankets. One of these bundles contained the radio and fixtures. Hendron testified that he knew nothing of the theft. He says that his idea was that Gibbs was out that night to get some illicit liquor from a still that he knew had been in that locality. On arriving in Susanville this property, excepting the radio, was left at Susie A. Sorahan's house. Hendron helped unload the bundles, Gibbs taking them into the same house where they were afterwards found by the officers. Gibbs then and there gave Hendron the radio as compensation for the use of Hendron's machine. That night Hendron took the radio to another place in town, where he was then living. A few days later, at the request of Gibbs, Hendron removed the radio from this house and took it into the woods, where there was an abandoned sawmill, at which he had formerly worked, and there buried the radio in a sawdust pile. He later brought it to town, removed the number plate, and sold it.

[1] Usually the accomplice comes upon the stand admitting his complicity in the commission of the offense. It is then purely a question of law for the trial court to determine. Under facts as shown here, it is a question for the jury to determine whether or not the witness is an accomplice. Under this evidence they could have determined as a fact that Hendron was not an accomplice.

In Corpus Juris, vol. 16, p. 677, it is said: said:

"The question of complicity is one to be decided by the jury where, although there is evidence tending to connect the witness with the crime, the facts are disputed or susceptible of different inferences."

The note to the above text cites *People v. Coffey*, 161 Cal. 423, 119 P. 901. In that case at page 448 (119 P. 907) the true definition of an accomplice is stated.

[2, 3] In the present case the alleged accomplice denied complicity in the theft. The jury having found that the defendant was guilty, the record, as we view it, should now be sustained upon the theory that they believed he was not an accomplice. Assuming, however, that Hendron was an accomplice, we are of the opinion that the corroboration was sufficient to sustain this conviction. The stolen property was found at the home of Susie A. Sorahan, where Hendron said it was taken. This woman was a cousin of defendant. Defendant had lived at her house. When arrested, defendant, after asking to see the warrant of arrest, inquired of the officer if he "had been down to Susie's." The defendant was arrested some distance from Susanville. The proof shows that, independent of Hendron, defendant immediately thought of "Susie's" house. The stolen property was found there.

The decisions have not, and, perhaps, cannot, lay down an inflexible rule as to just what degree of corroboration must be had of the testimony of an accomplice. In 16 Corpus Juris, p. 704, it is said:

"If he (the accomplice) is corroborated as to some material fact or facts this is sufficient to authorize an inference by the jury that he has testified truly even with respect to matters as to which he has not been corroborated, and thus sustain a conviction."

This text is supported by a large number of California cases.

The judgment should be affirmed; and it is so ordered.

We concur: HART, Acting P. J.; PLUMMER, J.

87 Cal. App. 29

PEOPLE v. SCHULER. (Cr. 1545.) ★

District Court of Appeals, Second District, Division 1, California. Nov. 21, 1927.

Hearing Denied by Supreme Court Jan. 16, 1928.

1. Criminal law §311—One charged with crime is presumed sane until contrary is established by preponderance of evidence.

One charged with crime is presumed sane until contrary is established by preponderance of evidence.

2. Criminal law §48—"Insanity," to constitute defense in criminal action, must be such as to render person incapable of knowing nature of act or of distinguishing between right and wrong.

"Insanity," interposed as defense in criminal action, must be such a diseased and deranged condition of mind as to render person incapable of knowing nature and quality of act he is charged with doing, or, if he did not know this, incapable of distinguishing between right and wrong in relation to such act.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Insane—Insanity.]

3. Homicide §270—Defendant's Insanity, at time of homicide, held for jury.

In homicide prosecution, question of defendant's insanity at time of commission of homicide held for jury.

4. Criminal law §1159(3)—Jury's finding on conflicting evidence not disturbed on appeal.

Finding of jury on conflicting evidence will not be disturbed on appeal.

5. Insane persons §26—Adjudication of defendant's insanity one month after homicide is not conclusive of his insanity at time of homicide.

That defendant, charged with homicide, was adjudged insane one month after commission of offense, is not conclusive that he was insane at time of homicide.

6. Homicide §237—Defendant, in homicide prosecution, must prove insanity by preponderance of evidence.

In homicide prosecution, wherein defense was insanity, instruction requiring defendant to prove insanity by preponderance of evidence held proper.

7. Criminal law §311—Presumption of continued existence of insanity arises only when it is shown that impairment is such as to produce general habitual derangement.

Insanity, once shown to exist, is presumed to exist until contrary is shown, only when it is shown that the intellectual faculties are so impaired as to produce a general habitual derangement of them, not traceable to a temporary cause.

8. Homicide §237—Evidence held sufficient to warrant finding that defendant was sane before and at time of commission of homicide.

In homicide prosecution, defense being insanity, evidence held sufficient to justify finding that defendant was sane before and at time of commission of offense, warranting verdict of guilty, notwithstanding he was adjudged insane shortly after commission of crime.

9. Criminal law §1030(3)—Defendant adjudged insane, but thereafter tried for offense, without requesting second trial for sanity, cannot assert that he was insane at time of trial.

Defendant, who, after commission of homicide, was adjudged insane, but thereafter placed on trial, and who did not request he be again tried for sanity, cannot, on appeal from conviction of murder, be heard to complain that he was insane at time of trial.

10. Criminal law §730(7)—District attorney's statement that defendant was released from asylum as sane held not prejudicial in view of court's statement that question was for jury.

In homicide prosecution, defense being insanity, district attorney's statement that defendant was released from insane asylum as being sane, though not supported by the evidence, was not prejudicial, in view of court's statement that question was for jury when opposing counsel differed.

11. Criminal law $\S$ 1144(9) — Presumption arises that, where defendant was prosecuted after having been committed to insane asylum, proper legal steps were taken before defendant was brought to trial.

Where defendant was prosecuted for homicide after having been committed to insane asylum, and record is silent as to his discharge from asylum as being cured, presumption arises that all proper steps were taken as required by law before defendant was brought to trial.

12. Criminal law $\S$ 1171(1) — District attorney's statement that defendant could not be returned to insane asylum, though error, held not prejudicial.

District attorney's statement in homicide prosecution, defense being insanity, that defendant, who had theretofore been committed to an insane asylum, "could not be returned to the insane asylum," though error, was not prejudicial, in view of sufficiency of evidence to support finding that defendant was not insane at time of commission of offense and failure of defendant to seek determination of his insanity at time of trial.

Appeal from Superior Court, Los Angeles County; Carlos S. Hardy, Judge.

Louis Schuler was convicted of murder in the second degree, and he appeals. Affirmed.

Wm. T. Kendrick, Jr., of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and John L. Flynn, Deputy Atty. Gen., for the People.

McLUCAS, Justice pro tem. The defendant was convicted of murder in the second degree, and appeals from the judgment and from an order denying his motion for a new trial.

It appears that the defendant was employed as a gardner by Harrison Chandler, and had been so employed for several years. The deceased, Godfrey Repensek, had also been employed by Chandler as a chauffeur for a little more than one year prior to his death. On March 3, 1925, when Chandler was approaching his home, about 75 yards from the garage he heard two shots which he thought was the exhaust from his automobile, as he knew the chauffeur was working on the car in the garage. After the lapse of about one minute, he heard a third shot, and then went into the house. Ten or fifteen minutes later the maid informed him that something had happened to the chauffeur; whereupon he went to the garage, and found Repensek lying underneath the automobile. After the shots were heard, Chandler saw the defendant proceed to the yard, where he worked on the lawn until the police officers arrived. Chandler testified that, so far as he knew, the defendant and the deceased were good friends, and that during all the time Schuler was working for him he never had any trouble; that he had never known Schu-

ler to have a gun in his possession; that he was not of a quarrelsome disposition; but that the witness "had noticed a little while before this happened that he was grouchy, a little grouchier than usual." F. F. Stevens, sergeant of police, testified that, upon arriving at the Chandler residence, he pulled the dead body of Repensek from underneath the automobile, and found two bullet holes in his head, and located the defendant pushing a wheelbarrow; that he asked the defendant if he shot Repensek, which the defendant denied. The sergeant saw a large lump on the defendant's head, "half as big as a hen's egg," and a small round hole in his head with a slight stream of blood coming from it. He asked the defendant if he had shot himself, to which the defendant replied that he had not; but, when asked, "How came that hole in there?" replied, "I shot." He asked him where the gun was, and, being told that it was up over the garage, proceeded to the garage, during which time the defendant stated that he had shot Repensek; that defendant said, "He is no good; I have trouble with him." The officer went upstairs in the garage, and found the gun under the bed-clothes, "which was all full of blood." On cross-examination the witness testified that the defendant, Schuler, was not in the best of mental condition at the time the witness talked with him; that the defendant kept saying he was suspicious of the man he shot; that defendant "had the attitude of an enraged bull—just a wild, sullen bull"; and that defendant did not talk coherently. A statement was taken from defendant at the time of his arrest, in which he stated that he shot Repensek; that Repensek tried to get the defendant to go down town with him the evening before the shooting, but that defendant refused to go; that nothing led up to the shooting, but that defendant was suspicious of Repensek; that "I thought he might meet a gang; I got suspicious that he wanted to lure me down town to get me beat up, or something like that." When inquiry was made as to what aroused defendant's suspicions, he replied, "Well, I was ordered to gather some flowers around the border, early to-morrow morning"; that this order was made by Mrs. Chandler.

Dr. Victor Parkin examined the defendant at the county jail on or about April 7, 1925. He testified that in his opinion the defendant was paranoiac, and at that time was suffering from delusions of persecution, of which the homicide was the direct result; that defendant did not know the difference between right and wrong, by reason of the fact that his belief in regard to what the deceased had been doing to him was false; that defendant believed he committed the act in self-defense; that defendant knew what he was doing when he killed decedent, but did not know

the consequences of his act. On cross-examination the witness testified that he saw the defendant but once during a period of from one to one and one-half hours; that both sane and insane persons have mental delusions; that defendant was in a paranoiac state, which was the result of mental disease; that, even though defendant felt impelled to commit the act under delusions which were false in fact, defendant probably knew that it was wrong to commit the act; that, if defendant received a blow in the nature of a bullet wound in the head, it might cause delusions that would develop following the injury, but not such delusions as antedated the injury; that in his opinion the delusions of the defendant, inasmuch as they were the basis upon which he committed the act, existed prior to the defendant's attempting to kill himself; that a recovery from such delusions may follow custody or care.

Dr. D. H. Calder testified that he was a member of the lunacy commission when the defendant was committed to the asylum in April, 1925; that in his opinion the defendant was insane at that time, but that he could not state the duration of insanity; that the delusion of persecution had been of long standing; that, although defendant might have known it was wrong to kill, yet he might have absolutely no restraint upon himself; that in his opinion the entrance of the bullet into the head of defendant would not have created delusions which existed in the defendant's mind; and that he doubted if the paranoiac state was ever recoverable.

Defendant took the witness stand, and testified that he had known the deceased for about nine months; that their relations were friendly; that on March 3, 1925, the deceased was in the garage working on the automobile; that the defendant was working on the lawn, and went into the garage for a drink of water; that the deceased had not spoken to defendant for a week or ten days, and seemed kind of sullen; that, when the defendant went into the garage, he was struck in the head with something solid; that he remembered nothing that occurred thereafter; that he did not remember shooting himself, and did not remember the doctors examining him; he remembered being in the asylum for over two years. On cross-examination the defendant stated that he had never been suspicious of the deceased; that the deceased was standing in the garage when he went into it, and also when the defendant was struck on the head. The witness further testified that he realized he was on trial for murder, and understood everything that was going on in the courtroom; that he had been discharged from the asylum as cured.

C. W. Ostrum, one of the attorneys for defendant, testified that he first saw the defendant in the early part of March, 1925;

that defendant told him he was being persecuted; that the man he killed wanted him to go down town and had a gang there that wanted to beat him up and kill him; that the defendant had a peculiar glitter in his eye; that, when he told the defendant that he was basing his defense on insanity, the defendant attacked him; that in his opinion the defendant was insane at that time.

On cross-examination the witness testified that the defendant told him he shot Repensek, but that he was justified. It was then stipulated that the defendant was shot over the right eye about the 3d of March, the date of the alleged homicide; that subsequently the defendant was committed to the asylum under an order of a judge of the superior court; and that defendant was in the asylum for two years. But one witness was called in rebuttal for the prosecution. Mrs. Pauline Pearl testified that defendant called on her on Sundays for a period of six months before the killing of the deceased; that she never noticed anything peculiar about him, and that he was a perfect gentleman; that all his actions were those of a sane man; that defendant never told her that people were plotting against him or persecuting him, or that he was suspicious of any person, or that he had troubles with any other persons; that she and the defendant were friends at all times.

[1-4] Appellant urges that the uncontradicted evidence shows that the defendant was insane when Repensek was killed; insane at all times pending trial, during the trial, and at the time of sentence. He takes the position that the evidence shows that defendant was paranoiac before, at the time of, and after, the offense was committed, and therefore was not capable of committing the crime charged in the information. The evidence upon which appellant bases his contention that the evidence was not sufficient to support the verdict is the testimony of Drs. Parkin and Calder; of the arresting officer that, at the time he arrested defendant, defendant acted like a "mad bull"; the fact that some years prior to the homicide the defendant had some trouble in Kansas City; and the fact that defendant was committed to an asylum soon after the homicide. It should be remembered that the testimony of the arresting officer was based upon his observation of the defendant immediately after the defendant had attempted to take his own life by shooting himself in the head; also that the observation of the alienists should be considered with the fact that the examinations were made soon after the defendant had shot himself. Pauline Pearl, an intimate acquaintance of the defendant, who testified concerning the defendant's actions for a period of six months prior to the homicide, stated that all of his actions were those of a sane man, and that she observed no peculiarities whatsoever. There was also testimony before the

jury as to defendant's actions immediately surrounding the homicide, which the jury were entitled to take into consideration; and the prosecution might rely upon the presumption of sanity in controverting the testimony of the alienists. The weight and credibility to be given to these witnesses was solely for the jury, and the testimony was to be considered by the jury in connection with all of the other evidence as to the acts and conduct of the defendant; all of which was material to the question of insanity.

The rule is well settled in this state that a person charged with crime is presumed to be sane until the contrary is established by a preponderance of evidence, and that insanity, interposed as a defense in a criminal action, means such a diseased and deranged condition of the mind as to render the person incapable of knowing the nature and quality of the act he is charged with doing; or, if he did know this, incapable of distinguishing between right and wrong in relation to such act. *People v. Williams*, 184 Cal. 590, 194 P. 1019. In the present case, there was some evidence tending to show insanity, but there was also evidence tending to show the defendant was sane. Under such evidence it was clearly a question of fact for the jury to determine whether, at the time of the homicide, the defendant was sane; and the finding of a jury on conflicting evidence will not be disturbed in this court. *People v. Niino*, 183 Cal. 126, 190 P. 626; *People v. Loomis*, 170 Cal. 347, 149 P. 581.

[5] Appellant urges that there can be no doubt that defendant was insane at the time the offense was committed, since within one month after the commission of the offense the defendant was tried by the lunacy commission and pronounced insane, and that the same persons who examined the defendant at that time were witnesses in this case. The judgment of insanity necessarily was that the defendant was insane at the time the judgment was pronounced, and not that defendant was insane at the time the offense was committed. The issue as to whether the defendant was insane at the time the offense was committed was decided by the jury in this trial upon conflicting evidence.

[6] Appellant complains of the language used by the court, commencing with the word "therefore" in the latter part of the following instruction:

"Insanity, as the expression is used in these instructions, means such a diseased and deranged condition of the mental faculties as to render the person incapable of distinguishing between right and wrong in relation to the act with which he is charged. An irresistible impulse to commit an act which a party knows to be wrong and unlawful (if it ever exists) does not constitute the insanity which is a legal defense. The standard of accountability is this: Had the party sufficient mental capacity to appreciate the character and quality of the act?

Did he know and understand that it was a violation of the rights of another, and in itself wrong? Did he know that it was prohibited by the laws of the land, and that its commission would entail punishment and penalties upon himself? If he had the capacity thus to appreciate the character and comprehend the possible or probable consequences of his act, he is responsible to the law for the act thus committed, and is to be judged accordingly. Although it is true, as you have been instructed, that generally the burden of proof is upon the prosecution, yet to this rule there is this exception: Where insanity is relied upon as a defense, the burden of proving the existence of such insanity is on defendant, and it is incumbent upon him to establish, by preponderance of evidence, that he was insane at the time of committing the act charged, and the evidence of mental derangement must be such, in amount, that, if the single issue of sanity or insanity of the defendant should be submitted to the jury in a civil case, they must find that he is insane. Insanity must be established by a preponderance of the evidence. Therefore, if you believe that the preponderance of evidence is in favor of the sanity of the defendant, or that there is not a preponderance of evidence to the effect that he was insane, at the time of the transaction involved herein, you will act upon the hypothesis that he was sane at that time. And, in considering the evidence relative to the defense of insanity, it will be proper for you to remember that ordinary experience teaches us that the majority of men are sane, and hence, it is to be presumed, until the contrary is proven by a preponderance of evidence, that the defendant was sane at the time of the commission of the act with which he stands charged, if you find from the evidence he committed such act."

The principles laid down by the foregoing instruction are in accord with those pronounced in *People v. Williams*, supra, and *People v. Loomis*, supra. The case cited by appellant (*People v. Kelley*, 7 Cal. App. 554, 95 P. 45) is to be distinguished from the present case, in that the jury in effect were told in that case, that, even though they believed the defendant insane, they could not find him not guilty of any crime included within that charged in the information other than murder of the first degree. In the *Kelley Case* the court instructed the jury:

"If you believe and find from the evidence that the defendant was, at the time of the alleged killing, insane from any cause either of a temporary or settled nature, then you should not find the defendant guilty of murder in the first degree, for if insane he could not form that willful, deliberate, premeditated and malice aforethought intent which the law absolutely requires to constitute murder in the first degree."

As stated by the court, the vice of the instruction was that there was not in any other of the court's instructions an instruction that:

"If the defendant was shown by sufficient proof to have been insane at the time of the commission of the act, he was thereby under

our law absolved from responsibility for the same, and, consequently, entitled to an absolute acquittal, or a verdict of not guilty of any offense comprehended in the charge preferred against him."

In the present case the jury was instructed that:

"The court instructs you that an insane person is not capable of committing a crime, and, if you believe beyond a reasonable doubt that the defendant killed Godfrey Repensek as alleged in the information, still if you are satisfied from the evidence that the defendant was insane at the time of the commission of the act, you must find the defendant not guilty."

Thus the jury were clearly instructed to find the defendant not guilty of any charge embraced in the information, if they found from the evidence that the defendant was insane at the time of the commission of the act.

[7, 8] Appellant's contention that the burden was upon the prosecution to prove insanity is without merit. The rule that insanity once shown to exist is presumed to exist until the contrary is shown arises only when it is shown that the intellectual faculties are so impaired as to produce a general, habitual derangement of them, not traceable to a temporary cause. *People v. Francis*, 38 Cal. 183, 189. In the present case, it was not shown that the defendant had ever been adjudged insane prior to the homicide, nor that the intellectual faculties of the defendant were so impaired before the offense was committed as to produce a general, habitual derangement of them; but there was sufficient evidence for the jury to find that defendant was sane before and at the time the offense was committed, and accordingly to find the defendant guilty.

[9] Appellant contends that defendant should not have been brought to trial, but that he should have been returned to the asylum. The record is silent as to the defendant having been returned by the officers of the asylum to Los Angeles county for trial. In view of this silence of the record, it will be presumed that the proceedings required by law were taken. *People v. Farrell*, 31 Cal. 576, 580, 581. The defendant did not request that he be again tried for sanity, and cannot be heard to complain on appeal that he was insane at the time of the trial. In *People v. Rice* (Cal. App.) 256 P. 450, 453, the court said:

"In the instant case no application was made by any person to submit the question of the then mental status of the defendant to a jury for determination; in the absence of any such request and where no objection was made at the opening of the trial to proceeding therewith by the defendant, any irregularities, if there were such, in the procedure leading up to the bringing of the defendant from the state hospital before the superior court for trial, were

immaterial and of no consequence, and did not in any way affect his substantial rights."

[10] During the closing argument the following colloquy occurred:

"Mr. Clark: Mr. Kendrick talked at considerable length of the insane asylum as a worse place than the penitentiary or death. But we can exclude that from consideration, ladies and gentlemen. The lunacy commission or the persons in charge of the insane asylum at Stockton have found that this man was sane. This man could not be returned to the insane asylum.

"Mr. Kendrick: If the court please, I hate to interrupt, but I want to assign that remark as prejudicial error and misconduct of the district attorney, and ask that the jury be instructed to disregard it. There is no evidence of that. He has never been declared sane. It is not true he cannot be sent back to the asylum immediately upon the end of this trial.

"Mr. Clark: The evidence is that he was declared sane, and was released from the asylum, by the defendant's own statement. If he was not sane, he would not be and could not be tried here.

"The Court: It will be for the jury to determine and remember what the evidence does show upon that point. They will be governed by the evidence, and will not be governed by the statements of counsel as to what the evidence is, when counsel are not in accord with each other."

[11, 12] In view of the statement of the trial court that the jury would determine and remember what the evidence shows, and will be governed by the evidence, and not governed by the statements of counsel when counsel are not in accord with each other, we do not believe defendant was prejudiced by the statement made by the district attorney, even though there be no evidence shown that defendant was released from the asylum as being sane, except by the defendant's own testimony on cross-examination. The circumstances in this case are such that the defendant was brought to trial after having been committed to the asylum, and, the record being silent as to his having been discharged from the asylum as being cured, except with respect to his own testimony, the presumption arises that all proper steps were taken as required by law before defendant was brought to trial. *People v. Farrell*, 31 Cal. 576, 581. While it was error for the district attorney to state that "this man could not be returned to the insane asylum," yet, in view of the fact that the evidence was sufficient to support a finding that defendant was not insane at the time the offense was committed, and, further, that no objection was made on behalf of defendant that he was insane at the time of trial, or that he be tried as to his sanity at the time of the trial, we conclude that the error complained of was not prejudicial.

The judgment and the order denying the motion for a new trial are affirmed.

We concur: HOUSER, J., Acting P. J.; YORK, J.

87 Cal. App. 224

PERHAM v. FIRST NAT. BANK OF LA VERNE. (Civ. 3371.)

District Court of Appeal, Third District, California. Dec. 1, 1927.

1. Appeal and error ⇐1011(1)—Trial court's findings on conflicting evidence held conclusive.

Findings of trial court on conflicting evidence, in action against bank for money deposited, *held* conclusive on appeal.

2. Appeal and error ⇐931(f)—All reasonable inferences will be indulged on appeal in support of trial court's findings.

On appeal all reasonable inferences are to be indulged in support of trial court's findings.

3. Appeal and error ⇐901—Burden is on appellant to show error in trial court's findings.

Burden is on appellant, who claims error in trial court's findings, to show its existence.

4. Banks and banking ⇐195—Where plaintiff delivered money to bank for purpose of loan to certain named persons, bank held not liable because persons were not financially responsible or security was insufficient.

Where trial court found that plaintiff, through her agent, delivered money to bank for purpose of loan to certain named persons, bank *held* not liable for fraud or negligence in making loans to persons not financially responsible or on insufficient security, especially where pleadings did not raise question of bank's negligence.

Appeal from Superior Court, Los Angeles County; Walton J. Wood, Judge.

Action for money deposited by Susie W. Perham against the First National Bank of La Verne. Judgment for defendant, and plaintiff appeals. Affirmed.

A. L. Hickson and Nichols, Cooper & Hickson, all of Pomona, for appellant.

Lucius K. Chase, of Pomona, and Alan Nichols, of Los Angeles, for respondent.

PRESTON, Justice pro tem. The plaintiff, Susie W. Perham, brought this action against the defendant, First National Bank of La Verne, to recover the sum of \$7,000, which she claims was deposited by her with said bank to be loaned for her benefit. The case was tried by the court sitting without a jury, and judgment was entered in favor of the defendant, First National Bank of La Verne. From this judgment plaintiff prosecutes this appeal.

The complaint is in form a simple action for money had and received, and so denominated by the plaintiff, and alleges:

"That on the 24th day of June, 1922, * * * the defendant received from the plaintiff the sum of \$7,000 for the use and benefit of said plaintiff, * * * and that plaintiff has not received anything of value from defendant, and

that the said \$7,000, or any part thereof, has not been repaid to this plaintiff, except that on the 24th of September, 1923, defendant credited plaintiff's account with said bank with the sum of \$135, and on the 24th of December, 1922, defendant also credited plaintiff's account with the sum of \$135, which plaintiff assumes, and alleges to have been interest accruing on said \$7,000, but that no other sum, either on account of principal or interest, has been paid to plaintiff by defendant, and that the whole of said \$7,000 together with interest at the rate of 8 per cent. per annum on \$5,000, and 7 per cent. per annum on \$2,000, from December 24, 1922, is due, owing, and unpaid. * * *

The answer of defendant denies the material allegations of the complaint and avers the facts to be that on or about the 24th of June, 1922, the plaintiff, Susie W. Perham, delivered to said defendant \$7,000 for the purpose of having \$5,000 thereof loaned to one R. M. Martin at the rate of 8 per cent. per annum, and for the further purpose of loaning \$2,000 thereof to one H. J. Vaniman, and the answer further alleges that, pursuant to said understanding, the \$5,000 and \$2,000, respectively, were so loaned, and both loans evidenced by promissory notes.

The court, among other things, found:

"That on or about the 24th day of June, 1922, said plaintiff did deliver to said defendant the sum of \$7,000 for the purpose of having \$5,000 thereof loaned to one R. M. Martin at the rate of 8 per cent. per annum, payable in three months after date, and for the purpose of obtaining from said R. M. Martin a promissory note, to be signed by said R. M. Martin, payable in three months after date at the rate of 8 per cent. per annum, and for the further purpose of loaning \$2,000 thereof to one H. J. Vaniman, said last-mentioned loan to be evidenced by a note in the sum of \$2,000, payable in six months after date to Susie W. Perham, bearing interest at the rate of 7 per cent. per annum, and to be signed by said H. J. Vaniman; that, pursuant to said understanding, said sum of \$5,000 was loaned on the 24th day of June, 1922, to said R. M. Martin, and his note in the sum of \$5,000 dated June 24, 1922, payable three months after date, with interest at the rate of 8 per cent. per annum, executed by said R. M. Martin, was delivered by said R. M. Martin to said defendant for said Susie W. Perham, and that said \$2,000 was loaned to H. J. Vaniman, and said loan was evidenced by a note dated June 24, 1922, in the sum of \$2,000, payable six months after date to Susie W. Perham, bearing interest at the rate of 7 per cent. per annum, and duly executed by H. J. Vaniman, which said note was delivered by said H. J. Vaniman to said defendant for Susie W. Perham; that thereafter said Susie W. Perham was advised thereof by said defendant, and said defendant was instructed by her, through her husband and agent, W. C. Perham, to retain possession of both of said notes for her, which said defendant has ever since done. * * *

"The court further finds that no part of said sum of \$7,000 has been repaid by said defendant to said plaintiff, excepting that on or about the 24th day of September, 1922, said defendant

credited the said plaintiff's account with said bank with the sum of \$135, and on the 24th day of December, 1922, the defendant also credited plaintiff's account with said bank with the sum of \$135, interest accruing on said dates, and that no other sum, either on account of principal or interest, has been received by said plaintiff from said defendant, but further finds that, said defendant having loaned said money as aforesaid for said plaintiff, said defendant is under no obligations to pay to said plaintiff the sum of \$7,000, or any part thereof, and further finds that no part of said sum of \$7,000, and no part of any interest thereon at the rate of 8 per cent. per annum, or otherwise on \$5,000 thereof, or 7 per cent. on \$2,000 thereof from December 24, 1922, or any portion thereof, is now wholly or in part due or unpaid from said defendant to said plaintiff. * * *

Appellant strenuously contends that these findings are not supported by the evidence. On the contrary, respondent insists that the evidence is ample to support all the findings made by the trial court.

[1-3] The evidence upon the material issues of the case is decidedly conflicting. The law is, of course, well established that the findings of the trial court upon conflicting evidence are conclusive on appeal, and all reasonable inferences are to be indulged in support of the findings, and the burden is upon appellant, who claims error, to show its existence. *Wilbur v. Wilbur*, 197 Cal. 7, 239 P. 332; *Treadwell v. Nickel*, 194 Cal. 243, 228 P. 25; *Hayne on New Trial and Appeal* (Rev. Ed.) p. 1574; *Gjurich v. Fieg*, 164 Cal. 429, 129 P. 464, Ann. Cas. 1916B, 111.

In *Treadwell v. Nickel*, supra, the court said:

"When a verdict is attacked for insufficiency of evidence, our power begins and ends with the inquiry whether there is substantial evidence, contradicted or uncontradicted, which in and of itself will support the conclusion reached by the jury. If, on any material point, the testimony is in conflict, it must be assumed that the jury resolved the conflict in favor of the prevailing party."

Again, in *Wilbur v. Wilbur*, supra, the court said:

"Where two or more inferences may reasonably be deduced from a certain state of facts or circumstances, a reviewing court is not permitted to substitute its deductions for those of the trial court."

We will therefore refer briefly to that portion of the evidence in the case which supports the findings of the trial court. Plaintiff and her husband, Willis C. Perham, had been since 1910, and were at the time of the transaction in controversy, customers of the defendant bank, and had transacted their business for several years with H. J. Vaniman, who was its vice president and cashier. On or about the 22d of June, 1922, said Willis C. Perham sold his ranch for some \$18,000, and deposited the proceeds thereof with the

defendant bank in the joint names of W. C. Perham and Susie W. Perham. On the day the money from the sale of the ranch was deposited in defendant bank W. C. Perham asked Vaniman if he could loan \$7,000 for him, and Vaniman replied in substance:

"I have a friend in Los Angeles by the name of R. M. Martin who could use \$5,000, and if you figure that my name is good for \$2,000, I could use \$2,000. Mr. Martin has agreed to pay 8 per cent., but for myself I do not wish to pay over 7 per cent. Mr. Martin has given me a deed to an orange grove containing 26 acres as security for a loan of something like \$8,000 which I have already made him, and I will include your \$5,000 in the same security."

W. C. Perham replied that he would let Vaniman know within a couple of days about the loans. Thereafter, and on June 24, 1922, Mr. Perham, together with his wife, the appellant herein, again called at the bank and had a further conversation with Vaniman regarding the proposed loans, which resulted in authorizing Vaniman to make the loan of \$5,000 to R. M. Martin and loaning \$2,000 to Vaniman. W. C. Perham gave Vaniman his personal check on defendant bank for \$7,000, and stated to him that on account of his ill health the notes should be made to his wife, Susie W. Perham. Thereupon Vaniman made and delivered to Mrs. Perham a receipt reading as follows:

"Received from Susie W. Perham, seven thousand dollars (\$7,000.00), \$5,000.00 at 8%, \$2,000, at 7%, same loaned for her benefit. [Signed by rubber stamp:] First National Bank, La Verne, California, H. J. Vaniman."

Vaniman then made his note to Mrs. Susie W. Perham for \$2,000, and told Mr. and Mrs. Perham he would send the other note to Los Angeles for Martin's signature.

Vaniman further testified that Mr. Perham told Vaniman, after the Martin note had been received, to keep the notes in the bank and that he would call for the interest when it became due.

The notes remained in the possession of the bank until the time of the trial. Thereafter two interest payments were credited by Vaniman on each note, and \$135, purporting to be the interest, was deposited to the account of Mr. and Mrs. Perham in defendant bank. After this transaction Vaniman continued to act as cashier and vice president of the defendant bank until March, 1923, when it was discovered that he had been for some time speculating in oil and losing heavily, and had misappropriated the funds of the bank. Shortly after his discharge as cashier and vice president, and in April, 1923, Vaniman made an assignment to the president of defendant bank of all his property, including the security that he claimed he had taken for the Martin note, and in the following July was declared a bankrupt.

W. C. Perham died on the 23d of June, 1923.

Mrs. Perham made demand on the bank for the money on July 13, 1923, and this action was commenced on August 3, 1923, and tried in July, 1924. Prior to the death of Mr. Perham no claim or demand was made against the defendant bank for the \$7,000 or any part thereof, and Mr. Yundt, the president of the defendant bank, testified that about a year after the loan was made Mr. and Mrs. Perham called upon him and inquired of him relative to Vaniman's resources, stating that they held certain notes, having made a loan to R. M. Martin and H. J. Vaniman. There is also some testimony in the record to the effect that Mr. Perham had, shortly before his death, attended a meeting of Vaniman's creditors and had listed his \$2,000 note among the liabilities of Vaniman. It is evident, from the findings of the trial court, that it accepted the testimony of Vaniman as a true statement of the transaction in question.

The appellant, Susie W. Perham, in her testimony flatly contradicts the foregoing testimony of Vaniman on almost every material point. She testified that she and her husband told Mr. Vaniman that they had decided to let the bank handle their money and loan \$7,000 for them, and Vaniman replied that the bank was glad to handle their money and that "we were wise to bring it to the bank instead of investing it in some wildcat scheme, where we would be liable to lose it," and, adding "that it makes business good for citizens to bring money to the bank." She also testified as follows:

"Q. Did Mr. Vaniman say anything relative to what would be done with the \$7,000? A. He said, when we spoke about the seven thousand, he said, 'I know right now where we can place five thousand of that to good advantage.'

"Q. Did he say where it was to be placed? A. He said it would be on a grove.

"Q. Did he mention the name of the man? A. I think not that I heard.

"Q. Did he say at that time where he was going to put the \$2,000? A. Well, he said, 'We will find some good place to put that where it will be good security.'

"Q. Did you ever see any notes for which this money was loaned? A. No, sir; I never heard of it.

"Q. Did Mr. Vaniman or any one else ever tell you about any notes? A. No, sir.

"Q. Did he ever deliver any notes to you or offer to deliver any? A. No; never mentioned.

"Q. Did you ever see Mr. Vaniman after this loan was made? A. Yes.

"Q. Did you ever talk to him about this loan or these loans? A. No.

"Q. When was the first time that you ever heard that \$5,000 was loaned to R. M. Martin of Los Angeles and \$2,000 to H. J. Vaniman,

cashier? A. Not till after Mr. Perham was gone.

"The Court: State that again. A. Not till after Mr. Perham was gone and suit had been instituted against the bank.

"Q. By whom? A. By myself.

"Q. The first information you had was what was made in the answer of this bank? A. Yes, sir."

A great many other facts and circumstances were adduced at the trial, but the above is sufficient to show the conflicting character of the testimony on the vital points. From all the facts and circumstances in the case the trial court might well have decided in favor of the plaintiff, and there would have been ample evidence to support such conclusion.

[4] Appellant contends that the acts of the bank were fraudulent per se, in that the bank, by its cashier, loaned appellant's money to its cashier, who then had outstanding more than \$23,000 of unsecured notes and was on the verge of bankruptcy. The difficulty with this contention is that the court found, upon conflicting evidence, that Perham himself authorized the loan to Vaniman, and not the bank.

Appellant also contends that the acts of the bank were fraudulent per se in making the loan of \$5,000 to Martin, when Martin already owed Vaniman and the bank \$8,000 on insufficient security. This contention is also answered by the fact that the court found that the bank did not authorize the loan to Martin, but that Perham himself authorized that the loan be made to R. M. Martin.

It is also contended by appellant that the bank was negligent in making the loans, in that the money was loaned to persons not financially responsible and without security. This contention is also answered by the finding that the money was loaned according to the directions of the husband of plaintiff, and also that such a cause of action is not raised by the pleadings.

We deem it unnecessary to discuss further any of the other contentions made, for the reason that the case in its last analysis is simply a case where the evidence is conflicting, and, the court having resolved the conflicts in favor of the defendant, such findings are conclusive on appeal, and the questions of law raised by appellant, however correct in the abstract, can avail her nothing in the face of such findings. Under such a situation we are not authorized to disturb the judgment.

The judgment is therefore affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

**REDD v. GARFORD MOTOR TRUCK CO.,
Inc., et al. (Civ. 4882.)***

District Court of Appeal, Second District, Division 2, California. Nov. 30, 1927.

Hearing Granted by Supreme Court Jan. 26, 1928.

1. Sales $\S$ 477(6)—Sellers' rights arising under conditional sales contract from buyer's failure to pay first installment held not waived by payment of subsequent installment.

Where buyer of truck under conditional sales contract failed to pay first installment, sellers' rights arising under contract held not to have been waived by payment of subsequent installment.

2. Sales $\S$ 481—Evidence attempting to show credit arrangement held not to support finding that defendants wrongfully repossessed truck under conditional sales contract.

Indefinite evidence attempting to show credit arrangement between buyer and sellers under conditional sales contract for sale of truck held insufficient to support finding that when defendants repossessed truck plaintiff was entitled to immediate possession, or that defendants wrongfully withheld possession from plaintiff.

Appeal from Superior Court, Los Angeles County; Paul Burks, Judge.

Action of claim and delivery by C. C. Redd against the Garford Motor Truck Company and another. Judgment for plaintiff, and defendants appeal. Reversed.

W. Cloyd Snyder, of Santa Paula, for appellants.

I. R. Rubin and M. G. C. Harris, both of Los Angeles, for respondent.

STEPHENS, Justice pro tem. Plaintiff purchased a truck of Garford Motor Truck Company, Inc., on a conditional sales contract. The sales price was \$5,670.15, upon which he received credit for another truck turned in at \$1,550, leaving a balance of \$4,120.15, payable monthly as follows: October 14, 1923, \$465, with interest at 8 per cent. per annum, the balance payable at the rate of \$215 with interest on the 14th of each succeeding month until the whole amount was paid. Time was of the essence of the contract, which provided that no representation other than contained in the contract would be recognized by lessee or lessor, and "that any payment made by the lessee to the lessor may at the option of the lessor be applied to any open or current account owing by the lessee to the lessor for any reason whatsoever."

Upon receipt of notice of the due date of the first installment of \$465 and interest of \$27.46, or total of \$492.46, plaintiff gave the defendant Dean, Garford Company's agent, a check for \$300, receiving back a memorandum credit: "By Cash 10/15/23 \$205.50, By credit, 10/15/23, \$50.00." The credit was for

securing a buyer for the old car. At this time plaintiff owed \$94.50 for merchandise. The \$300 check was then applied as follows: \$94.50 in merchandise, leaving the credit mentioned of \$205.50, credit for sale of old truck, \$50; total credits, \$255.50—leaving unpaid on first installment, \$236.96. In due time plaintiff received notice of second installment and paid it.

On November 21, 1923, plaintiff took this truck into defendants' place of business and left it there under an oral agreement that defendants would attempt to sell it. The next day defendants notified plaintiff that they had repossessed it under the contract. Shortly thereafter plaintiff offered to pay defendants \$239.96, the unpaid balance of the first installment, but defendants refused to take it. The truck was worth \$3,000 on November 22d. Judgment was given for plaintiff for the redelivery of the truck or \$3,000 as the value thereof, and for \$2,000 for its detention.

[1] These facts demonstrate that on the date of repossession of the truck there was unpaid on the first installment the sum of \$236.96. The mere fact that a subsequent installment had been paid does not constitute a waiver of any rights under the contract. Pacific Finance, etc., Co. v. Pierce, 48 Cal. App. 600, 191 P. 1115; Benedict v. Greer-Robbins Co., 26 Cal. App. 468, 147 P. 486. But plaintiff claims some relief from the situation because of a claimed arrangement with defendant that he should be carried on an open book account. It is impossible, however, to get anything definite on that subject from the evidence. The trial judge expressed this difficulty, and, after direct and cross examination of plaintiff, the following took place at the trial:

"The Court: What do you mean by this open account? Do you mean that of the initial payment of \$1,550, paid at the outset, there was a part that was not paid? A. Yes; that was our understanding, that I could pay that unpaid balance at any time I desired, any time that I could make the payment.

"Mr. Snyder: That is objected to as a conclusion, what the understanding was.

"The Court: When you refer to the open account you mean that there was carried on the books of Mr. Dean—of the Garford Motor Truck Company—a part of your first payment? A. Yes, sir.

"Q. How much? A. The difference between \$1,550 and a one-third value of the truck.

"Q. Well; what does that amount to? What was the total value of the truck? A. \$5,500 and some odd dollars.

"Q. Well; it was \$1,550 plus \$4,120.15, was it not? A. Yes, sir.

"Q. That would be \$5,670.15? A. Yes, sir; the full value of the truck, less \$50 credit.

"Q. And you say the amount of the open account was one-fourth of the difference? A. One-third.

"Q. One-third of the difference between \$5,620.15 and \$1,550? A. Yes; less that \$50—well, I see you have deducted that already.

"Q. That would be over \$1,000; it would be \$1,356.71, according to your explanation. A. It shows on the statements the amount of the unpaid balance of the open account, which I always went by—on the statements that I received."

There is no statement in evidence alluding to an unpaid balance of an open account. On the contrary, all of the statements in evidence refer to the contract. If anything can be made out of this, it is that the ordinary terms of sale of the truck was one-fourth of the whole sales price down, but that because plaintiff had not sufficient funds he was allowed to take the truck on \$1,550 down. In some unaccountable manner plaintiff got the idea that the difference was a book account credit. Of course, the contract shows that the price of the truck less initial payment was strung out through 18 monthly payments, and the contract embraces the whole agreement.

[2] It is obvious that the evidence does not support the finding that on the day of dis-possession plaintiff was entitled to the immediate possession of the truck, or that defendants wrongfully and unlawfully withheld it from plaintiff; but, on the other hand, the evidence shows affirmatively and without contradiction that defendants' retention of the truck was within their rights under the contract. It follows that the damages allowed in the judgment as the value of the truck and for the detention thereof from plaintiff are left without support.

Judgment reversed.

We concur: CRAIG, Acting P. J.; THOMPSON, J.

87 Cal. App. 243

PEOPLE v. BARNETT. (Cr. 1416.)

District Court of Appeal, First District, Division 2, California. Dec. 2, 1927.

Robbery ⇨ 24(1)—Evidence held sufficient to support conviction for robbery in first degree.

On trial for robbery in the first degree, evidence held sufficient to support conviction.

Appeal from Superior Court, City and County of San Francisco; Michael J. Roche, Judge.

John Barnett was convicted of robbery in the first degree, and he appeals. Affirmed.

Austin W. Arnold, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Lionel Browne, Deputy Atty. Gen., for the People.

KOFORD, P. J. Defendant appeals from a judgment of conviction of the crime of robbery in the first degree. The ground of

appeal is the alleged insufficiency of the evidence to warrant the verdict.

The complaining witness, upon reaching his home, was informed of a telephone message requesting him to go to the apartment of Miss Harris, a place where he had frequently called before. The message said that a party was in progress. He went there. Miss Harris was not at home, but was out of town and in Del Monte. He was admitted by a man and was almost immediately attacked by two men who robbed him, bound his hands and feet, and threatened to shoot him. One of the robbers remained behind him. He could not be described to the police. The other robber worked in front. The complaining witness' description of this man to the police and to Miss Harris subsequently led them to declare in the presence of defendant that the description was that of a man known as "Slick," who was a friend, companion, and "partner" of the defendant. Slick was never found after the robbery. The complaining witness worked himself free from his bindings after the robbers left him lying upon a bed in the apartment. He gathered three or four friends, and while returning to the scene of the robbery met the defendant on the street in company with a woman companion with whom the defendant lived. He complained to the defendant of his misfortune. Defendant asked him to say nothing on the street, but took him and his friends into his own apartment, which was just across the hall from the apartment of Miss Harris. Defendant there urged him to say nothing for two or three days, and that he would give a party and probably find out who it was that committed the robbery. The complaining witness testified that later at the police station the defendant said that, "if I would on the oath of my mother swear to God that I would not press charges if he got me my ring," he would try to get it back if I would go to Oakland with him. There was also testimony that Slick was a friend of defendant; that the purpose of going to Oakland to try and get the ring was to try and locate "Slick." Defendant refused to go to Oakland in company with the police, but offered to go with the complaining witness. When the complaining witness at the police headquarters asked defendant, "Jack, why don't you come clean and give me my ring and keys, because you are the fellow who did the framing of this job," defendant said, "Well, if I come clean, I do time anyway." Defendant's own version of this was: "They wanted me to go over to Oakland and find Slick. I said, 'Well, if I get the ring what guaranty have I got I will get out of this. What guaranty have I got?'"

Miss Harris testified that she had gone into defendant's apartment on the night of the

robbery; that she there saw another man with defendant; that she told them she was then going to Del Monte; that defendant had access to her apartment by means of a key to her door which was kept in a certain hiding place; that she knew no one else besides the defendant who had knowledge of the hiding place of the key.

The arresting police officer testified that defendant, upon being arrested, denied knowing any other name for Slick and declared he knew him only casually. He denied having a gun, although he had a number of automatic pistol cartridges upon his person when searched and had dropped 30 or 40 of them in the patrol wagon. Defendant later admitted ownership of the pistol which the police obtained from his apartment by stating to his woman companion that he had sent for it. This pistol was produced in court and said by the complaining witness to be similar to the one used by one of the robbers. Defendant later admitted knowing Slick by his correct name, and that he formerly had lived with him.

There is no question about the robbery having been committed at the time, place, and manner testified to. We think the evidence for the prosecution which we have reviewed is sufficient to support the jury's finding that the defendant was one of the principals to the robbery.

The judgment is affirmed.

We concur: NOURSE, J.; STURTEVANT, J.

87 Cal. App. 38

MILNER v. TOLIVER (two cases).★
(Civ. 4672.)

District Court of Appeal, Second District, Division 2, California. Nov. 19, 1927.

Hearing Denied by Supreme Court Jan. 16, 1928.

1. Appeal and error ⇨1002—Municipal corporations ⇨706(6, 7)—Conflicting evidence held to make negligence of automobile driver and contributory negligence of pedestrian question for jury, whose verdict is conclusive.

In action by pedestrians for injuries from being struck by automobile, conflicting evidence held to make negligence and contributory negligence questions for jury, whose verdict will not be disturbed on appeal.

2. Appeal and error ⇨1066—Instruction which might have been construed as applying inapplicable doctrine of last clear chance held not prejudicial error, where contributory negligence was not shown.

In action by pedestrians for injuries from being struck by automobile, held that, in view of absence of evidence of contributory negligence, no prejudicial error resulted from instruction which might have been construed by jury as stating doctrine of last clear chance, which was inapplicable to the case, since to make such doctrine applicable contributory negligence must be presupposed.

Appeal from Superior Court, Los Angeles County; Frank R. Willis, Judge.

Consolidated actions by Anna Milner against W. O. Toliver, and by Olive Milner against same defendant. Judgment for plaintiffs, and defendant appeals. Affirmed.

W. I. Gilbert, of Los Angeles, for appellant.

Joseph Musgrove and Fred O. McGirr, both of Los Angeles, for respondents.

PEAIRS, Justice pro tem. The appeal in the above-entitled action is from two verdicts by a jury in the consolidated cases, one in favor of Anna Milner for \$2,000 and one in favor of Olive Milner, her daughter, in the sum of \$1,000. These actions grew out of an accident occurring about 9:50 p. m. on the 18th day of February, 1922, at or near the intersection of Alvarado and Sixth streets in the city of Los Angeles. The plaintiffs were crossing Alvarado street from the southeast corner of Alvarado and Sixth streets to the westerly side of Alvarado street, and were struck by the car of defendant. Plaintiffs allege negligence on the part of defendant and the answer alleges contributory negligence on the part of plaintiffs. It was contended by plaintiffs that they were crossing Alvarado street after having looked in both directions, particularly, first to the south, and, after they crossed the street car lines, to the north; that they did not see any car but the street car until the automobile was within about a foot of them; that they were walking at a moderate rate of speed and were within about 6 feet of the west side of Alvarado street when hit by the car. The defendant claims that they were proceeding westerly on Sixth street and had stopped at the intersection of Sixth and Alvarado streets before starting into the intersection; that there was no one on the street when they started to make the turn except the street car, which was at the south side of Sixth street, just west of Alvarado street, preparing to turn south on Alvarado street; that they were going about 15 to 18 miles an hour and did not see the plaintiffs until they observed them just in front of the car, running across to the west. The evidence of J. W. Bond, a motorman on the street car, was that at the time he first saw the plaintiffs they were just west on the west car track on Alvarado street and that they moved about 10 feet further before they were hit by the automobile; that the automobile was 25 to 50 feet north of the plaintiffs when he first observed them; and that it hit them, as stated, when the plaintiffs had moved about 10 feet further. The evidence shows that the plaintiffs were hit while crossing to the west curb about 6 or 8 feet from the west curb. The motorman of the street car testified that the defendants were going more than 20 miles an hour,

and he said in a statement made soon after the accident that they were going probably 35 miles. A passenger on the street car stated that the plaintiffs were running across the car tracks and that the defendant was going faster than 20 miles an hour and possibly not 30. Both of these witnesses testified that the defendant crossed in front of the street car after the bell was rung by the motorman. One of them stated that he believed that the automobile speeded up.

Considering the evidence in the light of the testimony of either of these witnesses and that of the plaintiffs and of defendant and his wife, if the plaintiffs were moving at an ordinary gait, they were not going more than 3 miles an hour, and, according to defendant's wife, the defendant was moving about 15 miles an hour, or about five times as fast as plaintiffs. If we take the testimony of plaintiffs that they were walking across the street, the first notice of danger would have been after the defendant's car turned south, and, allowing the greatest distance estimated by witness Bond to be 50 feet between plaintiffs and defendant, and the speed of the defendant to be 15 miles per hour, they would have reached plaintiffs in about two seconds. If, on the contrary, we consider that plaintiffs were running at 6 miles per hour, then defendant would have traveled about 30 miles an hour. The relative speed, as the testimony shows, would have been five or six or more times as fast on the part of defendant, and if the plaintiffs were running the speed of defendant, then would have been that much more negligent. There is nothing in the evidence to show that there was any reason why the plaintiffs should not cross Alvarado street directly south of Sixth street from curb to curb, and, while they had the same right in the street as the defendant, the law places more of a burden upon those who turn in an intersection than it does upon those who go straight across the street. Outside of the street car, which did not preclude the crossing of the plaintiffs, there seems to have been no other object to interfere with the view of the defendant or of the plaintiffs. There is no evidence that any sound or signal was given by the defendant which could have been observed by the plaintiffs until the lights flashed upon them. The law requires that those turning at an intersection shall see that the way is clear. The evidence of the motorman on the street car is that the plaintiffs were across the car tracks and moving directly to the west at about the time the automobile passed in front of his car, and his view was apparently not obscured until the automobile hit the plaintiffs. This tends to show that the plaintiffs were moving in accordance with the law and at a proper speed and that there was no reason on the part of the defendant for not having observed plaintiffs at least after the turn of the defendant's car south on Alvarado street. The light

would not have in any way attracted plaintiffs so as to warn them before that turn was made. Taking the evidence of plaintiffs and the other two witnesses, it would appear that that car of the defendant was going at least five times as fast as the plaintiffs, who were, according to the motorman, west of the street car tracks at the time the turn was made by the defendant.

This is a sufficient discussion of the testimony to show the conflict therein and that the facts were such as should have been and were determined by the jury. There is no particular dispute as to the injury suffered, and only two questions seem to be raised by the briefs of appellant and respondent.

[1] Whatever conflict of evidence there was, was in regard to the alleged contributory negligence of plaintiffs and the negligence of the defendant. The jury by their verdict must have found the plaintiffs not guilty of contributory negligence and the defendant guilty of negligence, or they could not have rendered a verdict in favor of plaintiffs. This conflict of evidence is a matter for the jury and, after being passed upon by them, is not to be disturbed by this court. In the case of *Moss v. Boynton Co.*, 44 Cal. App. 474, 476, 186 P. 631, 632, it is said:

"Contributory negligence 'is a question of law only when the evidence is of such a character that it will support no other legitimate inference than that in the one case the plaintiff was guilty of contributory negligence. * * * When the evidence is such that the court is impelled to say that it is not in conflict on the facts, and that from those facts reasonable men can draw but one inference, and that an inference pointing unerringly to the negligence of the plaintiff contributing to his own injury, then, and only then, does the law step in and forbid plaintiff a recovery. * * * Even where the facts are undisputed, if reasonable minds might draw different conclusions upon the question of negligence, the question is one of fact for the jury.' *Zibbell v. Southern Pac. Co.*, 160 Cal. 237, 240, 116 P. 513; *Wing v. Western Pac. Co.*, 41 Cal. App. 251, 182 P. 969. And the question of contributory negligence must be determined without regard to any negligence on the part of defendant. *Hutson v. Southern Cal. Ry. Co.*, 150 Cal. 701, 903, 89 P. 1093."

[2] The only other point raised is whether the instruction of the court which reads as follows: "The liability is placed upon the party inflicting the injury if immediately before the actual infliction of the injury the injured person was in such a situation as to be unable by the exercise of reasonable and ordinary care on her part to extricate herself, and vigilance on her part would not have averted the injury," was of such a nature as to materially affect the verdict of the jury against defendant when considered in connection with all of the other instructions given by the trial court. The instruction complained of is not an instruction on the doctrine of the last clear chance, nor is this a

case where an instruction on that doctrine is allowable for the reason that contributory negligence must be presupposed to make the doctrine applicable; therefore it becomes a question of whether the jury put such a construction on it, considered with all the other instructions, as to affect the substantial rights of the defendant.

There being a conflict of testimony as to negligence of the parties and the jury having passed on the evidence, and as the instruction complained of could be harmonized with other instructions in case there was no contributory negligence, no prejudicial error is found in the instruction taken as a whole. In the case of *Palmer v. Tschudy*, 191 Cal. 696, 218 P. 36, it is said:

"The appellant complains of the giving of one instruction which is justly subject to the criticism that it was likely to be misleading. It should not have been given without further qualifications or explanation, but it is not probable that the jurors were misled thereby under the evidence herein."

The words quoted from the opinion in *Palmer v. Tschudy*, supra, seem very appropriate in this case, for we find nothing in the evidence as given in the transcript which would warrant a finding of contributory negligence on the part of the plaintiffs. On the contrary, the plaintiffs were crossing Alvarado street on the south side of Sixth street toward the west, and were past the center of Alvarado street before the defendant turned south thereon, and the plaintiffs were moving at least at an ordinary pace or faster, according to the defendant's testimony, and were within 6 or 8 feet of the west curb when struck by defendant's car. Quoting the criticism of the court in the case cited above in connection with the instruction complained of here we say, "It should not have been given without further qualifications or explanation;" but under all the evidence in this case it is not probable that the jurors were misled, or would have rendered any different verdict had the instruction complained of not been given.

The judgment is therefore affirmed.

We concur: WORKS, P. J.; THOMPSON, J.

87 Cal. App. 65

PEOPLE v. FRAZIER. (Cr. 1495.)

District Court of Appeal, Second District, Division 1, California. Nov. 21, 1927.

1. Parent and child $\S$ 17(6)—Evidence held to show father's failure to support minor child, willful and without lawful excuse (Pen. Code, $\S$ 270).

In prosecution for failure to provide minor child with necessary food, clothing, etc., defendant's failure to furnish support for which

he was legally obligated held willful and without lawful excuse within Pen. Code $\S$ 270, under evidence establishing fact that some provision for support of child was necessary, since father is not relieved from criminal liability for such omission merely because some other person furnishes necessary food, etc., for such child.

2. Parent and child $\S$ 17(2)—Father's contributing certain sums for support of minor child and inability for few months to make contribution held not inconsistent with criminal negligence and omission.

The fact that on certain occasions father gave to mother of minor child certain small sums of money for child's support, and that during a few months a situation prevented him from making any contributions towards the child's support, held not inconsistent with fact that father was guilty of criminal negligence and omission to provide for such child.

3. Criminal law $\S$ 150—Crime of failure to support minor child is in nature of continuing offense.

Crime of neglect and refusal to support minor child is in the nature of a continuing offense, and may be established by proving that it was committed any time before statute of limitations barred prosecution therefor.

4. Parent and child $\S$ 17(6)—It may be inferred that father might have applied some of money earned towards support of minor child (Pen. Code, $\S$ 270).

Where father of minor child was free to work, and actually did work and earn substantial sums of money all of time between 1922 and 1926, it may be inferred that he might have applied some of money earned towards support of minor child, pursuant to requirement under Pen. Code, $\S$ 270, since its amendment of 1923 (St. 1923, p. 592).

5. Criminal law $\S$ 170(2)—Defendant held not substantially prejudiced by exclusion of facts on cross-examination of prosecuting witness covered by other evidence.

Where substantially all of facts excluded by rulings on cross-examination of prosecuting witness were covered by other evidence introduced as a part of defendant's case, defendant will not be held to have been substantially prejudiced thereby.

Appeal from Superior Court, San Bernardino County; Charles L. Allison, Judge.

Paul Frazier was convicted for neglect and refusal to provide minor child with necessary food, clothing, etc., and he appeals. Affirmed.

David W. Richards, of San Bernardino, for appellant.

U. S. Webb, Atty. Gen., and George H. Johnson, Dist. Atty., of San Bernardino, for the People.

CONREY, P. J. [1, 2] The record does not show any motion for a new trial. On appeal from the judgment, defendant contends that

the verdict is contrary to law, in that the evidence failed to prove that the minor child was in need of any of the common necessities of life, and that the evidence fails to show that defendant at any time failed or refused to pay for the support of said minor child. Section 270 of the Penal Code, referring to the offense which is the subject of this action, provides that the omission by the father of a child to furnish necessary food, clothing, shelter, or medical attendance, or other remedial care, for his child, is *prima facie* evidence that such omission is willful and without excuse. It is also provided that the father is not relieved from criminal liability for such omission merely because the mother of such child, or any other person, furnishes such necessary food, etc., for such child. There is in the record abundant evidence that during a large part of the time for several years, down to and including the date definitely stated in the information (November 15, 1926, "and prior thereto"), the defendant was earning a substantial income, but did not make any provision for his child, or even trouble himself so far as to investigate and find out how she was provided for, or to what extent other persons were contributing to the child's support. It is in evidence that, at and before the period of time covered by the information, said child was being supported by a person not legally bound to do so, to wit, the second husband of the child's mother, to whom said mother had been married after her divorce from the defendant. We think that the evidence is sufficient to establish the fact that some provision for the support of this child was necessary; that the defendant was legally obligated to furnish such support; and that his failure to do so was willful, and without lawful excuse. The fact that on a very few occasions the defendant gave to the child's mother certain small sums for the support of the child, and the further fact that during a few months the defendant's situation prevented him from making any contribution toward the child's support, is not inconsistent with the fact that for long periods of time and within the period covered by the information the defendant was guilty of criminal neglect and omission to provide for said child.

[3] The crime charged in the information is in the nature of a continuing offense, and may be established by proving that it was committed at any time before the statute of limitations bars prosecution therefor. *People v. Curry*, 69 Cal. App. 501, 231 P. 358.

[4] Counsel for appellant claims that, because section 270 of the Penal Code was amended in 1925 (amendment effective July 23, 1925 [St. 1925, p. 544]), to read as it now is, therefore the only law under which the evidence could involve him in any criminal liability would be for the period beginning

July 23, 1925. It is a fact, however, that all of those portions of said section 270 to which we have referred, and which established the law under which defendant was prosecuted, have been a part of that section since the amendment of 1923 (St. 1923, p. 592). The evidence admitted tends to prove, and the defendant admitted, that during approximately all of the time between 1922 and 1926 the defendant was free to work, and actually did work and earn substantial sums of money. It is a fair inference that he might have applied some of this money toward the support of his minor child, if he had been disposed so to do.

[5] Appellant complains of two rulings of the court on cross-examination of the prosecuting witness. Substantially all of the facts excluded by those rulings were covered by other evidence introduced as a part of the defendant's case. Without holding that the rulings were erroneous, it is enough to say that the defendant was not substantially prejudiced thereby.

Finally, appellant contends that there was no proof of willful failure to provide for the child during the time that the defendant was in the marine corps and during the World War. In view of the fact that there is ample evidence to establish such willful neglect during the period extending from 1923 to 1926 the point suggested is not material to the merits of the case.

The judgment is affirmed.

We concur: YORK, J.; McLUCAS, Justice pro tem.

87 Cal. App. 208

PEOPLE v. PARISI. (Cr. 1386.)

District Court of Appeal, First District, Division 1, California. Dec. 1, 1927.

1. Witnesses ⇨363(1)—As respects attempt to extort money from defendant, motives of adverse witness may be inquired into to repel presumption witness speaks truth (Code Civ. Proc. § 1847).

In prosecution for the infamous crime against nature, as respects alleged attempt to extort money from defendant, motives of adverse witnesses could be inquired into to repel presumption under Code Civ. Proc. § 1847, that witnesses spoke truth.

2. Witnesses ⇨372(2)—As foundation for impeaching witness for attempted extortion or revenge, first question must be whether prosecution was not begun for such purposes.

To lay foundation for impeachment of witness because he instigated prosecution for purpose of extortion or revenge, witness must first be asked direct question if he has not begun prosecution for purposes named.

3. Witnesses $\S$ 372(2)—As regards question of extortion, sustaining objection to question as to what took place after prosecuting witnesses left defendant's apartment where offense was committed not touched on in direct examination, held proper.

In prosecution for the infamous crime against nature, where direct examination of boy's mother and detective ended at point where mother and boy left defendant's apartment, where offense was committed, and started home, as regards question of extortion of money from defendant, sustaining objection to question as to what took place after prosecuting witnesses left was proper, where such matter had not been touched on in direct examination.

4. Criminal law $\S$ 1169(3)—Defendant was not harmed by rulings on impeaching testimony as regards extortion, in view of his own testimony.

In prosecution for the infamous crime against nature, defendant was not harmed by sustaining of objections to his cross-examination of prosecuting witnesses as to what took place subsequent to the time witnesses left his apartment, as affecting question of extortion, where, according to his own testimony, no one connected with the prosecution had demanded money from him.

5. Criminal law $\S$ 1172(2)—Court's comment that evidence of prosecuting witness was immaterial was harmless, in view of charge that jury were sole judges of evidence.

In prosecution for the infamous crime against nature, comment of trial court, in overruling prosecution's objections to defendant's examination of boy victim as to contradictory statements made at previous trial, that, although testimony was immaterial, it would be allowed to stand, was harmless, in view of charge that jury were sole judges of weight of evidence.

6. Criminal law $\S$ 1119(2)—Transcript of evidence at former trial not being offered, reviewing court cannot say that ruling that evidence was immaterial was wrong.

In criminal prosecution, where transcript of evidence at former trial was not offered, reviewing court cannot say that trial court's ruling in overruling prosecution's objections to cross-examination of boy witness as to testimony at former trial that evidence was immaterial but would be allowed to stand was wrong.

7. Criminal law $\S$ 959—Refusal to continue motion for new trial on oral application to permit securing of affidavits held not abuse of discretion.

Trial court did not abuse its discretion in refusing to continue hearing of motion for new trial on oral application of defendant's counsel, in which he requested time to secure affidavits to support motion, but did not disclose whose affidavits he expected to obtain or what contents thereof would be nor why they had not already been obtained or that there were grounds to believe they would be obtained in future.

Appeal from Superior Court, City and County of San Francisco; Stanley Murray, Judge.

Antone Parisi was convicted of the infamous crime against nature, and he appeals. Affirmed.

George Lipman and Milton T. U'ren, both of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Emery F. Mitchell, Deputy Atty. Gen., for the People.

KNIGHT, J. The defendant was charged by indictment with the infamous crime against nature, and upon trial was found guilty. He has appealed from the judgment of conviction and the order denying his motion for a new trial. As grounds for reversal, he contends that the trial court improperly limited his cross-examination of the prosecution's witnesses, and thereby deprived him of the right to show that his arrest and prosecution were the result of an attempted extortion; also that the court erred in arbitrarily refusing to grant him time to secure affidavits to be used on motion for a new trial.

The circumstances leading up to the defendant's arrest, as they appear from the evidence, were as follows: The alleged crime was committed upon a boy 18 years of age, with whom and with whose family defendant had been on friendly terms for many years. At the time of his arrest and for some time prior thereto defendant lived alone in a couple of rooms constructed mostly of windows and glass doors on the roof of a building which he owned on Kearny street, San Francisco. During the early part of May, the boy's mother became suspicious of her son's appearance and conduct, and, unknown to the boy, employed a private detective named Otts to ascertain the character of the boy's habits and associates. While pursuing this employment, and about 6 o'clock on the evening of May 19th, Otts saw defendant talking to the boy on the street near defendant's premises and overheard him apparently make an appointment to meet the boy at 8 o'clock, pointing in the direction of his (the defendant's) apartment. Thereupon Otts informed the boy's mother that her son had been frequenting defendant's living quarters and was going to meet him there that night at 8 o'clock. She replied that there was no objection in his doing so; that defendant had been a good friend to the family for many years, particularly since the death of her husband some six years before; that he had been like a father to the boy, and consequently she was glad to have the boy in defendant's company. Being unable to convince her of the probability of improper relations existing between the two, and without notifying her or any one else of his intention, Otts planned to conceal one of his operatives in or near de-

defendant's apartment at the appointed hour that night, which he succeeded in doing in the following manner: The rear portion of defendant's premises, facing an alley, contained a garage, the keys to which were in defendant's possession, wherein were stored certain motor vehicles, one being a truck belonging to an acquaintance named Mrs. Donati, which she wanted to sell. Otts told the boy's mother he desired to purchase the truck for a friend and to have Mrs. Donati meet them at the garage that night about 8 o'clock for the purpose of allowing him to inspect the truck. According to the testimony of the prosecution's witnesses, none of them knew of Otts' real purpose in asking to inspect the truck. The boy's mother and Mrs. Donati were accompanied to the garage by the boy, his married sister, and Otts, whereupon defendant was summoned from his apartment by the boy's sister to open the garage and allow the inspection to be made. While the defendant was thus engaged, Otts left the garage under the pretext of going to phone to the prospective buyer of the truck, and while gone he succeeded in concealing his operative in the defendant's apartment. Soon after Otts left the garage the women and the boy started to leave, but, according to the testimony of the boy, his mother, and his sister, defendant placed his hand on the boy's arm and asked him to remain, which he consented to do. The women then left, and defendant, after closing and locking the garage proceeded with the boy up the back way to his apartment, where it is claimed the alleged criminal act was committed. During the perpetration of the act, Otts' operative came out from his place of concealment under the bed and called loudly for Otts, who, it seems, after leaving the garage, returned to the street to bring the boy's mother and his sister to the roof and then concealed himself near a window where he could observe what occurred inside defendant's apartment. Immediately upon hearing his operative call for him, Otts broke through the glass door and entered the apartment, followed by the boy's mother and sister, and according to their testimony, they saw the defendant and the boy just coming out of the bedroom, both partly disrobed. It is unnecessary to relate the details of the animated discussion which followed, more than to say that, according to the prosecution's witnesses, the boy, in defendant's presence, admitted that the crime charged had been committed upon him by defendant not only that night but on frequent occasions ever since the death of his father, as a result of which he had become diseased. The defendant did not deny these accusations, so the prosecution's witnesses testified, but tried to persuade the boy's mother and Otts against causing his arrest, stating that such action on their part would only bring disgrace upon the boy, that he would see to it that the boy was cured of the disease, and that he would

"fix the whole thing" by paying the boy's mother a large sum of money, and, furthermore, that he offered to pay Otts \$1,500, saying he had known similar cases to be fixed for \$1,000. All of these propositions were emphatically rejected, however, and the boy's mother insisted that defendant be taken to prison. Thereupon she left for home, accompanied by her son and her daughter.

At the trial, defendant denied ever having had improper relations with the boy, and charged that his arrest was the result of a scheme to extort money from him. In support of his claim of innocence, defendant testified that on the night in question the boy left the garage with the others; that thereupon he locked the doors and proceeded toward his apartment alone; that about the time he reached the roof he observed Otts and the boy's mother and his sister standing near his front door waiting, as he thought, for him to open the door; that the front door was fastened with a nail on the inside, and, that, consequently he entered through the rear door, intending to pass through the house to open the front door, but that, as he entered the rooms, he found the boy lying on the bed and at the same time saw a man with a pistol crawling out from beneath the bed, immediately following which Otts, the boy's mother and his sister entered the room and accused him of having committed the criminal act charged.

The numerous rulings criticized by defendant run throughout the record and are discussed in his brief in the order in which they were made. In considering the same here, we shall for convenience group them with reference to the subject-matter to which they relate.

[1-3] The direct examination of the boy's mother and of Otts ended at the point where the women and the boy left defendant's apartment and started for home. On cross-examination, defendant's counsel sought to prove what had taken place subsequent to that time. The prosecution interposed numerous objections, mainly upon the ground that the testimony sought to be elicited was not cross-examination, and many of these objections were sustained. Defendant contends that as a result of these rulings he was deprived of the right to show that later on that night, at Otts' office, an attempt was made to extort money from him. With respect to the admissibility of this kind of proof the law doubtless allows the motives of an adverse witness to be inquired into for the purpose of repelling the presumption that he speaks the truth (Code Civ. Proc. § 1847), and consequently a witness may be impeached by showing that he has instigated the prosecution for the purpose of extortion or revenge. But the decisions hold that, in order to lay the foundation for such impeachment, the witness must first be asked the direct question if he had not begun the prose-

cution for the purposes mentioned. *People v. Delbos*, 146 Cal. 734, 81 P. 131; *People v. Emmons*, 7 Cal. App. 685, 95 P. 1032. In the present case, defendant's counsel did not follow the foregoing rule, but, on the contrary, proceeded to prove on cross-examination the subsequent occurrences of that night in the chronological order in which they happened; that is, to show step by step what next occurred after the women and the boy left defendant's apartment. The trial court was consequently justified, we think, in sustaining the objections to the questions put in the form mentioned.

[4] In announcing its rulings and in explanation thereof, however, the trial court stated, in effect, on at least two occasions, that it recognized defendant's right to impeach the prosecution's witnesses upon the grounds mentioned and was willing that he should do so providing he complied with the rule above stated, and pointed out to defendant that under such rule he would be allowed to ask direct questions to show the motives of the witnesses, but was not allowed to accomplish that purpose by interrogating the witnesses as to the subsequent transactions occurring that night which were not touched upon during their direct examination, because, the court remarked, if such course were followed much immaterial matter would be brought before the jury. Finally, however, counsel for defendant did elicit from the witnesses testimony sufficient to lay the foundation for the introduction of impeachment evidence; the boy's mother having testified that no demands for money were made in her presence, and Otts having testified that no one other than the defendant mentioned the payment of money to drop the case. But, when the time arrived to bring forth the impeachment evidence, defendant, although having previously stated that "they" demanded money, etc., indicating that Otts and the boy's mother had done so, expressly disclaimed that either of them had ever made such a demand, and stated that the only demand came from a man named Montgomery which was made in Otts' office on Market street, where he was subsequently taken and detained by Otts until midnight, after which he was delivered into the custody of the police at the police station; that those present at Otts' office besides Otts and the defendant were Montgomery, and part of the time at least, an attorney called in by the defendant, the boy, his mother, and his sister; but, in answer to questions propounded by the court, defendant clearly stated that the only demand made upon him for money came from Montgomery while only himself and Otts were present. No evidence was thereafter offered on behalf of the defendant to prove, nor did it anywhere appear in the record, how or under what circumstances Montgomery appeared in the case or what his connection was therewith; neither did Montgomery testify as a

witness in the case; therefore, on motion of the district attorney, the court ordered stricken out as hearsay defendant's previous testimony indicating that the demand for money came from the prosecution's witnesses. Immediately following this ruling, defendant's counsel resumed the examination, and defendant repeated his former statement that no one except Montgomery had ever made a demand for money, his testimony being as follows:

"Mr. Lipman (Attorney for Defendant) Q. Now, how long were you in this office, Mr. Parisi, on Market street? * * * A. I was there more than three hours. Mr. Lipman Q. Well, did any one else besides Mr. Montgomery speak to you regarding money in that room at that time that night? * * * A. No."

This latter testimony was not stricken out, and thereupon the evidence as to the demand for money ended. It therefore appears that, notwithstanding the rulings complained of limiting the cross-examination of the prosecution's witnesses, defendant was permitted to and did in fact establish the foundation for the impeachment testimony, and furthermore was afforded an opportunity to produce the same, but by his own testimony proved that the demand which he claims was made came from one not shown to be connected in any way with the witnesses who had appeared against him. Since the defendant contradicted Otts' testimony to the effect that no demand for money was made by anybody in his presence, defendant was doubtless entitled, in support of his claim that such a demand was made to relate the nature of the demand and the circumstances under which he claims it was made. But, as pointed out, after he had sworn to the fact that it was Montgomery who made the demand, further examination by his counsel on this point was apparently abandoned; therefore, since Montgomery was not called as a witness, the conflict arising between defendant's testimony and that of Otts, as to whether Montgomery had made such demand, was left for the jury to resolve from such evidence as it had before it. The state of the record described therefore shows that, despite any technical errors which may have been committed by the trial court in ruling upon particular questions, defendant was not deprived of any substantial right.

Defendant further contends that he was denied the right to prove on cross-examination of the boy that the latter knew of Otts' employment and of the latter's plan to entrap the defendant; but the record does not support this contention, for it shows that the boy was cross-examined upon the subjects mentioned, and testified that he had no conversation with his mother or sister or with Otts about the matter; and that he was not aware of the nature of Otts' business. Neither does the record sustain defendant's claim

that he was not allowed to cross-examine the boy as to what occurred after leaving defendant's apartment, for it shows that defendant did quite fully interrogate the boy upon such matters. The only question ruled out related to the hour defendant left Otts' office, and this fact was established by other proof and in any event was not disputed.

[5, 6] Defendant complains also of the comment made by the trial court in overruling the prosecution's objections to the cross-examination of the boy with reference to certain contradictory statements claimed to have been made by him at a previous trial of the action relating to the question of whether or not the detective who was under the bed was armed, and as to the description given by the boy of the defendant's clothing. In making its ruling, the court remarked that, although in its opinion the testimony was immaterial, the same would be allowed to stand; that the jury was to weigh it for what it was worth. But the jury was charged at the conclusion of the evidence that the jurors were the sole and exclusive judges of the weight of the evidence and that the court had not intended to intimate what inferences were to be drawn from the evidence adduced, and that, if any expression of the court so indicated, such expression was to be disregarded. Therefore we do not believe that the remarks complained of operated against the defendant with any prejudicial effect. Defendant did not offer in evidence the portion of the transcript of evidence taken at the former trial by which he sought to impeach the boy's testimony as to the period of time elapsing between the time he left the garage and the time when Otts broke into defendant's apartment; consequently we are unable to say whether or not the court erred in holding as it did that the asserted contradiction was immaterial.

The rulings complained of in connection with the cross-examination of the boy's mother, other than those already noticed, are not of a serious nature. As to whether or not she knew who lived on defendant's premises would seem to be unimportant, because she had already testified that on the night in question she saw none of the inmates of the house; and the asserted suggestion by the court of two answers during the cross-examination of the witness about which complaint is made was harmless, because the court, apparently to save time, merely repeated the answers already given by the witness on cross-examination on the same point, neither of which answers was vital, having relation only to the witness' estimate of the period of time elapsing between the time she was going from the garage to the roof and while she was waiting at the top of the stairway near the roof before entering defendant's apartment.

Neither can we sustain the contention that defendant was not allowed on cross-examina-

tion to test the memory of the witness Otts as to the kind of a coat defendant was wearing, and as to the order in which the parties left defendant's apartment that night; also with reference to fixing the time when Otts first arrived at the garage. An examination of the record discloses that either before or after the rulings complained of were made the witness was interrogated upon these points. We have examined the remaining points urged by defendant relating to the cross-examination of the prosecution's witnesses, but do not believe they possess sufficient merit to require discussion.

[7] Defendant's final contention is that the court abused its discretion in refusing to continue the hearing of the motion for a new trial. The application for continuance was made orally by defendant's counsel, in which he stated that defendant desired time to secure affidavits in support of his motion; but he did not disclose whose affidavits defendant expected to obtain nor what the contents of the affidavits would be, nor why the affidavits had not already been secured; neither was it stated that there were reasonable grounds to believe that the same could or would be obtained in the future, or, if so, when. As said in *People v. Burrows*, 27 Cal. App. 428, 150 P. 382:

"In the absence of any showing that it [the continuance] will inure to the benefit of the defendant or be likely to right some wrong that may have been done him, how can the court say that any continuance should be granted? This cannot be assumed from the mere application for a delay. There must be some evidence offered in support of the application. Here the bald request was made of the court without any pretense of evidence or suggestion of any fact that would indicate the justice or propriety of granting the motion. There was no intimation of what was expected to be set forth in said affidavits, nor was any reason shown why the affidavits had not already been secured."

For the reasons stated in that case, it is apparent that the application for the continuance in the present case was properly denied. *People v. Winthrop*, 118 Cal. 85, 50 P. 390; *People v. Ross*, 134 Cal. 256, 66 P. 229; *People v. Yeager*, 194 Cal. 452, 229 P. 40; *People v. Ortiz*, 63 Cal. App. 662, 219 P. 1024.

In conclusion, it may be stated that, in view of the serious nature of the charge against the defendant and the circumstances attending his arrest, we have scrutinized the record in the case with care, and, although it would seem that the trial court required defendant's counsel in the presentation of the defense to adhere strictly to the rigid rules of evidence, we are not prepared to say that the rulings complained of had the effect of depriving defendant of a fair trial, nor do we believe, in view of the evidence adduced against him, that the trial has resulted in a miscarriage of justice.

The judgment and order appealed from are therefore affirmed.

We concur: TYLER, P. J.; CASHIN, J.

87 Cal. App. 156

WHETSTONE v. BOARD OF DENTAL EXAMINERS OF CALIFORNIA.
(Civ. 3248.)

District Court of Appeal, Third District, California. Nov. 28, 1927.

1. Physicians and surgeons ☞§11(3)—**Accusation charging unprofessional conduct in that dentist permitted his office nurse to clean teeth and administer treatment for pyorrhea held sufficient (Dental Act, § 14).**

On proceedings under Dental Act (Deering's Gen. Laws, Act 2048) § 14, to suspend license to practice dentistry, accusation alleging that respondent did unlawfully aid and abet an unlicensed person to practice dentistry, in that he permitted his office nurse to clean teeth and administer treatment for pyorrhea, *held* sufficient in substance and form.

2. Physicians and surgeons ☞§11(3)—**Refusal of board of dental examiners, in proceeding to suspend for unprofessional conduct, to grant continuance for further testimony, held not to show abuse of discretion.**

In proceeding before board of dental examiners for suspension of license to practice dentistry, board *held* not to have abused its discretion in refusing to grant respondent's motion for continuance in order to produce rebuttal testimony, where it was not shown that respondent had any such testimony to offer or could produce it.

3. Physicians and surgeons ☞§11(3)—**Suspension of license to practice dentistry will not be disturbed, if supported by substantial testimony.**

Finding of board of dental examiners, suspending license to practice dentistry, will not be disturbed, if there is any substantial testimony supporting it.

4. Physicians and surgeons ☞§11(3)—**Dentist, charged with permitting office nurse to practice dentistry without license, has burden of proving that such office nurse was duly licensed.**

In proceeding to suspend dentist's license to practice because he permitted his office nurse to clean teeth and treat pyorrhea, it is matter of defense to show that such nurse was duly licensed, but burden is on dentist to prove it.

5. Physicians and surgeons ☞§11(3)—**Evidence that dentist permitted nurse to clean teeth and treat pyorrhea held sufficient to show "practice of dentistry" by unlicensed person (Dental Act, § 11).**

In proceeding to suspend dentist's license to practice on ground that he permitted office nurse to practice dentistry without license, evidence that office nurse cleaned teeth and treated pyorrhea *held* sufficient to show "practice

of dentistry" within Dental Act (Deering's Gen. Laws, Act 2048) § 11.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Practice of Dentistry.]

Appeal from Superior Court, Sacramento County; Ernest Weyand, Judge.

Proceeding by the State Board of Dental Examiners against L. S. Whetstone for suspension of respondent's license to practice dentistry. Order suspending respondent's license was, on writ of certiorari to superior court, annulled, and the Board appeals. Judgment reversed, and writ denied.

Frank J. Burke, of Petaluma, and Jesse W. Carter, of Redding, for appellant.

J. M. Inman and P. G. West, both of Sacramento, for respondent.

PLUMMER, J. On the 15th day of March, 1926, the dental board of examiners of the state of California, after hearing had upon the accusation charging the petitioner with unprofessional conduct, made and entered its order suspending the petitioner's license to practice dentistry in the state of California for the period of five years. Upon writ of certiorari, this order was annulled. From this judgment the board of dental examiners of the state of California appeals.

The accusation filed with the dental board of examiners, and upon which the petitioner was tried and found guilty, alleges that the petitioner, on or about the 12th day of January, 1926, did willfully and unlawfully aid and abet an unlicensed person to practice dentistry in the state of California, in that the said L. S. Whetstone did knowingly and unlawfully allow and permit his office nurse to clean teeth and administer treatment for pyorrhea on the gums of one J. W. Cull, at the office of said L. S. Whetstone, in the city of Sacramento, and that the said L. S. Whetstone did, prior thereto, and on or about the 15th day of August, 1925, knowingly and willfully permit and allow his office nurse to treat the gums of one J. O. Babcock for pyorrhea, and that the said L. S. Whetstone did willfully, knowingly, and unlawfully permit and allow his office nurse, at his office, to clean the teeth of various other persons, at various other times, and that during all of said times said office nurse was not licensed to practice dentistry in the state of California, which said fact was, during all of said time, well known to the said L. S. Whetstone.

[1] It was contended in the trial court, and is also contended here, that the accusation filed against petitioner is insufficient in substance and form, and that it does not sufficiently comply with the provisions of section 14 of the Dental Act of the state of Cali-

fornia, known as Act 2048, Deering's General Laws. That section reads as follows:

"The proceedings to revoke or suspend any license under the third subdivision of section 13, may be taken upon the information of another. All accusations must be in writing, verified by some party familiar with the facts therein charged, and three copies thereof must be filed with the secretary of the board. Upon receiving the accusation the board shall, if it deem the complaint sufficient, make an order setting the same for hearing, at a specified time and place, and the secretary shall cause a copy of the order and of the accusation to be served upon the accused at least ten days before the day appointed in the order for said hearing."

No question is raised as to service of citation nor as to the statutory time allowed petitioner to answer the accusation. The objection is directed to the fact that at the hearing two witnesses were permitted to testify to other acts relating to the practice of dentistry where the patients were other than those specifically mentioned in the accusation. This testimony was admitted under the general allegation contained in the accusation that the petitioner had permitted the nurses in his office to perform the same and similar acts upon other patients, just as set out in the accusation in relation to the patients named Cull and Babcock.

In support of his contention that the accusation is insufficient and does not comply with the statute by reason of this general portion thereof, which we have set forth, the petitioner cites the case of *McClatchy v. Superior Court*, 119 Cal. 413, 51 P. 696, 39 L. R. A. 691. An examination of the facts set out in the opinion in that case discloses, however, that it does not support petitioner's contention. In the *McClatchy* Case the petitioner was denied an opportunity to present testimony. The sufficiency of the accusation or the pleadings upon which *McClatchy* was being tried were really not involved. It was simply the right to be heard and to present testimony which was denied. The petitioner also relies upon the case of *Dyment v. Board of Medical Examiners*, 57 Cal. App. 265, 207 P. 411. In the *Dyment* Case the sufficiency of the accusation was directly involved, but the circumstances there are readily distinguishable from those presented to us in the case at bar. In the *Dyment* Case the accusation charged the petitioner with being guilty of unprofessional conduct by violating section 14 of chapter 354 of the General Statutes of 1913 and acts amendatory thereof of the state of California, "In that he * * * procured by fraud and misrepresentation a certificate to practice medicine and surgery in the state of California." No facts or acts were set forth in the accusation upon which the charge of fraud was based. No intimation was given by the accusation of the acts

relied upon to sustain the charge or what kind of testimony would be introduced in order to sustain the charge. In the case at bar the petitioner is charged with specific acts. Those acts are specifically alleged to have been performed in relation to certain patients, and the same kind of acts in relation to other patients. In the *Dyment* Case the accusation contained no specific allegations of fact. No one, from reading the accusation, could form a conclusion as to what kind of acts would be relied upon as proving the fraud charged or as constituting the fraud charged. In the case at bar the petitioner is given direct and specific notice of the acts with which he is charged. The unprofessional conduct is the gravamen of the charge, not the names of the patients. What the petitioner did constituted his unprofessional conduct, and what the petitioner did, as we have just stated, is directly and specifically set forth. And, while we agree with the petitioner that "the right to practice dentistry is a vested property right, and dentists holding such rights under the board of dental examiners, and subject to its rules and regulations are entitled as a matter of right to have such rules and regulations relative to their removal from their profession fairly invoked and implied," we are of the opinion that the accusation in this case sufficiently conforms in all matters of substance with the Dental Act of the state of California, and that the petitioner has not been prejudiced by any want of either form or substance in the accusation, and therefore had full notice of the acts charged as being unprofessional.

[2] No testimony having been introduced relative to the charge of treating the patient Babcock, the petitioner's motion to strike that portion of the charge was granted. The cause was then submitted by the petitioner without the introduction of any testimony. After the cause had been submitted the petitioner moved the dental board of examiners to reopen the cause and continue the hearing in order that the petitioner might introduce testimony rebutting the testimony of the two witnesses relative to the general charges contained in the accusation. This motion was denied. While we are not prepared to say that boards acting in the capacity such as the defendant was in this case, should follow the strict letter of the law relative to reopening cases and permitting opportunity to introduce further testimony, it does not appear in this case that the petitioner had any such testimony or offered any evidence whatever to the dental board of examiners that such testimony could be produced, nor was any showing made as to any efforts made by the petitioner to secure such evidence. Under such circumstances we cannot

say that the dental board of examiners abused its discretion in refusing to grant the continuance. We may here state that the testimony of the two witnesses, as to the general charges, presented nothing of substance for the consideration of the dental board of examiners, and does not appear to have been relied upon in support of the accusation filed against the petitioner, and is not presented to us as containing evidentiary matter in support of the judgment of the dental board of examiners.

[3] It is further contended that the evidence is insufficient to support the judgment. The transcript sets forth the following uncontroverted testimony: The witness Cull, after testifying that he had gone to the office of Dr. Whetstone, in the city of Sacramento, received treatment from him in the removal of tartar from his teeth, and had his gums examined, that an agreement was entered into between him and Dr. Whetstone for a course of treatment costing the sum of \$35; that the patient called at different periods of time and received treatment; that the witness called at the office of Dr. Whetstone and received treatment upon five different occasions; that after the first treatment by the doctor, as just described, he called at the office of Dr. Whetstone and received the following treatment from one of the doctor's nurses—we will describe it by setting forth the questions and answers:

"Q. What did the treatment consist of? Explain to the board what was done. A. Well, I don't know the right name for it, but it was just a slight scraping and medicine injected in the gums, the same as he had done. Q. A slight scraping and medicine injected in the gum? A. Yes, sir. Q. The same, you say, as Dr. Whetstone? A. Only a slighter nature. Q. A slighter nature; and this nurse, Mrs. Babcock, did this at that time? A. Yes, sir."

On the subsequent occasion the testimony shows the following:

"Q. What, if anything, was done by either Dr. Whetstone or by the nurses on this fourth occasion? A. Yes, sir; just medicine put into the teeth the same as the time before by the nurse. Q. And were any instruments injected or used by the nurse on your mouth? A. Yes, sir; she poked around in my teeth with them and tested around. Q. And some medicine was injected? A. Yes, sir. Q. Into your gums? A. Well, not exactly injected—poked between the teeth."

On another occasion the testimony is as follows:

"Q. On this occasion, February 1, 1926, you met Mrs. Babcock at the office there? A. Yes, sir. Q. Was anything done on that occasion? A. I believe that was the time that my teeth were scraped or brushed with the drill. Q. Was any paste used on your teeth on that occasion? A. Yes, sir. Q. Well, you testified that she inserted instruments in your mouth?

A. Yes, sir. Q. And that she put medicine between your teeth? A. Yes, sir. Q. And that she used paste? A. Yes, sir. Q. And did she use—what did—I don't know whether you would know what to call it or not, did she use a scraper or something to scrape the tartar off your teeth? A. Yes, sir."

As to what took place upon the first visit of the witness to Dr. Whetstone's office, the transcript shows the following, upon cross-examination:

"Q. What discussion was had there with regard to the trouble with your teeth? A. Well, he just told me I needed a few fillings and told me that tartar should come off, and made me a price of \$35; told me how many treatments there would be, etc. Q. Well, did he tell you what was the matter with your teeth? A. Well, I cannot say that he did, just what was the matter with my teeth; he said there was an awful lot of tartar, I know that. Q. Did he say anything about pyorrhea at that time? A. I cannot say whether he did or not. Q. Did he ever say anything to you about pyorrhea? A. No, sir. Q. Did anybody in his office ever say anything to you about pyorrhea? A. I can't say whether they did or not; if they did, I can't remember it. Q. You were up there to get information, weren't you? A. Yes, sir. Q. And you can't recall whether anybody in that office told you a single time whether you had pyorrhea or not? A. True enough. Q. You knew you had it, didn't you? A. I wasn't sure that I had it, but they told me I had it. Q. Who do you mean by 'they'? A. Dr. Renwick."

The transcript further shows similar treatment at the different visits made by the witness to the office of Dr. Whetstone, and that every time he was treated by the nurse, he paid therefor the sum of \$2.50.

We do not need to follow the discussion of counsel as to what may be inquired into upon certiorari. The law seems to be well settled that jurisdictional matters only can be considered, but where there is an entire want of admissible testimony, it appears to be held that jurisdiction is lacking. In this case if there is any substantial testimony supporting the conclusion of the dental board, the judgment of the trial court should be reversed.

[4, 5] Section 11 of the Dental Act to which we have referred defines the practice of dentistry, among other things, as follows: One who shall "for a fee, salary or reward, paid directly or indirectly either to himself or to some other person, perform an operation of any kind, or treat diseases or lesions of the human teeth or jaws, or correct malimposed positions thereof, or in any way indicate that he will perform by himself or his agents or servants any operations upon the human teeth or jaws, or make an examination of, with the intent to perform or cause to be performed any operation on the human teeth or jaws," etc., is practicing dentistry. In the case of *Jacobs v. Board of Dental Examiners*, 189 Cal.

709, 209 P. 1006, the Supreme Court had occasion to define some of the terms used, which we have just quoted, constituting the practice of dentistry. In relation to the intent of the Legislature in using the word "operation," it is there said:

"It does not require the performance of a surgical operation to bring one within the purview of the law. The words 'operate' and 'operation,' technically used in connection with surgery, mean 'to perform some manual act upon the body of the patient, usually with instruments, with a view to restore soundness or health, or otherwise improve the physical condition,' and 'the act or series of acts and manipulations performed upon a patient's body, as in setting a bone, amputating a limb, extracting a tooth, etc.' Century Dictionary. They have also a plain ordinary meaning, in the light of which this act may and, we think, should be construed. According to the authority just quoted 'operate' means 'to perform or to be at work,' 'to produce an effect, act, work'; and 'operation' means 'action,' 'working,' 'a specific act or activity,' and 'the course of action or series of acts by which some result is accomplished.' The same dictionary defines 'an operator' as 'one who operates in any way, or on or against anything.'"

In the Jacobs Case, the acts which were held to come within the definition of practicing dentistry, as set forth in section 11, supra, the work performed was as follows: A plaster paris mould or cast of the mouth was taken for the purpose of getting the measure for a plate. This was done on the first visit. On the next day a wax bite of the mouth was taken by placing a piece of wax in the patient's mouth and telling him to bite on it. On the third visit a wax plate set with teeth was placed in the patient's mouth for him to try in, causing the patient to bite into the wax mould for a "try in." On the fourth visit the finished plate was delivered to the patient. He paid therefor the sum of \$10. All this work was done in Dr. Jacobs' office by one Findley, not a licensed dentist.

In the case of State v. Sexton, 37 Wash. 110, 79 P. 634, the Supreme Court of Washington affirmed the judgment of the lower court wherein an accusation against the appellant was held sufficient, in that it charged the crime of practicing dentistry without a license, in that the appellant did treat a disease and lesion of the human teeth, and did correct malpositions of the human teeth and jaws of one R. A. Metzger, in violation of the provisions of the dental laws of that state. The facts in that case established the following: That the appellant cleaned the teeth of Metzger by removing tartar therefrom, and made an examination of them in order to give an estimate of the cost of having them fixed; that he "sounded" them and "picked" them. This testi-

mony, even though controverted, was held sufficient to sustain a judgment in a criminal prosecution finding the defendant guilty of practicing dentistry without a license. As to what is meant by the term "aiding" and "abetting" an unlicensed person to practice dentistry, it is sufficient to refer to the case of Lassen v. Board of Dental Examiners. 24 Cal. App. 767, 142 P. 505, where those terms have received consideration. It is likewise a matter of defense in hearings of this kind to show that the person employed in the practice of dentistry has been duly licensed. Anderson v. Board of Dental Examiners, 27 Cal. App. 336, 149 P. 1006. The burden of proof is upon the employer to show that his employee is duly licensed. Where instruments are used in the removal of any accumulations upon the teeth, where medicines are employed in treating the gums of a patient, where paste is placed upon the teeth as a part of such treatment and thereafter removed by a revolving brush, propelled by a power not stated, which is used in removing the paste and as a part of the process of cleaning them or as a part of the treatment, we think a charge of practicing dentistry as defined by the Dental Act has been made out, and, if one is charged, as in this case, with aiding and abetting an unlicensed person to practice dentistry who, in his office performs such acts upon his patient, a judgment so finding is supported by the testimony.

It follows from what has been said that the judgment of the trial court should be, and the same is hereby, reversed, the writ of review denied, and the petition therefor dismissed.

We concur: FINCH, P. J., HART, J.

86 Cal. App. 558

PEOPLE v. STERLING REFINING CO.
(Civ. 5955.)

District Court of Appeal, First District, Division 2, California. Nov. 3, 1927.

1. Evidence — 29—Reviewing court could take judicial notice that Vehicle Act was passed prior to effective date of Motor Vehicle Fuel or License Act (St. 1923, p. 571; Code Civ. Proc. § 1875; St. 1923, p. 517).

Since the Motor Vehicle Fuel or License Act (St. 1923, p. 577), § 17, provided that the act should go into effect on September 30, 1923, provided there should have been theretofore enacted act known as California Vehicle Act, the District Court of Appeal, under Code Civ. Proc. § 1875, could take judicial knowledge that the Vehicle Act (St. 1923, p. 517) became a law prior to September 30, 1923, the effective date of the Fuel or License Act.

2. Evidence $\hookrightarrow$ 51—Reviewing court in taking judicial knowledge of public and private legislative acts can examine into legislative history (Code Civ. Proc. § 1875).

The District Court of Appeal, being authorized by Code Civ. Proc. § 1875, to take judicial knowledge of public and private acts of the Legislature, has right to examine into legislative history of acts.

3. Statutes $\hookrightarrow$ 259—That Vehicle Act differed on final enactment from original draft held not to affect Motor Vehicle Fuel or License Act conditioned on Vehicle Act being previously enacted (St. 1923, p. 577, § 17; Vehicle Act).

It being common knowledge that almost every legislative bill is amended, modified, or changed before it becomes law, that Vehicle Act (St. 1923, p. 577) differed in final enactment from draft of act as originally introduced did not affect Motor Vehicle Fuel or License Act (St. 1923, p. 577), § 17, which provided that it became effective on September 30, 1923, provided a California Vehicle Act should have been enacted prior thereto.

4. Statutes $\hookrightarrow$ 255—Statutes speak from date of enactment.

Statutes speak from date of enactment, and not from date of their introduction in the Legislature.

5. Statutes $\hookrightarrow$ 121(1)—Act regulating and licensing business of producing motor vehicle fuels held not invalid as to title (St. 1923, p. 571; Const. art. 4, § 24).

Motor Vehicle Fuel or License Act (St. 1923, p. 571), entitled an act to regulate and license business of producing and distributing motor vehicle fuels, providing for collection and disposition of license taxes, and prescribing penalties, held not to violate Const. art. 4, § 24, providing every act shall embrace one subject which shall be expressed in title.

6. Constitutional law $\hookrightarrow$ 48—Statute is declared unconstitutional only when it clearly violates Constitution.

Before courts will declare an act unconstitutional, it must be made clearly apparent that it is violative of some provision of Constitution and inconsistent with it.

7. Constitutional law $\hookrightarrow$ 48—If there is reasonable doubt as to validity of act, it must be upheld.

If there is reasonable doubt as to the validity of an act, its constitutionality must be upheld.

8. Statutes $\hookrightarrow$ 105(1)—Constitutional provision, requiring subject of act to be expressed in title, must be liberally construed (Const. art. 4, § 24).

Const. art. 4, § 24, requiring subject of act to be expressed in title, must be liberally construed, and all that is required to be contained therein is reasonably intelligent reference to subject to which legislation is addressed.

9. Statutes $\hookrightarrow$ 109—Title of act need not embrace abstract of its contents.

It is not necessary that title of act should embrace an abstract of its contents; it being

general custom to state subject in general terms.

10. Statutes $\hookrightarrow$ 109—When general purpose of act is declared in title, details for accomplishment of purpose are regarded as necessary incidents.

When general purpose of an act is declared in title, details provided for accomplishment of that purpose will be regarded as necessary incidents.

11. Statutes $\hookrightarrow$ 121(1)—That title of Motor Vehicle Fuel or License Act did not state that act would take effect September 30, 1923, did not affect its validity (St. 1923, p. 571).

Where Motor Vehicle Fuel or License Act (St. 1923, p. 571) provided in section 17 that act should go into effect on September 30, 1923, provided California Vehicle Act had been previously enacted, that title of act did not state that it should take effect on September 30, 1923, did not affect its validity, since the people are presumed to know when law goes into effect.

12. Statutes $\hookrightarrow$ 64(8)—Motor Vehicle Fuel or License Act held not invalidated because single section was invalid, in view of legislative intent (Const. art. 4, § 1; St. 1923, p. 577, §§ 15, 17).

Conceding that Motor Vehicle Fuel or License Act (St. 1923, p. 577), § 17, was invalid because act was not to go into effect unless California Vehicle Act had been previously enacted, it was legislative intent that balance of the act should not be affected thereby, under Const. art. 4, § 1, since section 15 of the act provided that, if any part of act was held unconstitutional, validity of remaining portion of act was to be unaffected.

13. Statutes $\hookrightarrow$ 64(1)—If remaining severable part of statute can be carried into effect if void part is eliminated, unconstitutional provision is disregarded.

If different parts of statute are severable and independent and are capable of being carried into effect if void part is eliminated, and statute indicates that it was intention to enact such provisions irrespective of others, unconstitutional provision will be disregarded and the statute read as if void provisions were not there.

14. Constitutional law $\hookrightarrow$ 60—Legislature in enacting Motor Vehicle Fuel or License Act effective after enactment of Vehicle Act did not transfer responsibility of deciding expediency of legislation (St. 1923, p. 571).

In enacting the Motor Vehicle Fuel or License Act (St. 1923, p. 577), § 17, providing that act should go into effect on September 30, 1923, provided Vehicle Act had been previously enacted, the Legislature did not transfer to others responsibility of deciding what legislation was expedient and proper, since entire matter remained in hands of same lawmaking body.

15. Constitutional law $\hookrightarrow$ 60—Legislature cannot transfer to others responsibility of deciding expediency of legislation.

The Legislature cannot transfer to others responsibility of deciding what legislation is ex-

pedient and proper with reference to either present conditions or future contingencies.

16. Venue ⇨16—Statute providing that controller collect moneys due state by suit in courts of Sacramento county did not give such court exclusive jurisdiction (Pol. Code, § 433; Motor Vehicle Fuel or License Act).

Pol. Code, § 433, directing collection of moneys due state by suit in controller's name, of which suits courts of Sacramento county have jurisdiction, without regard to residence of defendants, did not give exclusive jurisdiction to superior court therein, and hence superior court of county of Los Angeles had jurisdiction of action by controller to collect moneys claimed to be due under the Motor Vehicle Fuel or License Act (St. 1923, p. 571).

17. Venue ⇨17—Defendants, not objecting to superior court's jurisdiction nor demanding change of venue, waived right to complain (Motor Vehicle Fuel or License Act; Code Civ. Proc. §§ 396, 397).

Where, in suit by controller in superior court of Los Angeles county to collect moneys claimed to be due to state of California as license taxes under Motor Vehicle Fuel or License Act (St. 1923, p. 571), defendant did not object to court's jurisdiction or demand change of venue, he waived right to complain of jurisdiction, under Code Civ. Proc. §§ 396, 397.

18. Venue ⇨3—Superior court of Los Angeles county had jurisdiction of suit by Attorney General to collect license taxes on motor vehicle fuel (Motor Vehicle Fuel or License Act, § 9; Pol. Code, § 433).

Motor Vehicle Fuel or License Act (St. 1923, p. 574), § 9, providing that controller may request Attorney General to sue in any court of competent jurisdiction to collect taxes, is not in conflict with Pol. Code, § 433, providing that controller may bring suits in Sacramento county to collect moneys due state, and hence action for collection of license taxes on motor vehicle fuels was properly brought in superior court of Los Angeles county.

19. Licenses ⇨19(3)—Defendant selling mixture of gasoline and kerosene as motor vehicle fuel could not claim when paying tax it was one-half kerosene (Motor Vehicle Fuel or License Act, § 1, subd. (b); § 6).

Where refining company sold gasoline, which was in fact one-half kerosene, for motor vehicle fuel, it could not claim, when called on to pay license taxes on motor vehicle fuel under Motor Vehicle Fuel or License Act (St. 1923, pp. 571, 573), § 1, subd. (b), and section 6, that it was one-half kerosene and claim 50 per cent. of fuel sold by it was exempt from taxation.

Appeal from Superior Court, Los Angeles County; J. Walter Hanby, Judge.

Action by the People of the State of California against the Sterling Refining Company. From a judgment for the People, defendant appeals. Affirmed.

H. M. Anthony, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Frank L. Guereña, Deputy Atty. Gen., for the People.

PRESTON, Justice pro tem. The Attorney General, at the request of the state controller, commenced this action in the name of the people of the state of California, in the superior court of Los Angeles county, against defendant and appellant, Sterling Refining Company, a corporation, to collect from it the sum of \$6,184.69, together with interest thereon at the rate of 7 per cent. per annum from May 10, 1924, claimed to be due to the state of California as license taxes on certain motor vehicle fuel under what is known as the "Motor Vehicle Fuel Act of 1923" (Stats. 1923, p. 571).

The case was tried by the court sitting without a jury, and judgment was rendered in favor of plaintiff for the full amount claimed. From this judgment defendant prosecutes this appeal, based upon the judgment roll alone.

The complaint alleges, and the court found:

"II. That during the quarter of the year beginning January 1, 1924, and ending March 31, 1924, said defendant refined, manufactured, produced, and compounded in said state, and sold and delivered therein, 616,269 gallons of motor vehicle fuel. * * * That in the refining, manufacture, production, and compounding of said 616,269 gallons of motor vehicle fuel, the defendant used kerosene to the extent of 50 per cent. That all of said 616,269 gallons of motor vehicle fuel were sold by defendant for use in and for the purpose of operating and propelling motor vehicles upon the highways in California.

"III. That thereafter on the 11th day of April, 1924, said defendant filed with the state board of equalization of said state on a form prescribed by said state board a verified statement and report showing the total number of gallons of motor vehicle fuel refined, manufactured, produced, and compounded by it within said state and sold by it therein during the quarter of the year ending March 31, 1924, and in said statement the number of said gallons was stated to be 616,269; that thereupon said state board computed the license tax due, or to become due, from said defendant because of such sales so made by it, and found to be due upon said statement and report the sum of \$12,325.38, and from said amount so computed and found to be due there was allowed as a deduction the sum of \$123.25, the same being 1 per cent. of said sum of \$12,325.38, and the balance due from said defendant upon and by reason of said tax after allowing said deduction was the sum of \$12,202.13; that thereupon said board of equalization extended said sum of \$12,202.13 upon a tax roll prepared and kept for the purpose, and thereafter and on or before the 30th day of April, 1924, delivered said tax roll to the state controller of said state, and said state controller did within 10 days thereafter notify said defendant that said license tax in said sum was due from it and payable to the state controller on or before May 10, 1924.

"IV. That said sum of \$12,202.13 so due to said state from said defendant as and for said license tax has not, nor has any part, been paid

to said state or to said state controller, except the sum of \$6,017.44, and there is now due, owing, and unpaid the sum of \$6,184.69."

The answer of defendant admits that it did, on the 11th day of April, 1924, file with the state board of equalization a verified statement and report showing that during the quarter ending March 31, 1924, it had produced 616,269 gallons of motor vehicle fuel.

A number of points are urged by appellant in its attack upon the judgment, and these contentions will be considered in the order in which they appear in appellant's brief.

[1] The first contention is that the Motor Vehicle Fuel or License Act of 1923 (Stats. 1923, p. 571), under which this action is brought, never went into effect on September 30, 1923, as provided in section 17 of the act, nor has it since gone into effect.

Section 17 of said act provides:

"This act shall go into effect upon the thirtieth day of September, one thousand nine hundred twenty-three, provided there shall have been theretofore enacted that certain act to be known and cited as the 'California Vehicle Act,' introduced in the forty-fifth session of the Legislature as Senate Bill No. 743."

[2] Section 1875 of the Code of Civil Procedure provides in part:

"Courts take judicial notice of the following facts:

"3. Public and private official acts of the legislative, executive, and judicial departments of this state and of the United States. * * *

Under this statute, we have a right to examine into the legislative history of these two acts, and upon such examination we find that the "California Vehicle Act" (St. 1923, p. 517) was introduced in the forty-fifth session of the Legislature of 1923, and designated Senate Bill No. 743. The "Motor Vehicle Fuel Act" was introduced at the same session and designated Senate Bill No. 744. Each bill was introduced, according to the final official calendar of legislative business, on May 4, 1923. The original draft of each bill was amended during its consideration. Senate Bill No. 743 was passed by the Assembly on May 16th, and by the Senate, after a free conference, on May 18th, and was approved by the Governor on May 30th, and, upon being filed with the secretary of state, was designated as chapter No. 266. Senate Bill No. 744 was passed by the Assembly on May 16th and by the Senate on May 17th, and was also signed by the Governor on May 30th, and upon being filed with the secretary of state was designated chapter 267.

[3] From the history of the two bills, the appellant argues that Senate Bill No. 743, as finally enacted, differed from Senate Bill No. 743 as originally introduced, and from this concludes that the "Motor Vehicle Fuel Act" did not go into effect at all. There is no merit in this contention. If the Legislature had intended that the "Motor Vehicle Fuel Act"

should not be effective until Senate Bill No. 743 had been enacted into a law *in the precise form as originally introduced*, it would have been a very easy matter for it to have so declared. What the Legislature undoubtedly intended, as plainly expressed in section 17, above set forth, was that the "Motor Vehicle Fuel Act" should go into effect on September 30, 1923, only in the event that prior to that date the "California Vehicle Act" *had been enacted into a law*. It is common knowledge that almost every bill introduced in the Legislature is amended, modified, or changed in some particular before it becomes a law, and it would be unreasonable to assume that the Legislature only intended that the "Motor Vehicle Fuel Act" should go into effect on September 30, 1923, in the event that prior thereto Senate Bill No. 743 had been enacted into a law *in the precise language as originally introduced*. By designating it Senate Bill No. 743, in addition to stating that it was the "California Vehicle Act," was only another means of identification.

[4] Another sufficient answer to this contention of appellant's is that statutes *speak from the date of enactment*, and not from the date of introduction in the Legislature. Both acts were approved by the Governor on May 30, 1923, so when the Legislature spoke in section 17 of the Motor Vehicle Fuel Act about the passage of the "California Vehicle Act," designated as Senate Bill No. 743, it undoubtedly referred to the "California Vehicle Act," in the form signed by the Governor on May 30, 1923.

[5] It is next contended by appellant that said "Motor Vehicle Fuel Act" violates section 24 of article 4 of the state Constitution.

Section 24 of article 4 of the Constitution provides:

"Every act shall embrace but one subject, which subject shall be expressed in its title. But if any subject shall be embraced in an act which shall not be expressed in its title, such act shall be void only as to so much thereof as shall not be expressed in its title."

In speaking of this constitutional provision, the Supreme Court in *Ex parte Liddell*, 93 Cal. 633, 29 P. 251, said:

"The object of the provision is to prevent legislative abuse—to prevent the passage of acts bearing deceitful and misleading titles. It is intended to protect the members of the Legislature, as well as the public, against fraud; to guard against the passage of bills the titles of which give no intimation to the members of the Legislature or to the people of the matters contained therein."

To the same effect, see, also, *Cooley's Constitutional Limitations* (6th Ed.) 169; *Abeel v. Clark*, 84 Cal. 228, 24 P. 383; *People v. Jordan*, 172 Cal. 394, 156 P. 451; *Moore v. Williams*, 19 Cal. App. 600, 127 P. 509; *In re Maginnis*, 162 Cal. 200, 121 P. 723.

[6, 7] The rule is well established that be-

fore courts will declare an act unconstitutional, it must be made clearly apparent that the act is violative of some provision of the Constitution and inconsistent with it. If there is a reasonable doubt as to the validity of the act, its constitutionality must be upheld. *Deyoe v. Superior Court*, 140 Cal. 476, 74 P. 28, 98 Am. St. Rep. 73; *Moore v. Williams*, supra; *Black on Constitutional Law*, page 329.

[8] It is also well settled that this constitutional provision (section 24 of article 4), requiring the subject of the act to be expressed in the title, must be liberally construed, and that all that is required to be contained therein in order to meet the constitutional requirements is a reasonably intelligent reference to the subject to which the legislation is to be addressed. *Estate of Wellings*, 192 Cal. 506, 221 P. 628; *McClure v. Riley*, 198 Cal. 23, 243 P. 429, and cases there cited; *Bassford v. Earl*, 172 Cal. 660, 158 P. 124; *Estate of Elliott*, 165 Cal. 339, 132 P. 439; *People v. Jordan*, supra; *Abeel v. Clark*, supra; *Ex parte Liddell*, supra.

[9, 10] The law is also well established that it is not necessary that the title of an act should embrace an abstract of its contents. It has always been the custom to state the subject of the bill in general terms with the fewest words, and the framers of the Constitution doubtless intended the Legislature to conform to that custom. Numerous provisions having a general object fairly indicated by the title may be united. When the general purpose is declared, the details provided for the accomplishment of that purpose will be regarded as necessary incidents. *Abeel v. Clark*, supra; *Moore v. Williams*, supra.

[11] The act is entitled "An act to regulate and license the business of producing, refining or distributing gasoline, distillate and other motor vehicle fuels, providing for the collection and disposition of license taxes, prescribing penalties for violation of the provisions of said act, and repealing all acts and parts of acts inconsistent herewith." A careful examination of the act itself convinces us that the subject-matter embraced within the body of the legislative act is sufficiently referred to in the title to fully meet all requirements of section 24 of article 4 of the Constitution. Appellant lays particular stress upon the fact that the title of the act does not say that the act shall take effect on September 30, 1923. No such requirement is found in the Constitution; it only requires that the title express the subject of the act, etc., and, as we have seen, the purpose of the constitutional provision is to prevent legislators and the public from being entrapped by misleading titles to bills, whereby legislation relating to one subject might be obtained under the title to another. The people are presumed to know when a law goes into effect. When a law goes into effect is no part of the act itself, and it is never the custom

of the Legislature to place in the title the date when the act goes into effect. Hundreds of legislative enactments may be examined without the discovery of a single one in which the operative date is expressly mentioned in the title.

[12] Appellant next contends that the provisions of section 17 of said "Motor Vehicle Fuel Act" invalidates the whole act. There is no merit whatever in this contention. If it be conceded, for the sake of argument, that section 17 of said act is invalid, it does not affect the balance of the act, because section 15 of said act provides:

"If any section, subsection, sentence, clause or phrase of this act is for any reason held to be unconstitutional, such decision shall not affect the validity of the remaining portions of this act. The Legislature hereby declares that it would have passed this act and each section, subsection, sentence, clause and phrase thereof irrespective of the fact that any one or more of the sections, subsections, sentences, clauses or phrases be declared unconstitutional."

This section clearly shows that it was the intention of the Legislature that, even if section 17 be adjudged invalid, nevertheless, the balance of the act should become effective 90 days after adjournment of the Legislature, as provided in section 1 of article 4 of the Constitution.

[13] It is a familiar and cardinal rule of statutory construction that if the different parts of a statute are severable and independent of each other, and the provisions that are within the constitutional power of the Legislature are capable of being carried into effect after the void part has been eliminated, and it is clear from the statute itself that it was the intention of the Legislature to enact these provisions irrespective of the others, the unconstitutional provision or provisions will be disregarded, and the statute read as if the void provisions were not there. *Hale v. McGettigan*, 114 Cal. 112, 45 P. 1049; *People v. Capelli*, 55 Cal. App. 468, 203 P. 837; *Bacon Service Corporation v. Huss*, 199 Cal. 21, 248 P. 235.

A reading of the entire statute (Stats. 1923, p. 571) itself convinces us that section 17 is entirely independent of the other provisions of the act, and can be eliminated without impairing or rendering incomplete the other provisions of the act. Section 15 of the act above quoted affords indisputable evidence that the Legislature intended that said statute should become operative, notwithstanding that section 17 thereof be declared void.

The precise language used in section 15 above quoted was used by the Legislature in what is known as the "Motor Transportation License Act" (Stats. 1923, p. 706), and the Supreme Court, in *Bacon Service Corporation v. Huss*, supra, in passing upon the constitutionality of that act, held that such language as used in section 15 of said Motor Vehicle Fuel Act was *indisputable evidence*

of the intention of the Legislature to pass the act, irrespective of any void provisions thereof.

[14, 15] Appellant contends that the Legislature, by the enactment of section 17, is attempting to transfer to others the responsibility of deciding what legislation is expedient and proper. It is a well-settled rule, of course, that the Legislature cannot transfer to others the responsibility of deciding what legislation is expedient and proper, with reference to either present conditions or future contingencies. In re Wall, 48 Cal. 313, 17 Am. Rep. 425. However, no such situation is created in the enactment of said Motor Vehicle Fuel Act. The Legislature had the power to prescribe that the act would go into effect on September 30, 1923, which was subsequent to the date when legislative enactments ordinarily become effective under section 323 of the Political Code and section 1, article 4, of the state Constitution, and it also had the power to declare that acts should then become effective only if prior thereto a certain statute had been enacted by the same lawmaking body. Section 17 does not refer to an uncertain condition, but to a definite and certain event; namely, the adoption of the "California Vehicle Act" before September 30, 1923. The entire matter remained in the hands of the same lawmaking body; nothing was left to the judgment or discretion of any other person or party, and no question of the expediency of the law was left to the judgment of any other person, and the Legislature exercised its own judgment definitely and finally.

[16] It is next contended by appellant that the superior court of the state of California, in and for the county of Los Angeles, had no jurisdiction of this action. In support of this contention appellant relies upon section 433 of the Political Code, which provides:

"Duties of Controller. 16. To direct and superintend the collection of all moneys due the state, and institute suits in its name for all official delinquencies in relation to the assessment, collection, and payment of the revenue, and against persons who by any means have become possessed of public money or property and fail to pay over or deliver the same, and against all debtors of the state; of which suits the courts of Sacramento county have jurisdiction without regard to the residence of the defendant."

This section does not purport to give *exclusive jurisdiction* to the superior court in and for Sacramento county of all suits filed by the state controller to collect money due the state. This section merely makes an exception to the general rule, fixing venue of actions.

[17] Another complete answer to this contention of appellant's is found in the fact that the record fails to show any objection made by appellant to the jurisdiction of the superior court of Los Angeles county, and fails to show any demand for a change of venue.

For this reason alone appellant has waived any right it may have had to complain of the jurisdiction of the superior court of Los Angeles county. Sections 396, 397, Code Civ. Proc.; Bohn v. Bohn, 164 Cal. 532, 129 P. 981; Smalley v. George C. Peckham Co., 175 Cal. 146, 165 P. 438; 25 Cal. Jur., pages 889, 890, and cases there cited.

[18] It may also be noted in this connection that section 9 of said Motor Vehicle Fuel Act, which became a law long after section 433 of the Political Code was enacted, provides:

"Upon the request of the state controller, it shall be the duty of the Attorney General to commence and prosecute to final determination in any court of competent jurisdiction an action at law to collect any tax herein imposed which is delinquent and all penalties and interest accrued."

There is no conflict between section 433 of the Political Code and section 9 of said Motor Vehicle Fuel Act, and the superior court of Los Angeles county was a court of competent jurisdiction to hear and determine this action.

[19] Appellant next contends that the kerosene contained in the motor vehicle fuel which it manufactured and sold is not subject to the license tax. This contention is based upon the finding above set forth.

Section 1, subd. (b), of said act, is as follows:

"Motor vehicle fuel' shall include all gasoline, distillate, benzine, naphtha, liberty fuel and other volatile and inflammable liquids produced or compounded for the purpose of, or which may be used in, operating or propelling motor vehicles except kerosene and except unfinished products requiring rerun, blending, or compounding and which are not used or sold for use in such form for the purpose of operating or propelling motor vehicles."

If appellant's so-called "gasoline" was, in fact, one-half kerosene, nevertheless such a mixture would certainly constitute "a volatile and inflammable liquid," and, it having been sold by appellant to be used in operating automobiles upon the public highways of California, as found by the trial court, was subject to the license tax. When appellant sold this mixture to the public to operate motor vehicles with, no representation was made that it contained one-half kerosene, but when called upon to pay the license taxes thereon, appellant claims for the first time that it was one-half kerosene. Certainly, no court would lend itself to assist appellant to avoid the payment of the license taxes under such a pretense. Moreover, the answer of appellant admits that during the quarter ending March 31, 1924, it refined, manufactured, produced, and compounded 616,269 gallons of motor vehicle fuel, and made a verified return to the board of equalization as required by section 6 of said act, and there is nothing in the record showing that appellant *claimed*

that 50 per cent. of the 616,269 gallons was exempt from taxation when it made and filed said verified report to the board of equalization, and no such claim was made until this action was commenced. For this reason alone no such claim can now be made. When appellant prepared its report, as provided in section 6, then was the time for it to claim any exemptions that it might have. There is nothing in the law to authorize the board of equalization to make any deduction which is not claimed by the applicant.

We are fully satisfied that there is no merit in the appeal, and for that reason the judgment should be and it is affirmed.

We concur: KOFORD, P. J.; STURTEVANT, J.

86 Cal. App. 712

WEYSE et al. v. BIEDEBACH et al.*
(Civ. 4596.)

District Court of Appeal, Second District, Division 2, California. Nov. 15, 1927.

Rehearing Denied Dec. 15, 1927.

1. Quieting title $\S$ 37(1)—Answer denying plaintiffs' ownership and right of possession, and admitting defendant claimed interest in property, held sufficient.

Where complaint, in action to quiet title, alleged ownership and right to possession in plaintiffs, and that defendant claimed interest therein, and praying that he set forth nature of his claim, answer denying plaintiffs' ownership and right of possession, and admitting defendants claimed interest in property, held not insufficient because it failed to set forth nature of defendant's claim as demanded.

2. Adverse possession $\S$ 27, 85(5), 95—Evidence held to show defendant and predecessors exercised rights of ownership, and paid assessments, besides claiming under color of title.

In action to quiet title to lots and adjoining property, evidence held to show that defendant and predecessors in title, following tax sales of property in 1914, claiming under color of title, exercised every right and performed every duty incidental to ownership at sales for delinquent taxes, and paid subsequent assessments thereon.

3. Adverse possession $\S$ 44, 46—"Use and occupation" does not always require constant use, and is sufficient if temporary abandonments do not interrupt possession (Code Civ. Proc. $\S$ 321 et seq.).

"Use and occupation," requisite to adverse possession under Code Civ. Proc. $\S$ 321 et seq., do not always require constant use, it being enough that property is devoted to ordinary use of occupant and temporary abandonments or periods of vacancy, which evince no intention of abandonment of possession, do not interrupt possession.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Use and Occupation.]

4. Adverse possession $\S$ 31—Any visible act demonstrating intention to claim ownership and possession putting legal owner on inquiry or conveying actual notice is sufficient.

As regards adverse possession of land, any visible act which clearly demonstrates intention to claim ownership and possession of land, and either puts legal owner on inquiry or conveys actual notice, is sufficient.

5. Adverse possession $\S$ 25—One claiming by adverse possession need not be in personal occupation, since possession by tenants inures to his benefit.

It is not necessary that one claiming by adverse possession be in personal occupation of land, since possession by tenants inures to his benefit.

6. Landlord and tenant $\S$ 63(1)—Failure of purchaser at tax sale of property of defunct corporation to collect all rents from former corporate director in possession did not effect estoppel of director to deny purchaser's, his admitted landlord's, title.

Where directors of defunct corporation brought action to quiet title to corporation's land, which had been sold at tax sale for delinquent taxes against purchaser at sale thereof, who had entered into possession and collected rents from one of plaintiffs, a former director of corporation owner, held, failure of defendant purchaser at tax sale to collect all rent due from director did not show them in joint possession as effecting estoppel of plaintiffs to claim legal title as against admitted landlord.

7. Quieting title $\S$ 51—Judgment requiring defendant to pay rents received, less taxes paid as condition to quieting title to property, held proper (Pol. Code, $\S$ 3898).

In an action to quiet title to lots, where part of lots were adjudged to be property of plaintiffs, judgment requiring defendant who had been in possession of property to pay rents received by him, less taxes paid by him during time of his possession, as condition to quieting title to property adjudged to belong to him, held proper, under Pol. Code, $\S$ 3898.

8. Quieting title $\S$ 50—Judgment requiring defendant to pay rents received, less repairs made on property, held proper.

In action to quiet title to lots, part of which were adjudged to be property of plaintiffs, judgment requiring defendant to pay rents received on properties adjudged to belong to plaintiffs, less amount spent for repairs and commissions in preservation of plaintiffs' properties, held proper, since defendant was not required to institute separate suit for their recovery.

9. Taxation $\S$ 814(1)—That taxes were irregularly assessed was immaterial, where owner was required to refund taxes paid, regardless of irregularities in assessments rendering taxes uncollectible (Pol. Code, $\S$ 3628).

In an action by directors of corporation which forfeited its charter to quiet title to lands owned by corporation, and which defendants claimed by adverse possession under color of tax deeds, that taxes were assessed in name of the original corporation, and not its successor

after reorganization, was immaterial, since, under Pol. Code, § 3628, in suit to quiet title, owner is required to refund taxes, penalties, costs, and interests, regardless of fact that irregularities in assessments might render taxes uncollectible.

10. Taxation ⚭814(1)—Plaintiffs held required to refund taxes paid by claimant in possession, regardless of fact that several lots could not be identified.

In action to quiet title as against claimant of lots in possession under color of title by tax deeds, plaintiff was liable to refund taxes paid by claimant, regardless of fact that assessments were levied on special parcels, and lots or parcels could not be identified.

11. Adverse possession ⚭117—Finding defendant and predecessors for more than five years were in open, notorious, and exclusive possession, claiming title, held to show "ownership" (Code Civ. Proc. § 325).

In action to quiet title, finding that defendant and predecessors entered property, and for more than five years prior to filing complaint had been in open, notorious, and exclusive possession, claiming to own property under written muniments of title, and had paid taxes for more than five years, *held*, under Code Civ. Proc. § 325, to show defendants' "ownership."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Ownership.]

Appeal from Superior Court, Los Angeles County; Albert Lee Stephens, Judge.

Action by Henry G. Weyse and others against Harvey Biedebach and others, in which named defendant filed a cross-complaint. From a judgment for defendants, and for cross-complainant, and from order denying plaintiffs' motion to set aside decree and to enter another and different decree, plaintiffs appeal. Order and judgment affirmed.

See, also, 261 P. 1092, 1096.

Charles Lantz, Winslow P. Hyatt, Frederick C. Huber, and Samuel M. Garroway, all of Los Angeles, for appellants.

Fred W. Heath, of Los Angeles, for respondents.

CRAIG, Acting P. J. It appears that on September 28, 1920, appellants filed the complaint upon which this suit is based, alleging that at all times from July 2, 1903, until March 1, 1913, the Antioak Leather Company was a corporation organized and existing under and by virtue of the laws of the state of California, and that on said last-mentioned date its charter was forfeited for nonpayment of the state license tax; that appellants were the directors of said corporation, and upon such forfeiture they became trustees of the stockholders and creditors of said corpora-

tion, and entitled to the possession, management, and control of its property and assets. As such trustees, appellants instituted this proceeding to quiet title to lots 1 to 39, inclusive, of the Hay Tract addition to Nadeau Park, and adjoining property, in Los Angeles county, of which they alleged said corporation was the owner from December 29, 1904, until the forfeiture of its charter, and that the plaintiffs thereupon succeeded to and had ever since been vested with, legal title to the real properties described in the complaint. They prayed that they as such trustees be adjudged to be the owners in fee and entitled to possession thereof as against the defendants, and that the latter be forever enjoined and debarred from asserting any claim to or lien upon any part of said premises adversely to the plaintiffs.

The defendant Biedebach, respondent herein, filed a separate answer, denying the formal allegations of the complaint for want of knowledge or information, and specifically denying directly that on March 1, 1913, the Antioak Leather Company was, or that the plaintiffs, as trustees or otherwise, had been, the owners or entitled to possession of any of said real property; affirmatively alleging that the answering defendant claimed to own an estate in all of the property described in the complaint, except in nine lots numbered 2, 8, 12, 24, 26, 31, 32, 33, and 34; that the plaintiffs and their predecessors in interest had been dispossessed and disseized of all of said property described in their pleading since on or about March 1, 1913; that their action was barred by section 318 of the Code of Civil Procedure, and that all of said property was deeded to the state of California more than five years prior to the institution of said proceeding.

Biedebach also filed and served a cross-complaint, wherein it was alleged that he and his predecessors in interest had, for a period of more than five years prior to the commencement of this action, been in open, notorious, exclusive, and adverse possession of all of the real property involved therein (except the nine lots above mentioned), and "during all of said time have been occupying said premises and claiming same against the whole world, and has paid all taxes levied and assessed against said premises during said time." By a second and separate cause of action, he alleged that he was the owner and in possession of said property; that his title was based upon certain tax deeds executed by the tax collector of Los Angeles county; that, in pursuit of the title of the state of California, the cross-complainant and his predecessors in interest had paid for taxes, penalties, and costs, including redemptions, for a period of eleven years continuously from 1908 to and including the year 1919, the total sum of \$4,506.46. The cross-com-

plainant prayed that his title to the property so claimed be cleared as against the plaintiffs.

The parties waived a jury, and, at the close of the trial before the superior court, substantially all of the allegations of the plaintiffs were found to be true, except that more than five years prior to the commencement of this suit respondent Harvey Biedebach and his predecessors in interest entered upon and took possession of lots 1, 3, 4, 5, 6, 7, 22, and 23 of the property described in the pleadings; that he had been in the open, notorious, and exclusive possession thereof; that he claimed to own the same under written muniments of title against the world, and had paid all taxes levied and assessed against said lots for more than five years previously to the filing of the complaint; that the plaintiffs, as trustees, had not during the period of time last mentioned been seized or possessed thereof, but that, with the exception of said eight lots, the plaintiffs, as trustees, were the owners and entitled to possession of all the real property in suit. The court also found that, prior to the tax sales, under which respondent claimed title, all of the property described in the complaint was inclosed by a substantial fence sufficient to turn and inclose livestock; that certain buildings had been erected on parts thereof, without regard to lot line, which said fence and buildings had been maintained by the plaintiffs to the date of trial, except that the respondent "on April 10, 1921, and on several occasions subsequent thereto, made certain repairs upon said fence." It was further found that the ownership of Biedebach to said eight lots was based upon certain tax deeds executed by the tax collector during the years 1914 and 1919, for nonpayment of state and county taxes for the year 1908, and also upon a claim of title by adverse possession under such written muniments; that each of said tax deeds was based upon an assessment roll which had never been authenticated by affidavits of the county auditor; that respondent and his predecessors in interest had from time to time tenanted portions of all of the premises, and had collected rents aggregating the sum of \$5,352, \$3,859.26 of which he had collected from tenants of the plaintiffs' property; that the assessment of 1908 was void, but that the amounts so assessed were due the county of Los Angeles, except as to an exposition tax of three mills on each \$100 valuation. The findings, conclusions of law, and decree respectively determined and required that the net rents collected by respondent upon appellants' portion of the premises exceeded the aggregate taxes, penalties, costs, and interest paid by respondent, which he should pay to appellants, or, that upon the failure of such payment, they have execution therefor.

This appeal is taken from those specific parts of the judgment: (1) excepting the eight lots numbered 1, 3, 4, 5, 6, 7, 22, and 23, from

the decree in favor of plaintiffs; (2) declaring that, by reason of the adverse possession of said lots, respondent and his predecessors in interest, M. Dawson and A. W. Brode, Biedebach is the owner and entitled to possession thereof, and that his title be quieted as against all claims of appellants; (3) allowing respondent to deduct from the total rents, issues, and profits received by him the taxes, penalties, interest, and costs above mentioned, in the sum of \$613.54, and withholding from appellants the rents, issues, and profits collected by respondent for the use of said eight lots; and (4) from an order denying the plaintiffs' motion to set aside the decree and to enter another and different decree "in conformity with the findings of fact and plaintiffs' notice of intention to move for such order."

[1] Before entering into a discussion of the principal grounds upon which a reversal is sought, we pause to observe appellants' attack upon the sufficiency of respondent's answer. The complaint was in usual form, alleging ownership and right to possession of the real property described, that the defendants claimed some interest therein, and praying that the latter be required to set forth the nature of their claims. The answer denied the plaintiffs' ownership and right to possession, and admitted that the defendant Biedebach claimed an interest in the property. It is contended that the answer was insufficient, for the reason that it failed to set forth the nature of the defendant's claim, as demanded by the complaint. This question was squarely passed upon adversely to appellants in *Burris v. Kennedy*, 108 Cal. 331, 344, 41 P. 458, 461, wherein it was said:

"It is not a bill of discovery, and defendants are not required to state the nature of their claim for the benefit of plaintiff, or simply to have it passed upon by the court."

The same rule was announced in *United Land Ass'n v. Pacific Improvement Co.*, 139 Cal. 370, 69 P. 1064, 72 P. 988.

[2] It is insisted by appellants that there was no actual, continuous, uninterrupted adverse possession of any portion of the property, or dispossession of the plaintiffs by respondent or his predecessors in interest, for any five-year period. It apparently is not respondent's contention that appellants were in the first instance ejected from, or dispossessed of, the premises, his assertion being that they abandoned them, and that respondent and his predecessors in interest paid all taxes and penalties levied and assessed thereon, and occupied them either in person or by tenant for a period of more than five years next preceding the institution of these proceedings; that tenants in possession were notified in writing to pay rent to respondent or to vacate, in at least one instance a tenant being one of the plaintiffs, and that such notices

were promptly observed without question; that appellants removed machinery and other personal property therefrom; that the premises were inclosed by fences and buildings; and that, as the fences or other structures required, they were repaired by the respondent or his vendors.

It affirmatively appears without contradiction that, prior to the forfeiture of its corporate charter by the Antioak Leather Company, and during the year 1908, all taxes levied and assessed upon the realty described in the complaint were permitted to become delinquent, and that in July, 1914, or more than a year after such forfeiture, the property here involved was sold for taxes and penalties; that one Brode purchased lots numbered 7, 22, and 23, and one Dawson purchased lots numbered 1, 3, 4, 5, and 6 at said sale. Respondent Biedebach was present, and purchased lot 21, but this latter parcel was awarded to appellants by the trial court, and is not in controversy here. It also was testified, and not denied, that immediately following the sale each of the vendees entered the premises, took possession, and posted signs notifying the public in general that he was the owner of the property to which they were attached. Dawson testified that following his purchase he, together with his son, defendant Brode, and Biedebach went upon the lots which he had bought, measured them, and thereafter occasionally repaired the fence, but that he appointed Brode as his agent to collect rents. Brode testified that he collected rents from such persons as were on the premises, or notified those who refused to pay rent that they must vacate, and that the latter complied with his demand in this respect; that he posted signs offering a reward of \$50 for the conviction of any person removing or disturbing any of the property, and \$25 for information leading to the arrest and conviction of any one trespassing thereon; that he collected rents from appellant J. C. Hentzy, one of the former directors of the Antioak Leather Company and the trustee to whom it appears the others had delegated the management of their interests in whatever remained of the corporate property. It appears by the testimony of witnesses and exhibits in the record that Hentzy was absent much of the time, and that neither he nor any other representative of the defunct corporation pretended to occupy the property except as a place of storage for certain machinery and other personalty until they were ultimately sold and removed. True, he wrote an occasional letter to one J. C. Higgins, who wrecked and sold the machinery, requesting that he collect and forward "another month rent for me as I will be short"; that he sell the boiler, etc., but there is documentary and other evidence strongly tending to show that neither the corporation nor its directors or trustees ever operated the plant, asserted

any ownership in the property, other than as above recited, or paid any taxes after the year 1913. In fact, it does appear that they were without funds, and that they had no intention of occupying the premises, and that upon demand Hentzy paid rents to respondent Biedebach as heretofore stated.

Both Dawson and Brode conveyed their lots to the respondent Biedebach. The latter testified that he personally posted the notices already mentioned; that he leased a portion of the property to a Japanese, and other portions to one Coffman, California Vegetable Union, a Mr. Morino, and others respectively; that former tenants who had livestock or other personal property upon the premises were notified to pay specified rentals or to vacate, and that in some instances tenants vacated, while others paid rents to the witness. Checks were introduced in evidence, and respondent testified that they were received by him from Hentzy as rent for the portion of the premises upon which machinery and other effects of the company were permitted to remain until disposed of. Brode, Dawson, Biedebach, and others swore that at no time was any one known to have occupied the premises, or to have offered any claim to or objection to the witnesses occupying, improving, or renting any portion of the property. Biedebach expended considerable amounts of money in reroofing the Vegetable Union building, fumigating a cottage, and repairing doors, windows, fences, plumbing, etc., and swore that none of the taxes remained unpaid at the time of the trial, except those assessed for 1920-1921.

It thus becomes apparent that the plaintiffs not only displayed no intention of occupying or repairing the premises in question, but paid no taxes thereon after 1913, while respondent and his predecessors, following the tax sales, exercised every right and performed every duty incidental to ownership, having purchased at sales for delinquent taxes and paid subsequent assessments, besides claiming under a color of title.

"Where, as in the present case, the tax has been allowed to become delinquent and a sale has taken place, and, so far as appears, a redemption has been made thereof, while the party or his successor in interest was in undisturbed possession and all this is done in good faith, we see no reason why the same should not be held to operate as a payment and we think it is sufficient to bring the occupant within the terms of the statute which requires him to pay the taxes upon the property claimed." *Owsley v. Matson*, 156 Cal. 401, 405, 104 P. 983, 985. To the same effect is *Gray v. Walker*, 157 Cal. 381, 108 P. 278.

[3-5] It is further objected by appellants that neither actual nor constructive possession by respondent and his predecessors in interest was shown, and that adverse possession was therefore not established, within the in-

tent of sections 321 et seq. of the Code of Civil Procedure. Authorities are cited by appellants which hold that adverse possession must be shown to have been actual, open, and not clandestine nor interrupted. It is argued therefrom that neither respondent nor his predecessors appear or claim to have been personally in occupation of the premises in suit, or to have continuously had their representatives or tenants in possession of appreciable portions thereof continuously; that "actual possession means that possession which is accompanied by real and effective enjoyment of the property."—Citing *Lacoste v. Eastland*, 117 Cal. 673, 49 P. 1046. And that "interruption of adverse user, however slight, prevents acquisition of title by prescription"—Citing *Ball v. Kehl*, 95 Cal. 613, 30 P. 782. Many other cases are cited to the same effect. As we have heretofore observed, however, besides the fact that the appellants, according to several witnesses, at no time indicated an intention of occupying the premises after the tax sales, and were not known to have displayed even an intention of interrupting the quiet occupation by respondent and his predecessors in interest, the latter made repairs, rented to various tenants, and collected the rents from all who used the property for any purpose, including the appellants themselves.

The rule is well established in California that the use and occupation requisite to adverse possession do not always require "constant" use. *Myers v. Berven*, 166 Cal. 484, 137 P. 260. It is enough that the property be devoted to the ordinary use of the occupant, and temporary abandonments or periods of vacancy which evince no intention of abandonment do not interrupt the possession. *Montgomery & Mullen L. Co. v. Quimby*, 164 Cal. 250, 128 P. 402; *Botsford v. Eyraud*, 148 Cal. 431, 83 P. 1008; *Goodrich v. Mortimer*, 44 Cal. App. 576, 186 P. 844. Furthermore, any visible act which clearly demonstrates an intention to claim ownership and possession, and either puts the legal owner upon inquiry or conveys actual notice, is sufficient. *Franz v. Mendonca*, 131 Cal. 205, 63 P. 361. It is not necessary that one claiming by adverse possession be in personal occupation. Possession by tenant inures to his benefit. *Lloyd v. Mills*, 68 W. Va. 241, 69 S. E. 1094, 32 L. R. A. (N. S.) 702; *Sutton v. Whetstone*, 21 S. D. 341, 112 N. W. 850; *Ala. State Land Co. v. Hogue*, 164 Ala. 657, 51 So. 320; *Wright v. Giles*, 60 Tex. Civ. App. 550, 129 S. W. 1163.

Many authorities are cited by appellants which hold that a mere claim of ownership, accompanied by intermittent periods of occupancy, does not constitute a possession under color of title, without interruption, contemplated by the statute. It appears, however, that the respondent and his predecessors in interest personally visited the property in

question at least once a month, and that, although their tenants were not in possession of all the eight lots all of the time, yet portions of the whole were occupied by lessees from the time of redemption until suit was filed, and at no time did appellants interrupt by actual possession or demand therefor. In fact, as we have observed, they became tenants of respondent, and paid rent to him; and to all intents and purposes vacated as soon as their personal property could be disposed of. It appears by correspondence in the record that Hentzy urged his agents to sell machinery and other personalty of the defunct corporation at as early date as possible.

[6] It is next contended that Brode, one of respondent's vendors, did not retain in good faith the lots which he had purchased at the tax sale; that, when Hentzy stated that the tax deeds were worthless, Brode replied:

"I told him it would take the Supreme Court to decide that, and that until they did decide that we would have to have some rent."

This statement is assigned by appellants as an indication of doubt in Brode's mind as to his legal rights, but appellants fail to quote the entire answer of Brode in this respect:

"And he made arrangements to pay me rent, and paid it to me as long as the tenants were there. * * * I kept some record of money received from Mr. Hentzy as rental for the premises I purchased at the tax sale. I have here all I was able to find. I think there is another check or two I might have found. Sometimes he would indorse the check he got, and sometimes he would give me one of his own. * * * I gave him a receipt for the payments he made. I kept a carbon of the receipts. * * * I collected rents from Mr. Hentzy five or six months."

Appellants argue that, since there is no showing that Hentzy paid to Brode all of the rents which the former collected from tenants, it should be assumed that both were equally in possession, and that payment of rent by Hentzy to Brode should not be permitted to estop appellants from claiming the legal title. We think from the facts already recited that this position is untenable. Brode purchased at the tax sale, and his deeds, whether valid or otherwise, constituted at least a color of title. Tenants were notified to pay rents to him, and notices were prominently posted upon the premises, signed by Brode as owner. The tenants who may have occasionally and in a few instances paid rent to Hentzy could not be said to have altered the rights or status of either party, since Hentzy paid Brode whatever rents Brode demanded, and, if he collected and retained moneys from certain tenants, knowing, as he did, that Brode claimed the property by purchase, he is not justified under equitable principles in charging his admitted landlord

with bad faith. *Franklin v. Merida*, 35 Cal. 558, 575, 95 Am. Dec. 129, cited by appellants, merely holds that one in possession of land who is induced by mistake, fraud, or misrepresentations to accept a lease from another, may, upon discovery of the truth, go back of the lease, and dispute the title of the fictitious landlord, and is not estopped to do so by the apparent relationship of landlord and tenant. Obviously that case is not here in point except in so far as it approves the respondent's right to show that he was not in fact a tenant of appellants. They apparently abandoned the property, paid no taxes, and made no effort to set aside the tax deeds. Brode did not lease from Hentzy, and the former collected rents, but was never requested to pay rent to either of the appellants. Hence there is no pretense in the record that Brode or his successor in interest, Biedebach, was ever considered as appellants' tenant in any sense of the term.

[7] Respondent alleged in his cross-complaint that, in pursuit of the title of the state in and to said premises, he and his predecessors in interest had paid out and expended for taxes, penalties, and costs assessed and levied thereon, including redemptions, for the years 1908 to 1919, the aggregate sum of \$4,506.46, not including interest. The trial court found that the tax deeds, owing to errors in procedure at the time of sale, were void, but that the taxes, excepting the exposition tax of one mill on each \$100 valuation, were justly due the county, and that respondent and his predecessors in interest had paid them. The eight lots heretofore mentioned, which it was found that respondent and his vendors had acquired by adverse possession, were adjudged to be the property of respondent, and all other properties described in the plaintiffs' complaint were awarded to the latter. As a condition to quieting the respondent's title to said eight lots, the judgment required that Biedebach pay to the plaintiffs or their attorneys, or deposit in court, the amount of rents, issues, and profits received by him from the portions of the property decreed to plaintiffs, to wit, the sum of \$4,487.10, less the proportionate share of taxes paid thereon, and \$543.40 expended in connection with repairs, expenses, and commissions, or \$613.54. Appellants contend that, due to a blending of several taxes, the entire assessment of 1908 was void, and that taxes paid thereafter were not paid by Biedebach in pursuit of the state's title, but, if paid at all, were remitted to his predecessors in interest; that he bought from them the mere naked title, if any there was; and that, having failed to plead it, he acquired no right to compel the appellants to reimburse him for any of the taxes so paid. Section 3898 of the Political Code provides, in part, as follows:

"Whenever in any action at law, it has been or shall be determined by a court that the sale

and conveyance provided for in this and the preceding section or in section three thousand seven hundred seventy-one of this Code heretofore or hereafter made are void for any reason, and that the purchaser from the state may not be finally awarded the property so purchased, no decree of the court shall be given declaring a forfeiture of the property until the former owner, or other party in interest, shall have repaid to the purchaser the full amount of taxes, penalties and costs paid out and expended by him, to be determined by the court, in pursuit of the state's title to the property so sold."

Thus it would appear that the appellants or their successors in interest, if there were such, were required by statute to pay to the purchaser (that is, Biedebach's predecessor in interest as to each respective lot) the amount of taxes, penalties, and costs which had been expended in pursuit of the state's title. Appellants contend that such predecessor alone, should be permitted to collect these refunds, and that they should not have been deducted from the rents, issues, and profits collected by Biedebach and his predecessors from the properties of appellants. Said predecessors, however, conveyed to respondent in each instance "all his estate, right, title, interest, property, possession, claim and demand whatever, as well in law as in equity in and to the property." In *Squires v. Estey*, 33 Cal. App. 287, 165 P. 34, it was held that, regardless of the fact that defects and irregularities exist in an assessment which render a tax deed void and the taxes uncollectible by the state, still the case would fall within the rule announced in *Holland v. Hotchkiss*, 162 Cal. 366, 123 P. 258, L. R. A. 1915C, 492, that:

"Where the owner comes into equity asking equitable relief to remove or cancel a tax deed or sale as a cloud upon his title, or to obtain a judgment which, in effect, will invalidate such sale or deed, the court should refuse any relief except upon the condition that he first repay to the tax purchaser, or his grantee or assignee, the taxes, penalties, interest, and costs justly chargeable upon the land and which the purchaser has paid at the sale, or afterward upon the faith of it, with legal interest from the time of such payment, less rents received, if any, if the purchaser has been in possession."

We think the two cases last mentioned effectively foreclose appellants' right to withhold such taxes, penalties, costs, and interests, by whomsoever actually paid to the state, since the respondent alleged that he had expended the sums specified, and it would surely be inequitable to restore the property to appellants free and clear of all taxes assessed for several years. It is further complained that taxes paid subsequently to the tax sale were not paid "in pursuit of the state's title," and should be excluded, but this question also is answered by the authorities just quoted, which embrace taxes paid

by one holding a tax deed "afterward upon the faith of it, with legal interest from the time of such payment."

[8] As to the question of repairs, commissions, etc., expended in preservation of appellants' properties, these moneys also were paid out for the use and benefit of the owners, and we know of no rule requiring one to institute a separate suit for their recovery. Respondent was not a trespasser, but occupied the premises in good faith, under a deed from the state. It would scarcely be questioned that, if compelled to relinquish the property which he repaired, he would have a cause of action for his just expenses in that behalf.

[9] It appears that the corporate owner of the real property taxed was at one time known as the Anti Oak Leather Manufacturing Company, and that thereafter, through reorganization, it was named the Antioak Leather Company, but that all taxes were assessed in the name of the original company. Appellants argue, and cite authorities announcing the rule, that, while under section 3628 of the Political Code a mistake in name will not invalidate an assessment, it is the duty of the assessor to assess personal property in the true name of the owner, else the assessment is void, citing *Lake County v. Sulphur Banks Q. S. M. Co.*, 66 Cal. 17, 20, 4 P. 876. However, appellants' authorities in this regard are not applicable in the instant case. *Lake County v. Sulphur Banks Q. S. M. Co.*, and others of like character, were direct suits for the collection of taxes which were held to be invalid. As we have already observed, in a suit to quiet title the owner will be required in equity to refund taxes, penalties, costs, and interests, regardless of the fact that defects and irregularities in the assessments might render the taxes uncollectible by the state. *Squires v. Estey*, supra.

[10] Appellants insist that, although assessments were attempted to be levied upon specific parcels of land, the streets had been abandoned, and that there was no means of ingress to or egress from the property, except by way of Slauson avenue, from which it is said that the several lots or parcels could not be identified. It appears, however, that Center street and First street have been in use since 1905, the property was inclosed, and on the easterly side a gate was maintained; that, following the tax sale, the purchasers measured their properties for the purpose of establishing their lines, and a chart of the Hay Tract addition to Nadeau Park is embodied in the record, showing the various lots, with their boundaries. However, from what has been said as to the actual payment of taxes for the use and benefit of appellants, which in equity they must be held liable to refund regardless of the validity of the assessments, this point requires no further discussion.

[11] As to the fourth and last ground urged for reversal, wherein it is contended that the decree should have been set aside, and another and different decree entered in "conformity with the findings of fact," appellants base their entire argument upon the points hereinbefore discussed. Their motion in the trial court stated that "there is a failure to find as a fact that the defendant Biedebach and his predecessors in interest have been in continuous, adverse possession of any of the property described in plaintiffs' amended complaint for more than five years immediately preceding the commencement of this action." The court did find that "the defendant Harvey Biedebach, and his predecessors in interest, entered upon lots 1, 3, 4, 5, 6, 7, 22, and 23 of the above-described property, and, for more than five years prior to the filing of the complaint herein, have been, and said defendant has been, in the open, notorious, and exclusive possession, claiming to own the same under written muniments of title, against the whole world, and has paid all taxes levied and assessed against the same for more than five years previous to the bringing of this action. * * *" From what has already been said, it is apparent that such finding comports with section 325 of the Code of Civil Procedure, requiring that one claiming by adverse possession shall have paid the taxes for at least five years successively, and the decree based thereon recites that respondent "is held to be the owner of and entitled to the exclusive possession of said last-named lots, and that his title thereto be quieted. * * *"

No error prejudicial to appellants appearing, the order denying their motion to set aside said decree, and the judgment, are affirmed.

We concur: THOMPSON, J.; COLLIER, Justice pro tem.

86 Cal. App. 736

WEYSE et al. v. BIEDEBACH et al. ★
(Civ. 4775.)

District Court of Appeal, Second District, Division 2, California. Nov. 15, 1927.

Rehearing Denied Dec. 15, 1927.

I. Appeal and error $\S$ 173(2)—Objection that corporation could not diminish number of directors, urged for first time on appeal, cannot be considered (Civ. Code, $\S\S$ 290, 362).

In action by directors of a defunct corporation to quiet title to its property, defendant's objection that board of directors of the corporation could not, under Civ. Code, $\S\S$ 290, 362, be diminished to five directors without vote of majority of stockholders thereof being urged for the first time on appeal, has been waived, and cannot be considered.

2. Abatement and revival ⚡46—Objection that diminution of number of directors of corporation was ineffectual can be raised only by demurrer or answer (Civ. Code, §§ 290, 362; Code Civ. Proc. §§ 430, 433, 434).

In action by directors of a defunct corporation to quiet title to its property, where board of directors, formerly consisting of seven members, voted that the number should be diminished to five, and all five directors were parties plaintiff, defendant's objection that, under Civ. Code, §§ 290, 362, number of directors could not be diminished without vote of majority of stockholders, amounting only to plea in abatement, based on alleged incapacity of plaintiffs to sue, could, under Code Civ. Proc. §§ 430, 433, 434, be raised by demurrer, if fact thereof appeared on face of complaint, and, if not, must be raised by answer.

3. Adverse possession ⚡114(1)—Evidence held not to show claimants' actual continued occupation and possession for five years, in addition to payment of taxes levied (Code Civ. Proc. §§ 322, 323, 325).

In action to quiet title to lots, one of which defendant claimed under tax deed, evidence held not to show title therein in defendant by actual continued occupation and possession for five years, in addition to payment of taxes levied and assessed thereon, as required by Code Civ. Proc. §§ 322, 323, 325.

4. Adverse possession ⚡71(2)—Defendant claiming lot under apparently valid deed was not barred from claiming by adverse possession because deed was void or voidable.

Where deed under which claimant of lot by adverse possession was apparently valid, fact that it was void or voidable, or had been executed by one having no title, would not constitute bar to his defense to former owner's action to quiet title or to defendant's cause of action to quiet title therein by cross-complaint.

5. Quietening title ⚡43—Question of validity of exceptions or proper description is not before court, where decision thereon did not affect validity of deeds in suit.

Where, in action to quiet title, defendant claimed that plaintiff could not request judgment quieting title because conveyances through which prior owner acquired title did not clearly describe property, and hence legal title did not vest because of exception in description of property in deed to it, question as to validity of exceptions is not before court, where decision thereon would not affect validity of corporation's deeds.

6. Deeds ⚡137—Exception withdraws part of thing described as being granted, and which would pass but for excepting clause.

An exception withdraws some part of the thing described as being granted, and which would pass but for the excepting clause.

7. Deeds ⚡140—Granting part is not invalidated by defect in exception, but exception becomes ineffectual, if not properly described.

The granting part of a deed is not invalidated by a defect in the exception, but the ex-

ception itself becomes ineffectual, if not properly described, and the grant remains in force.

8. Taxation ⚡746—Tax deed held not void because executed by sheriff after term (Hittel's Gen. Law, § 6885).

That deed to plaintiff's predecessors was executed by sheriff after his term had expired held not to make deed void, where, under Hittel's Gen. Law, § 6885, in force at time of execution of deed, outgoing sheriff completed execution of writs which he had begun.

9. Appeal and error ⚡877(2)—Defendant, not having established defense to plaintiff's assertion of title as against him, cannot complain of decree quieting title in plaintiffs.

Where, in suit to quiet title, defendant claimed title by adverse possession under tax deeds, and where deeds from the state did not and could not convey title, and defendant did not establish a defense to plaintiff's assertion of title as against him, he could not complain of decree quieting title in plaintiffs.

10. Appeal and error ⚡173(4)—Defendant, not having objected to amount and terms of tender, cannot first urge on appeal that tender was subterfuge (Code Civ. Proc. § 2076).

Under Code Civ. Proc. § 2076, requiring specific objection to amount and terms of tender as requisite to subsequent complaint thereon, where defendant made no objection when plaintiffs tendered him \$4,000, he cannot first urge on appeal that, since \$4,000 was not the exact amount, it was but a subterfuge, and constituted no tender.

Appeal from Superior Court, Los Angeles County; Albert Lee Stephens, Judge.

Action by H. G. Weyse and others, as trustees of the creditors and stockholders of the Antioak Leather Company, against Harvey Biedebach and others. From a part of judgment rendered for plaintiffs, named defendant appeals, and plaintiffs appeal from orders relieving named defendant from default and allowing him to file bill of exceptions. Affirmed.

See, also, 261 P. 1086.

Fred W. Heath, of Los Angeles, for appellant.

Charles Lantz, Winslow P. Hyatt, and Frederick C. Huber, all of Los Angeles, for respondents.

CRAIG, Acting P. J. This is an appeal by the defendant Biedebach from the same judgment from which the plaintiffs and respondents herein appealed in *Weyse v. Biedebach* (Civ. 4596), decided by this court on November 15, 1927, and reported in 261 P. 1086. Respondents also appealed from orders relieving Biedebach from default and allowing him to file his bill of exceptions, and settling the same, in this appeal. *Weyse v. Biedebach* (Cal. App.) 261 P. 1096.

[1] The first point here to be decided is as to whether or not the parties plaintiff were

legally empowered to maintain this suit to quiet title. It is contended by appellant, and appears from the record, that on April 21, 1910, the articles of incorporation of the Antioak Leather Company provided for a board of directors consisting of seven members; and that on that date, by a resolution of all of its stockholders, it was voted that this number be diminished to five directors, and on the same date, by unanimous vote, a board of five members was elected, consisting of H. G. Weyse, A. W. Hutton, J. C. Hentzy, W. E. Hutton, and Allan Melrose, the five plaintiffs in this suit. At that time the Civil Code, §§ 290 and 362, provided that a majority of the stockholders of a corporation might diminish the number of directors; that a certificate of such change must be filed with the secretary of state and county clerk; and that no provision of said sections should be construed as authorizing an increase or diminishing of the number of directors without complying with the special provisions of the Civil Code. The statutory certificate mentioned was not filed. One of the original seven directors died, and one resigned. Thereafter, and on March 1, 1913, the corporation forfeited its charter by failure to pay its state license tax. During the fall of 1920 appellants Weyse and the Huttons met in the offices of the latter, and elected to institute a suit to quiet title to lots 1 to 39, inclusive, of the Hay Tract Addition to Nadeau Park, and adjoining property, as a result of which meeting this action was commenced.

[2] It is contended by appellant that, having failed to file the certificate required by the Civil Code, the attempted diminution of the number of directors was ineffectual that the legal board comprised seven members, two of which offices were vacant, and hence that a quorum consisted of at least four. It is argued therefrom that the three directors who instigated the suit—A. W. Hutton, W. E. Hutton, and H. G. Weyse—had not legally any authority to prosecute this action. It appears however, that all five surviving directors were parties plaintiff, and, in any event, appellant's objection to the proceeding amounts to no more than a plea in abatement based upon the alleged incapacity of the plaintiffs to sue. This is an objection which must be presented by demurrer, if the fact appears upon the face of the complaint, and, if it does not so appear, it must be presented by answer. Code Civ. Proc. §§ 430, 433, 434; Labory v. Orphan Asylum, 97 Cal. 270, 32 P. 231; First Nat. Bank v. Henderson, 101 Cal. 307, 35 P. 899; Ward Land & S. Co. v. Mapes, 147 Cal. 747, 82 P. 426; Nicholson v. Auburn Gold Min. Co., 6 Cal. App. 547, 92 P. 651; Reed & Co. v. Harshall, 12 Cal. App. 703, 108 P. 719; Riverdale Min. Co. v. Wicks, 14 Cal. App. 526, 112 P. 896; Crittenden v. Superior Court, 166 Cal. 340, 136 P. 287; Agricultural Club v. Hirsch & Son, 39 Cal. App. 433, 179 P. 430. Appellant having raised this

question for the first time on appeal, it has been waived, and cannot now be considered. California Savings & Loan Soc. v. Harris, 111 Cal. 133, 43 P. 525.

[3, 4] Upon the merits of the case, as we observed in Weyse v. Biedebach (Civ. 4596), 261 P. 1086, supra, the appellant in this case purchased lot 21, and thereafter acquired from Dawson and others lots 1, 3, 4, 5, 6, 7, 22, and 23, but the trial court rendered judgment in his favor as to the last-mentioned eight lots only, decreeing to the plaintiffs all other properties in suit, including lot 21. Appellant contends that his title to this lot should also have been quieted. As heretofore determined by this court, in affirming the judgment in the other appeal, the tax deeds were invalid, but constituted sufficient color of title to support an adverse possession, provided all of the other elements were shown to have existed. Appellant testified that in July, 1914, he and the purchasers of adjoining lots measured their properties, and posted notices bearing their names and addresses, with the word "Owner" thereon; that there was an oil tank on lots 21 and 22; that he visited the property frequently, measured the oil, which he sold, and thereafter removed the tank; that he paid all taxes on lot 21 from 1908 to 1920, and that at no time did any one interfere with, or question, his right to possession; that he leased lot 21 to a Japanese in 1917, for a period of three years. During cross-examination, however, appellant admitted that his tenant paid but \$10 on account of rent, planted nothing, and moved away at the end of the first year. Appellant's own witnesses swore that, although they had seen live stock and grading implements of respondents' tenants on the property, they had not seen other use made of it, and one who had known the property for 20 years admitted that he had never seen Biedebach on the lot. We find no evidence tending to show that he did more than sell the oil and tank, and to lease the lot in 1917, for which he received practically no rent. Aside from paying taxes, no evidence is called to our attention which tends to indicate that appellant exercised dominion over, or occupied, personally or otherwise, the lot in question, except for a few months. The trial court had all of the witnesses before it, and was cognizant of the circumstances. It decided adversely to appellant in this instance, and, although a motion was thereafter made for modification of the decree, the motion was denied. We are impelled to remark that the briefs in this case are exceedingly meager and of slight assistance. In many instances quotations from the record do not indicate where therein they may be found, and authorities cited are not applicable. Nevertheless, we have made an exhaustive study of the evidence and a thorough examination of the statutes and decisions of this state, from which we are con-

vinced that, even without the application of the salutary rule in courts of review that all intendments must be resolved in favor of the decrees of tribunals of original jurisdiction, a judgment for appellant as to lot 21 would not have been justified. True, the deed under which he claimed this lot was apparently valid, and in such a case the fact that it was void, or voidable, or had been executed by one having no title, would not constitute a bar to his defense or to a cause of action to quiet title by cross-complaint. *Millett v. Lagomarsino*, 107 Cal. 102, 40 P. 25; *Webb v. Winter*, 135 Cal. 455, 67 P. 691. But to sustain a title by adverse possession it is incumbent upon the claimant to show actual, continued occupation and possession for a period of five years, in addition to the payment of state, county, and municipal taxes levied and assessed upon the property. Code Civ. Proc. §§ 322, 323, 325. This requirement appellant did not meet.

[5] Appellant next insists that respondents ought not to recover a judgment quieting title to other property described in the pleadings, because, it is asserted, the conveyances through which the corporation originally attempted to acquire title did not correctly describe the property, and hence that the legal title did not vest in the corporation or in its trustees. Specifically stated, it is contended that both the deed to the Antioak Leather Company and to its vendor described the property conveyed, with the following provision:

"And leaving residue of land in said southwest quarter of said section belonging to or claimed by said Anton Mallachowitz and wife in as nearly a square form as possible in northwest corner of said lands lying east of and fronting said railroad. * * *"

It is also asserted, and appears from copies of conveyances in the record, that the deed to an antecedent owner contained the following language:

"Also all that piece or parcel of land being a portion of the southwest quarter, section 15, township 2 south, range 13 west, San Bernardino Meridian, lying immediately adjoining the Los Angeles and San Pedro Railroad, on the westerly side thereof, containing 12 acres of land more or less." "Also all that piece or parcel of land being a portion of the southwest quarter, section 15, township 2 south, range 13 west, San Bernardino Meridian, lying immediately adjoining the Los Angeles and San Pedro Railroad on the easterly side thereof, and near the south line of said quarter section, the said land being in a square form or piece on the line of said railroad containing eight acres. * * *"

It is contended by appellant that the map of the tract in controversy shows the railroad making an acute angle with the north line, so that a square is impossible; that the property lying on the westerly side of the railroad is not bounded either on the north or

the south side; and that, as to the portion last mentioned, "near may mean an inch, a foot, a rod, or a chain distant from the south line," and that in these three instances the descriptions are so indefinite as to render any attempted conveyance containing them ineffectual, and therefore invalid.

[6, 7] With respect to the "square," as well as the 12-acre piece and that of 8 acres "near the south line," our attention is not called to any attempted showing in the record, and we have found none, to the effect that either one was included in the conveyances, or intended to be included. As to the piece first mentioned, the deeds, as already observed, described certain lands, and were limited as "leaving a residue * * * in as nearly a square form as possible." One Reyes originally acquired title to the entire southwest quarter of section 15 by United States patent, and thereafter Mallachowitz acquired the south half of said quarter. Later conveyances excepted the 8 acres, as well as the 12 acres, more or less, here in controversy. We are concerned only with the question as to whether or not the deeds to the Antioak Company were valid. An exception withdraws some part of the thing described as being granted, and which would pass but for the excepting clause. *Sears v. Ackerman*, 138 Cal. 583, 72 P. 171; *Pitcairn v. Harkness*, 10 Cal. App. 295, 101 P. 809. The granting part of a deed is not invalidated by a defect in the exception, but the exception itself becomes ineffectual if not properly described, and the grant remains in force. *Marcone v. Dowell*, 178 Cal. 396, 173 P. 465; *Tennant v. Tennant M. Home*, 167 Cal. 570, 140 P. 242; *Lange v. Waters*, 156 Cal. 142, 103 P. 889, 19 Ann. Cas. 1207. Hence the question as to the validity of the exceptions, or the proper description of them, is not here before the court, for their decision would not affect the validity of the deeds in question.

[8] H. M. Mitchell, as sheriff, executed to A. H. Wilcox, one of the intervening owners, a deed of certain of the property here involved, on April 12, 1880. It is asserted that the sheriff's term had then expired, and that said deed was void because the sheriff had no authority to execute it. It appears, however, that at that time the statutes required that an outgoing sheriff complete the execution of writs which he had "begun to execute, by the collection of money or a levy on property." Such was the common-law rule and the law of this state until 1883. *Hittel's Gen. L. § 6885*; *Wood v. Lowden*, 117 Cal. 232, 49 P. 132; *Perrin v. McMann*, 97 Cal. 52, 31 P. 837; *In re Baker*, 32 Cal. App. 320, 323, 162 P. 922.

[9] Other points attempted to be advanced are to the effect that certain defective affidavits in the tax office were subsequently corrected, rendering the deeds valid; that, although the assessments were admittedly ex-

cessive, this fact would not of itself render valid deeds invalid; and that, upon arrival of other claimants to the property, respondents vacated. It is argued, therefrom, that respondents' judgment quieting title, in the face of valid deeds to other persons, and of evidence of disseizin, is erroneous. As we have already shown, the properties here involved either were never deeded to the state, and deeds from the state did not, and could not, convey title, or, in some instances, title was not acquired by appellant. In either event, neither by his answer, cross-complaint, or proof, has appellant established a defense to the plaintiffs' assertion of title as against him, and, this being true, he is not in a position to complain of the findings and decree of the trial court.

[10] Finally, it is argued that the plaintiffs tendered to appellant the sum of \$4,000, merely by "producing" that amount, as a purported offer to reimburse him for whatever moneys he might be entitled to recover for disbursements in their behalf; that, inasmuch as this was not the exact amount, it was but a subterfuge, and constituted no tender at all. However, section 2076 of the Code of Civil Procedure requires that specific objection to the amount and terms of a tender is requisite to subsequent complaint based thereon, in a legal proceeding. This the appellant does not appear to have made, and the point cannot now be raised for the first time.

The judgment is affirmed.

We concur: THOMPSON, J.; COLLIER, Justice pro tem.

86 Cal. App. 728

WEYSE et al. v. BIEDEBACH. (Civ. 4783.)★

District Court of Appeal, Second District, Division 2, California. Nov. 15, 1927.

Rehearing Denied Dec. 15, 1927.

1. Appeal and error **§985**—Trial court's ruling, relieving of default in serving and filing bill of exceptions, must be upheld, where sufficient grounds therefor were stated.

Where there is no showing on what grounds defendant was relieved from default in serving and filing bills of exceptions, but appropriate and sufficient grounds therefor were stated, ruling must be upheld, in view of appellate court's duty to resolve all intendments and presumptions in favor of trial court's rulings.

2. Exceptions, bill of **§41(1)**—Order relieving of default in serving and filing bill before party seeking extension was in default held void.

Order relieving default in serving and filing bill of exceptions, having been made before party seeking extension was in default, was void for want of jurisdiction of court to make it.

3. Exceptions, bill of **§42**—Plaintiff's request for extension for preparation of amendments waived objections that bill was not timely served and order relieving default was void.

Request by plaintiffs' attorneys, when accepting defendant's bill of exceptions for 30 days for preparation of amendments, constituted waiver of plaintiffs' right to object on ground that bill was not served in time, and estopped them from asserting default, because order relieving defendant's default in serving and filing bill was void.

4. Exceptions, bill of **§43(1)**—Six-month limitation, after which no relief from default is obtainable, begins to run only after action by adverse party (Code Civ. Proc. § 473).

Limitation of Code Civ. Proc. § 473, providing for amendments and relief from judgment order or proceedings that relief thereby authorized may not be granted in any case where application for it is made more than six months after judgment or proceeding is taken, permits application to be made at time application for relief from default is presented, even though it be more than six months after default, and such period of six months does not begin to run until some action is taken by adverse party, based on default, or order of court is made as result of default.

5. Exceptions, bill of **§43(2)**—Order relieving default in having bill engrossed for excusable neglect held not abuse of discretion (Code Civ. Proc. § 473).

Order of trial judge relieving defendant of default in having bill of exceptions engrossed in time held not abuse of discretion within Code Civ. Proc. § 473, where, because of numerous amendments allowed to bill and volume and character and work thereon, defendant's neglect to have it timely engrossed was excusable.

6. Appeal and error **§949**—Exceptions, bill of **§43(1)**—Setting aside default and granting relief is discretionary, and will not be disturbed, unless discretion is abused.

Superior court's action in setting aside default and granting relief therefrom is discretionary, and will not be disturbed, unless abuse of discretion is clearly shown.

7. Exceptions, bill of **§43(1)**—Notice stating motion to set aside default was based on affidavit held sufficient reference, so that affidavit supplied grounds omitted (Code Civ. Proc. § 473).

Notice of motion to set aside default, under Code Civ. Proc. § 473, stating that it was based in part on affidavit served therewith, was sufficient reference, so that contents of affidavit could supply information as to grounds relied on omitted from notice.

8. Exceptions, bill of **§43(1)**—Notice of motion to be relieved from default held sufficiently definite to include failure to have bill of exceptions timely engrossed (Code Civ. Proc. § 473).

Notice of motion, under Code Civ. Proc. § 473, for relief from default in manner of preparing and presenting proposed bill of exceptions, with amendments as settled, and for other relief, if necessary, held sufficiently defi-

nite to include relief for failure to have bill timely engrossed.

Appeal from Superior Court, Los Angeles County; Albert Lee Stephens, Judge.

Action by Harry G. Weyse and others as trustees, etc., against Harvey Biedebach. Judgment for plaintiffs, and defendant appealed. From orders relieving defendant from default and certifying and ordering filed proposed bill of exceptions, plaintiffs appeal. Affirmed.

See, also, 261 P. 1086.

Charles Lantz, W. P. Hyatt, F. C. Huber, and S. M. Garroway, all of Los Angeles, for appellants.

Fred W. Heath, of Los Angeles, for respondent.

CRAIG, Acting P. J. In 1920 appellants instituted an action to quiet title to certain lots numbered 1 to 29 in the Hay Tract addition to Nadeau Park, in Los Angeles county, and recovered judgment therein, from which the respondent in this proceeding appealed (and which appeal is numbered 4775), 261 P. 1092. Notice of entry of judgment in that case was served and filed November 8, 1922, and on November 16, 1922, counsel for Biedebach obtained an order from Judge Frank R. Willis of the superior court granting him 30 days in addition to that allowed by law within which to prepare and serve his proposed bill of exceptions, "no additional time having heretofore been granted." Thereafter, and on November 29, 1922, upon stipulation of counsel, a second order extending the time 30 days further was granted by Judge Albert Lee Stephens, before whom the case had been tried, and on January 25, 1923, the last-named judge, upon stipulation therefor, extended such time "30 days from and after January 27, 1923, the date to which said time has heretofore been extended." The defendant's bill of exceptions was not served or filed within the time allowed by this latter order, and on March 2, 1923, his counsel presented before Judge Howard A. Peairs of said superior court a motion to be relieved from his default and for an order extending the time for preparation and service of his bill of exceptions, which motion was argued and submitted. and the same was granted, defendant's time being once more extended "for a period of 30 days from and after February 26, 1923; the time as extended expiring on March 28, 1923." No stipulation or order extending time was thereafter made on behalf of the defendant. To this last-mentioned order the plaintiffs objected upon the ground that the court had no jurisdiction to relieve the defendant from default, or to so extend his time. On March 28, 1923, the defendant's proposed bill of exceptions was served upon opposing counsel, and on May 17, 1923, it was stipulated that plaintiffs have 30 days from that date within which

to prepare and serve their proposed amendments. It appears by affidavit of counsel for appellant herein that "on June 15, 1923, time having been duly extended therefor, without prejudice, and expressly reserving their objection to the settlement of said bill of exceptions as not having been served in time, (plaintiff's) served upon said defendant's attorney said proposed amendments to said proposed bill of exceptions, reserving therein their objections thereto as follows, to wit," and specific reservations and exceptions to the order relieving defendant from default, and to the filing or settlement of a bill of exceptions, are enumerated, following which appear the defendant's proposed amendments.

On August 13, 1923, the proposed bill of exceptions and proposed amendments were presented to the judge who tried the case, and, after argument, and over objection of the plaintiffs, the same was settled, and it was ordered that the same be engrossed and presented for signature within the time provided by law. Counsel for the appealing party thereupon carried the bill and proposed amendments to his office for engrossing, but it appears that nothing further was done in the matter for about 4 months.

On November 21, 1923, the plaintiff's attorney served upon counsel for the defendant a notice in writing that on November 27, 1923, they would move the court for an order that "no proceedings by defendant, Harvey Biedebach, for the settlement of a bill of exceptions on the appeal of defendant, Harvey Biedebach, herein are now pending in this court"; that no proposed bill of exceptions had been served, presented, settled, or engrossed (with or without amendments) within the time permitted by the statutes, and that the defendant was not entitled to have presented, certified, or filed any bill of exceptions upon said appeal. On November 27, 1923, when this motion was presented, the defendant in turn moved the trial court, "under section 473 of the Code of Civil Procedure," for an order relieving him from "any default in the matter of preparing and presenting proposed bill of exceptions with amendments as settled by the court, and for other relief, if any necessary, to relieve defendant or his attorney from any default or laches in that behalf." Each such motion was accompanied by affidavit of the party's counsel, that for the plaintiffs reciting the facts heretofore detailed, and averring that 100 days had elapsed since the settlement of the bill, but that the same had not been engrossed, signed, certified, or filed. The affidavit of defendant's counsel alleged that he did not receive all of the plaintiffs' proposed amendments until on or before June 25, 1923, at which time the judge who tried the case was absent from the county; that it was impossible to present it for some time thereafter, but that, on or about August 18, 1923, the same was settled, and that no time was indicated or fixed by the court when the bill

of exceptions should be completed or presented for signature, it was extremely voluminous, entailed much time and effort; and that "the said transcribed bill as settled is now (November 27, 1923) in the possession of the clerk of this court, and a copy thereof has been prepared and is ready for service upon the plaintiff's counsel." Both of these latter motions were continued, and, when finally argued and submitted, were taken under advisement. On March 4, 1924, the trial court made and filed a written order in the following language:

"Defendant has presented his bill of exceptions for settlement, and plaintiffs by motion object to its settlement on various grounds, among them being that the engrossed bill was not presented to me for signature within the time prescribed by law. In this I sustain the plaintiffs' contention, and hold defendant in default. As to all other portions of plaintiffs' motion, it is denied.

"Defendant seeks to be relieved from his default by appropriate motion, and this motion is granted.

"In considering the above, which includes a question of the legality of an order by Judge Peairs setting aside a previous default and granting further time, I have been in much doubt. I, however, conceive it to be my duty to resolve such doubt in such manner as will preserve the benefit of appeal, should the Court of Appeal sustain the legality of these orders."

On March 6, 1924, there was entered upon the minutes of the trial court an order reciting:

"Bill of exceptions presented by defendant is fully settled and allowed and certified to be correct, and is ordered filed as the engrossed bill of exceptions."

The plaintiffs thereupon appealed from the order of March 4, 1924, granting the defendant's motion to be relieved from default, and from that of March 6, 1924, last quoted, certifying and ordering filed the engrossed bill of exceptions.

[1] We have related in detail the various steps taken by the respective parties, since, while this appeal is taken only from the two orders last mentioned, it is contended by appellants herein that the trial court made them without jurisdiction, for the reason that from February 26, 1923, to March 6, 1924, each and every act of the court and of counsel in case numbered 4775 occurred after the expiration of the right to perfect an appeal in that case, and was therefore invalid, and could furnish no foundation or jurisdiction for the orders herein in controversy.

It appears without contradiction that counsel for respondent herein receipted for appellants' proposed amendments to the bill of exceptions on June 15, 1923; also that, whereas appellants notified opposing counsel 6 days prior to the date of their motion that on November 27, 1923, they would move the court

for an order declaring respondent in default, no affidavit or notice of motion for relief from default in the last instance, or offer of engrossed bill of exceptions, was forthcoming until the very day upon which appellants' motion was called for hearing, at which time the respondent represented for the first time that he had his bill of exceptions "ready for service upon the plaintiffs' counsel."

On February 26, 1923, respondent's time for serving and filing his proposed bill of exceptions expired, after which he was admittedly in default. It does not appear upon which grounds relief from default and extension of time were granted on March 2, 1923. Hence, since appropriate and sufficient grounds were stated, resolving, as we must, all intendments and presumptions in favor of the ruling of the trial court, such order appears to be proper and valid. However, it is claimed that the court had no power to make it. No appeal was taken from the order of March 2, 1923. Yet it is important to consider its validity, because, if it had the effect of relieving the default existing when it was rendered, the order made on March 4, 1924, would not be vulnerable to the objection of having been made more than 6 months after the first default, which it might otherwise be construed as attempting to cure. On the other hand, if the first order was void, the default which it assumed to relieve was unaffected, and may have been incurable at the time the second order—that of March 4, 1924—was made, more than 6 months having then elapsed since the default occurring through failure to file the bill of exceptions within the time allowed by law.

[2, 3] A computation of the various periods over which the time was extended to prepare and serve a bill of exceptions shows that the time given without consent of the respondent (appellant here) did not exceed 30 days beyond that allowed by law. However, the order of March 2, 1923, was not made before the party seeking the extension was in default, and hence, for that reason, it was void for want of jurisdiction of the court to make it. *Curtis v. Superior Court*, 70 Cal. 390, 11 P. 652; *Connor v. Southern California Motor Road Co.*, 101 Cal. 429, 35 P. 990. Yet, as in the case of *Kramm v. Stockton Electric R. Co.*, 22 Cal. App. 737, 136 P. 523, the attorneys for the respondent "not only accepted the bill but requested of, and secured from, the defendant a stipulation granting to them 36 days in which to prepare and serve their proposed amendments." This constitutes a waiver of any right which the respondent therein (appellant here) might have had to object on the ground that the bill was not served in time, and he is estopped from asserting a default against the other party on the ground that the order in question was void.

[4] It is said that the court had no jurisdiction to make the order of March 4, 1924, granting the motion presented on November

22, 1923, since more than 6 months had then elapsed after the default from which said motion sought to secure relief. This, however, arises from an interpretation of section 473 of the Code of Civil Procedure, which might have been worthy of serious consideration but for the fact that it is met with disapproval in a number of decisions of our Supreme Court. It is now settled beyond question that the limitation contained in the Code section just mentioned to the effect that the relief thereby authorized may not be granted in any case where application for it is made at a time exceeding 6 months "after such judgment, order or proceeding is taken" permits the application to be made at the time the application for relief from default is presented to the court, even though this be more than 6 months after the default itself occurs. In other words, the period of 6 months named in section 473 does not begin to run until some proceeding or action is taken by the adverse party based upon the default or some order of the court is made as a result of such default. *Stonesifer v. Kilburn*, 94 Cal. 33, 29 P. 332; *Banta v. Siller*, 121 Cal. 414, 53 P. 935; *Pollitz v. Wickershaw*, 150 Cal. 238, 88 P. 911. But 6 months did not elapse from 10 days after the bill of exceptions was settled and ordered engrossed until the order granting the relief from default from which order the appeal was taken was made. The period thus involved was only from August 23, 1923, until March 4, 1924.

[5, 6] It is next claimed that the order last mentioned constituted an abuse of discretion of the trial court. In support of this contention many cases are cited holding that ignorance of the law is not excusable under section 473 of the Code of Civil Procedure. While it is true that respondent's motion and affidavit in support of it show some apparent lack of information as to when the bill of exceptions was required by law to be engrossed, other grounds than this are contained within the affidavit upon which the superior court extended relief. These other facts in substance justify the conclusion that, because of the numerous amendments allowed by the superior court to the proposed bill of exceptions and the volume and character of the same, and the large amount of work and time of counsel required in connection therewith, neglect to have the bill of exceptions engrossed within the time required by law was excusable. It is elementary that the action of the superior court in setting aside a default and granting

relief therefrom is a matter largely within its discretion, and that its action in that behalf will not be disturbed, unless a clear case of abuse of that discretion is divulged. Such a condition is not here disclosed.

[7] It is next insisted that the notice of motion heard November 27, 1923, was fatally indefinite, in that it did not specify from what default on the part of the moving party relief was sought or upon which of the grounds enumerated in section 473 of the Code of Civil Procedure the motion was based. The affidavit in support of the motion contains a statement of facts which we think is sufficient to justify the trial court in concluding that there had been neglect upon the part of counsel for appellant herein, and that such neglect was excusable. The notice of motion states that it is based in part upon the affidavit served therewith. This is a sufficient reference so that the contents of the affidavit supply the information as to the grounds upon which relief was sought, and which was omitted from the notice itself. *Reher v. Reed*, 166 Cal. 525, 137 P. 263, Ann. Cas. 1915C, 737; *Savage v. Smith*, 170 Cal. 472, 150 P. 353.

[8] There is no merit in the other specification of indefiniteness. The default from which relief was asked is "any default in the manner of preparing and presenting proposed bill of exceptions with amendments as settled by the court, and for other relief, if any necessary, to relieve defendant or his attorney from any default or laches in that behalf." Standing alone, this is probably somewhat broad and uncertain, but, taken in connection with other facts known to the respondent in that proceeding, it cannot be said that he was not fully informed as to the default in question. In the first place, it must be remembered that this notice of motion was served immediately after the notice of motion on the part of the respondent in that proceeding, pointing out that the appellant therein was then in default in the matter of the engrossment of the bill of exceptions; but, in addition to this, the affidavit of the attorney for the appealing party (respondent here) described in detail the default from which relief was sought by reciting the steps taken and the dates thereof.

The orders appealed from are affirmed.

We concur: THOMPSON, J.; COLLIER, Justice pro tem.

87 Cal. App. 108

PACIFIC STATES CORPORATION v. GRANT. (Civ. 4536.)

District Court of Appeal, Second District, Division 2, California. Nov. 23, 1927.

1. Motions $\Leftrightarrow$ 42—Statute against making second motion in same court held not to go to jurisdiction (Code Civ. Proc. § 182).

Code Civ. Proc. § 182, providing that if application for order is refused no subsequent application for same order shall be made except in higher court, *held* not to deprive court of jurisdiction to entertain second motion.

2. Dismissal and nonsuit $\Leftrightarrow$ 60(6)—Letters of counsel held not equivalent to written stipulation for extension of time of trial tolling statute respecting dismissal for failure to bring to trial (Code Civ. Proc. § 583).

Letters between counsel *held* not to definitely extend time for trial beyond 5 years after filing of answer, within Code Civ. Proc. § 583, requiring dismissal of action if it be not brought to trial within that time, except where parties have stipulated in writing that time may be extended.

3. Dismissal and nonsuit $\Leftrightarrow$ 60(3)—Estoppel cannot take place of written stipulation to prevent dismissal for failure to bring action to trial in statutory time (Code Civ. Proc. § 583).

Estoppel by action cannot take the place of written stipulation for extension of time of trial to prevent dismissal, under Code Civ. Proc. § 583, for not being brought to trial within 5 years after answer.

Appeal from Superior Court, San Diego County; W. P. Cary, Judge.

Action by the Pacific States Corporation against U. S. Grant, Jr. From an order vacating the order dismissing the action for want of prosecution, defendant appeals. Reversed.

Sprigg & O'Farrell, of San Diego, for appellant.

Lewis, Fleming & Goodwin, of Los Angeles, and Hamilton & Lindley, of San Diego, for respondent.

COLLIER, Justice pro tem. This is an appeal from an order vacating an order dismissing the action for want of prosecution made under the last sentence of section 583 of the Code of Civil Procedure, where the case has not been brought to trial within five years from the date of filing the answer.

The following is a chronology of the case, including correspondence between the attorneys:

September 19, 1917, complaint filed.

October 1, 1917, answer filed.

May 4, 1922, letter, Lewis to Wright.

May 5, 1922, letter, Wright to Lewis.

July 8, 1922, letter, Lewis to Wright.

July 15, 1922, letter, Wright to Lewis.

October 1, 1922, expiration of five-year period under section 583 of the Code of Civil Procedure.

November 17, 1922, defendant substitutes attorneys.

November 17, 1922, court dismisses action on its own motion, but at the suggestion of attorneys for defendant.

November 17, 1922, letter, Wright to Lewis.

November 22, 1922, letter, Lewis to Sprigg (substituted for Wright).

November 27, 1922, letter, Sprigg to Lewis, notifying plaintiff that the case had been dismissed by the court.

February 23, 1923, notice of motion by plaintiff to vacate judgment of dismissal served.

February 26, 1923, motion heard before Judge C. N. Andrews, and denied, "10 days are granted plaintiff within which to file an amended affidavit herein upon which plaintiff's motion may be reheard." (Note.—The record does not disclose any amended affidavit was ever filed, except as it was attached to the following notice.)

May 1, 1923, notice of motion to vacate order of dismissal of November 17, 1922, filed. (Note.—The notice does not refer to the order of February 26, 1923, denying a vacation of said order of November 17, 1922.)

May 7, 1923, motion heard before Judge W. P. Cary, and granted. Case reinstated.

Defendant appeals from the order of May 7, 1923, and alleges that said order was void for two reasons: (1) That there was no written stipulation extending time under section 583 of the Code of Civil Procedure, and hence it was mandatory upon the court to dismiss the action and the court had no discretion in that matter; (2) that the said superior court had no jurisdiction to rehear said motion to vacate the dismissal after it had been considered on its merits and denied.

Counsel for plaintiff controvert points 1 and 2 and add a third point, as follows: (3) That the defendant was estopped from moving for or obtaining a dismissal of the suit.

[1] We will first discuss point 2, that the court was without jurisdiction to make the order of May 22, 1923. Appellant relies upon section 182 of the Code of Civil Procedure, which reads as follows:

"If an application for an order, made to a judge of a court in which the action or proceeding is pending, is refused in whole or in part, or is granted conditionally, no subsequent application for the same order shall be made to any court commissioner, or any other judge, except of a higher court; but nothing in this section applies to motions refused for informality in the papers or proceedings necessary to obtain the order, or to motions refused with liberty to renew the same."

The Supreme Court has set the question at rest in *Andersen v. Superior Court*, 187 Cal. 95, 102, 200 P. 963, 966, where the court says:

"As further ground of objection to the issuance of a writ of mandate in this matter, re-

spondents urge that the motion for dismissal was properly denied, for the reason that two previous motions based on the same grounds had been presented by these petitioners and denied by another judge of the same court, and that the motion before us was made in violation of the rule provided in section 182 of the Code of Civil Procedure. * * *

"Section 182 does not apply to the renewal of a motion refused for informality of the moving papers or proceedings, or in cases where leave to renew is given; and, in any event, *does not go to the jurisdiction of the court to entertain a second motion.* The penalty is provided by section 183 of the Code of Civil Procedure, and is punishment for contempt, and authority to the court to set aside an order obtained by a violation of the rule.

"In any event, *the proper practice in the case of an unauthorized motion is to strike it from the files.* (Italics ours.)

True, the Supreme Court does not refer to *Hanson v. Hanson*, 3 Cal. Unrep. 66, 20 P. 736 (1889), which seems to favor appellant, but the *Andersen Case* is the last pronouncement of that court, and therefore governs. We therefore determine that the court had jurisdiction to pass upon said motion, in view of the fact that no motion to strike the same has ever been filed.

We now pass to point 1, which we regard as the controlling question in the case. It is to be remembered that the record discloses the fact that *this case had never been set for trial at any date whatsoever.*

If there was a written stipulation at all, it will be found in the following correspondence between the attorneys. In reading the correspondence it must be borne in mind that Mr. Lewis represented the plaintiff, and Senator Leroy A. Wright, a member of the firm of Wright & McKee, was handling the case in person for the defendant.

On May 4, 1922, Howard S. Lewis, the attorney for the plaintiff in this action, wrote relative to this case to Leroy A. Wright, attorney for defendant, as follows:

"If Mr. Grant does not see fit to settle the matter along the line suggested, I trust you will co-operate with me in stipulating that the case may be set at the convenience of one of your departments. Your reply will be greatly appreciated."

On May 5, 1922, Mr. Wright wrote to Mr. Lewis in answer to the foregoing letter, as follows:

"I should have written you before, but have been so busy that I have neglected to do so. *Mr. Grant has declined to further discuss the litigation.* He is away again with Mrs. Grant for a trip of a month or more. I could therefore not consent to the trial of the case until he returns. As soon as he does return, I will be glad to notify you and then we will stipulate as to the trial." (Italics ours.)

Later, on July 8, 1922, Mr. Lewis wrote to Mr. Wright:

"I would like very much to bring the U. S. Grant, Jr., matter to a definite conclusion, and wonder what day I can see you after this coming week, if I would come down, and if U. S. Grant, Jr., is at home."

In reply to this, Mr. Wright wrote under date of July 15, 1922, as follows:

"I have before me your favor of July 8, and beg to say that I will be engaged all of next week in the trial of a jury case, and that within a few days after its conclusion I am planning to leave on my summer vacation. Mr. and Mrs. Grant left more than a month ago and are now traveling somewhere in Japan. I understand that Mr. Grant will not return until some time next fall. I will be pleased to advise you when he does return."

Under date of November 17, 1922, in reply to a letter from Mr. Lewis asking that this case either be settled or set down for trial, Mr. Wright wrote as follows:

"Some months ago when you asked me to agree to the setting of the above-entitled case for trial, I wrote you that I could not do so as Mr. Grant was absent, but promised that I would notify you upon his return. Mr. Grant returned about a week ago, and has discharged this firm and employed Mr. Patterson Sprigg. We have already signed the substitution and presume Mr. Sprigg will communicate with you."

On November 22, 1922, Lewis dispatched the following letter to Patterson Sprigg, attorney at law, San Diego, Cal.:

"The above case has been allowed to hang fire pending settlement for a long time. I submitted to Senator Wright letters in the handwriting of Mr. Grant, together with other documentary proof signed by Mr. Grant, which gives the defense interposed a complete contradiction. I am prepared to submit to you, as attorney for Mr. Grant, the same documents, and if you are not satisfied to also advise Mr. Grant to settle this case I will have this matter set down for the earliest possible trial that can be had.

"Your early attention to this matter will be greatly appreciated."

In reply to this letter on November 27, 1922, Mr. Patterson Sprigg wrote a letter as follows:

"I have your favor of the 22d. I assume that Senator Wright must have advised you that I have been substituted as attorney in this case. After I had been employed by Mr. Grant, and the substitution of attorneys was effected, I inspected the record and discovered that the answer had been filed in this case for more than 5 years, and I informed Mr. Grant that under the provision of our Code, the case could be dismissed for want of prosecution. He then advised that the case be dismissed if possible. I called the court's attention to the record of the case, and the court, at its own motion, dismissed the same.

"I regret exceedingly that this action should cause you embarrassment, but I have no other course."

It will be observed that upon the date of the letter of November 17, 1922, Wright to Lewis, above set forth, the court dismissed the action. It will further be observed that the said letter was written after the 5 years had expired.

Since the motion of May 7, 1923, was heard and decided, the Supreme Court, in the case of *Miller & Lux v. Superior Court*, 192 Cal. 333, 219 P. 1006, has laid down a very definite rule regarding the application of section 583 of the Code of Civil Procedure, which we deem determinative of this case, and, had it been in the books at the time the motion was heard, we do not doubt the result would have been different. In that case the court says:

"An examination of the cases construing section 583, supra, discloses that no case decided by this court has held that *anything short of a written stipulation extending in express terms the time of trial to a date beyond the five-year period, or expressly waiving the right to a dismissal under that section, will suffice to toll the running of the statutory time.* On the contrary, the cases uniformly hold that the provisions of section 583 are mandatory and that, *in the absence of a written stipulation, any action not brought to trial within the statutory period must be dismissed* [citing cases]. * * * The language of the Code section under consideration is simple and direct and expressly provides the means whereby litigants may extend the statutory period. It is argued by plaintiffs that despite the apparently plain import of the language used, specifically providing that an action must be dismissed unless the time for trial be extended by written stipulation of the parties, nevertheless such time may be otherwise extended—that is to say, by words and conduct on the part of the defendants constituting a waiver of their right to dismiss. And in this behalf it is insisted that the request of the attorney for the defendants in the three actions that the Turner Case, in which he represented the plaintiff, be tried prior to the three actions in which he represented the defendants and his insistence that this case precede the others was conduct sufficient to constitute such an estoppel. While there is language in several of the cases construing section 583 which seems to recognize the possibility of a waiver by estoppel, *it is to be noted that without exception these cases hold that a written stipulation is required* [citing cases].

"The statute provides that the time for trial may be extended by *written stipulation*. It does not provide that it may be extended by a written stipulation 'or its equivalent.' And in *Larkin v. Superior Court* [171 Cal. 719, 154 P. 841, Ann. Cas. 1917D, 670], supra, it was said that whether or not an oral stipulation in open court entered upon the minutes of the court is the same as a written stipulation and would toll the running of the statute is a 'serious question.' Obviously, the primary purpose of this section is to prevent the unlimited postponement of trials. The statute, however, is not altogether arbitrary and inflexible, for it provides that *the parties may extend the time by proceeding in a certain definite way.*

"The provision that a written stipulation be

entered into was intended to preclude all disputes, with their attendant charges and countercharges of overreaching and unethical conduct, by a requirement that clear and uncontrovertible evidence be presented to the court that the statutory time was deliberately intended to be extended by both parties. * * *

"* * * The very harshness of the rule would seem to be intended to put the plaintiff on the qui vive to secure irrefutable evidence of the defendant's consent to an extension of the statutory time." (Italics ours.)

The rule laid down by the foregoing may be succinctly stated as follows: (1) There must be a written stipulation; (2) such stipulation must in definite terms extend the time beyond the statutory period or expressly waive the right to dismissal; (3) the stipulation must show clearly and uncontrovertibly that the statutory time was deliberately intended to be extended by both parties; (4) that there is no equivalent for such written stipulation, by either words or actions.

[2] Tested by this rule, we come to the consideration of the instant case. Certainly there is nothing in the letter of May 4, 1922, Lewis to Wright, and that of May 5, 1922, Wright to Lewis, which in any reading would do more than extend the time of trial for about "a month or more," which was then within the statutory time, and hence did not operate to toll the statute. *Larkin v. Superior Court*, 171 Cal. 719, 154 P. 841, Ann. Cas. 1917D, 670; *Rio Vista M. Co. v. Superior Court*, 187 Cal. 1, 200 P. 616; *Miller & Lux v. Superior Court*, supra, at page 338 (219 P. 1008).

The letter of Wright to Lewis, under date of July 15, 1922, does not "in definite terms extend the time beyond the statutory period," nor does it in such terms or in any terms "waive the right of dismissal." The time of Mr. Grant's return was extremely indefinite—"some time in the fall," which might be either before or after October 1, 1922. Neither does that letter or any letter show a "deliberate intent" on the part of both parties or either party to extend the statutory time. There is nothing in the case of *Donohoe Co. v. Superior Court* (Cal. Sup.) 258 P. 1094, or *Rio Vista Mining Co. v. Superior Court*, supra, to the contrary, as in each of those cases the correspondence "in definite terms" fixed a trial date beyond the five-year statutory period, as is shown by recitals in the opinion in the *Rio Vista Case*, and the record itself in the *Donohoe Case*. In both cases the trial date had been previously set, a fact entirely dissimilar to the case at bar. Also, in the *Rio Vista Case* the parties actually went to trial on the date agreed upon beyond the five-year period. Here no trial was ever set or had.

Mr. Lewis' only excuse for not pressing the case to trial in view of Mr. Wright's letter of July 15, 1922, was, as stated in Mr. Lewis' affidavit:

"That Senator Wright would have been placed in a very embarrassing position to have had the case set for trial with his client absent in Europe or the Orient, and this affiant would not place Senator Wright in any such position which was fully understood by this affiant and Senator Wright."

This position is answered by the following quotation from *Miller & Lux v. Superior Court*, supra, at page 342 (219 P. 1009):

"It may be suggested that if counsel had desired to avoid the bar of the statute it would have been a very simple matter, after calling the court's attention to the situation, to have requested that one witness be sworn in the cases and then the hearing of the cases continued until a time which would be convenient for the court and the parties to the action."

[3] Respondents rely somewhat on the actions and alleged statements of Senator Wright taken and made at a conference in Senator Wright's office on April 10, 1922, at which conference Mr. Lewis, his client, Merritt, and Senator Wright were present, but it is to be noted that the conference occurred before any of the letters relied upon by respondents were written.

At most such actions and statements, construed most strongly against the defendants, could only be used by way of estoppel or as the equivalent of a written stipulation, and the Supreme Court in the *Miller & Lux Case*, supra, has decided that there is no such estoppel.

Again, we have examined the record as to what was said and done at such conference, and can find nothing therein which would amount to an estoppel, even if such were allowed.

This, we think, is fully supported by the letter of Lewis to Wright of date May 4, 1922, and Mr. Wright's reply thereto, which we have quoted. There the plaintiff was *definitely* informed that all negotiations were off. "Mr. Grant has declined to further discuss the litigation."

Not only did the plaintiff delay for more than five years in setting the case for trial, for as a matter of fact it has never been set, but for almost three months after Mr. Lewis, the plaintiff's attorney, was aware that the case had been dismissed on the court's own motion, no steps were taken to revoke said order, and no excuse is offered for such delay. When, on February 26, 1923, an attempt was made to revoke the order of dismissal, it failed, and nothing was done for over two months thereafter, or until on May 7, 1923, when another motion was made to set aside the order of dismissal of November 17, 1922, and said motion was granted. All of this does not bespeak diligence, but, on the contrary, the procrastination which apparently has ruled the case from its inception.

The order of November 17, 1922, dismissing

said case was proper. The order vacating said dismissal was erroneous. Therefore the order dated May 14, 1923, filed May 15, 1923, and entered May 15, 1923, vacating the order of November 17, 1922, and reinstating the case, is reversed.

We concur: CRAIG, Acting P. J.; THOMPSON, J.

87 Cal. App. 236

PEOPLE v. BLUMEN et al. (Cr. 1400.)★

District Court of Appeal, First District, Division 1, California. Dec. 2, 1927.

Hearing Denied by Supreme Court Jan. 30, 1928.

1. Criminal law §274, 1149—Granting permission to withdraw plea of guilty is within court's discretion, not reviewable, save for abuse.

Granting or denying of permission to withdraw plea of guilty and substitute plea of not guilty is within sound discretion of trial court, and its action must be sustained, unless abuse of discretion clearly appears.

2. Criminal law §274—In prosecution for grand larceny, evidence held to justify court in denial of leave to withdraw plea of guilty.

Evidence held sufficient to justify trial court in believing there was no reasonable doubt of defendants' guilt in prosecution for grand larceny, where defendants did not deny theft of bonds, only defense being one obviously technical, and denial of leave to withdraw plea of guilty was not abuse of discretion.

3. Criminal law §274—Denial of motion for leave to withdraw plea of guilty, interposed for purpose of speculating on chance of gaining probation, held not abuse of discretion.

Denial of defendants' motion for leave to withdraw plea of guilty held not abuse of discretion, where plea was made without any misconception as to nature of charge and for purpose of speculating on chance of gaining probation, notwithstanding claim that defendants were led to believe probation would be granted.

4. Larceny §30(7)—"Ten (10) Norsk 5½% Stats. Loan 1918 bonds of the value of \$21,000 * * *" held sufficient description of stolen property in grand larceny indictment (Pen. Code §§ 967, 1131).

In prosecution for grand larceny, count of indictment, describing stolen property as "ten (10) Norsk 5½% Stats. Loan 1918 bonds of the value of \$21,000 in gold coin of the United States of America," held not demurrable for failure to describe property with sufficient certainty, since, under Pen. Code §§ 967, 1131, particular number, denomination, or kind of bond need not be alleged.

5. Indictment and information §71—Law merely requires that defendant in criminal case be informed in plain language of act he is alleged to have committed.

Law requires merely that person charged with criminal offense be informed in plain, in-

telligent language of the specific act he is alleged to have committed.

6. Extradition ⇨ 19—Defendants held not convicted of another charge than on which extradited from England, notwithstanding variance between value of property and alleged value.

In prosecution for larceny, in which defendants were extradited from England for trial on certain count of indictment, that bonds described therein were of less value than amount alleged held insufficient to sustain contention that defendants were extradited on one charge and convicted on another, in violation of treaty between United States and Great Britain.

7. Indictment and information ⇨ 199—Defendants waived variance between value of stolen property and alleged value by pleading guilty.

In prosecution for grand larceny, defendants waived all questions of variance between value of bonds stolen and value, as alleged in indictment, by pleading guilty to charge.

Appeal from Superior Court, City and County of San Francisco; Harold Louderback, Judge.

Julius M. Blumen, alias J. M. Busch, and another, were convicted of grand larceny on a plea of guilty. From an order denying a motion for leave to withdraw the plea of guilty, and from the judgment of conviction, they appeal. Affirmed.

Joseph A. Brown, of San Francisco, for appellants.

U. S. Webb, Atty. Gen., John L. Flynn and James S. Howie, Deputy Attys. Gen., for the People.

KNIGHT, J. Appellants pleaded guilty to a charge of grand larceny and applied for probation, but, before their applications were heard, moved the court for leave to withdraw said pleas, and the motion was denied. An appeal was then taken from the order denying said motion and from the judgment of conviction.

[1] The rule is well established that the granting or denying of permission to withdraw a plea of guilty and to substitute a plea of not guilty is a matter within the sound discretion of the trial court, and that its action must be sustained, unless an abuse of discretion clearly appears. *People v. Manriquez*, 188 Cal. 602, 206 P. 63, 20 A. L. R. 1441. The circumstances as shown by the record here in support of the trial court's decision denying said motion may be stated as follows: Appellants are brothers. One of them had been employed in the foreign exchange department of a San Francisco bank. In February, 1926, they were indicted for the theft and embezzlement of the bank's securities, consisting of foreign national bonds, approximately in value \$100,000. Three separate indictments were returned against

them. One contained three counts, charging them jointly with grand larceny, and the other two charged them singly, one with grand larceny and the other with embezzlement. At the time the indictments were found appellants were fugitives, but later were apprehended in London, England, and, pursuant to extradition proceedings, were returned to San Francisco for trial. They appeared in court with counsel for arraignment on August 13, 1926, and were given until August 23d to plead. Demurrers on general and special grounds were thereafter interposed and overruled; and on October 20th pleas of not guilty were entered to each charge. On November 29th the causes came on for trial, at which time appellants, being represented by counsel, asked and were granted permission to withdraw their pleas of not guilty to the charge set forth in the second count of the joint indictment, and thereupon entered pleas of guilty thereto; whereupon and on motion of the district attorney the court dismissed the charges set forth in the first and third counts, and the two remaining indictments. On December 3d, which was the date set for the pronouncement of judgment, appellants applied for probation. The hearing of their applications was continued until January 3, 1927. At that time appellants filed a motion for leave to withdraw their pleas of guilty and their applications for probation, and to vacate the order dismissing the other charges. After a full hearing, during which much oral and documentary proof was received, appellants' motion was on February 5, 1927, denied, and their applications for probation were continued for hearing until March 12th, at which time said applications were also denied. Thereupon the court pronounced judgment, the sentence being imprisonment in the state prison.

At the commencement of the hearing of the motion counsel for appellants conceded in behalf of appellants (neither having testified at said hearing) that they understood the serious nature of the charge when they pleaded guilty thereto, and that they were mentally competent and fully realized the nature and effect of such pleas. At the time the motion was filed, however, appellants also filed a verified petition setting forth certain alleged facts in support of the motion, and it was therein alleged that they were led to believe by statements made to them by one of their attorneys on the morning the trial was to have commenced, and, by statements previously made to them "by various other persons," that irrespective of the question of their guilt they would be granted probation if they would plead guilty to one of the charges against them; that they "did not intend to plead guilty to any charge except for the beliefs induced in their minds that thereby and thereupon * * * they would

receive prompt and definite probation and be freed of all further incarceration and difficulty for and in connection with any of the matters involved in any of the counts in said indictments"; but that since the making of said application for probation "it has developed that interested persons are opposing such application contrary to the belief induced in their minds and the assurances given them." Appellants' counsel stated in reply to an inquiry made by the court that the "various other persons" referred to by appellants in their verified petition were Detective Proll of the San Francisco police department and one MacCubbin, a special investigator for the insurance carrier for the bank, both having served as agents for the state of California to bring appellants back from London to San Francisco; afterwards the names of certain officers of the surety company were added to those mentioned.

All of the persons mentioned, however, including appellants' attorney, unqualifiedly denied ever having intimated to appellants or to either of them that they would be granted probation under any conditions. Their attorney declared that the suggestion that they plead guilty originated entirely with appellants and not with him; that when they first mentioned it he was opposed to their doing so, and that they were repeatedly advised by him that, if they did plead guilty, the matter of granting or refusing probation rested wholly with the court. Detective Proll testified that, although in response to the various inquiries made by appellants on the return trip to San Francisco he endeavored to explain the legal procedure necessary to be followed in applying for probation, he had never intimated that it was possible for them to obtain probation; MacCubbin testified substantially to the same effect, stating that he had made no statements whatever to appellants encouraging them to plead guilty, nor did he intimate that they would be released on probation if they did so plead; and the officers of the surety company filed affidavits likewise denying having made any such promises.

Appellants further averred in their verified petition that on the day their trial was to have commenced Leopold Blumen, as a result of jail confinement, "was sick and ill and has been continuously sick and ill and he was nervous and mentally and physically disturbed and unfit to make any determination; * * * that J. M. Blumen was also sick and mentally and physically distressed and particularly worried and concerned over his brother's illness. * * *" But it is evident from the shrewd manner in which the crimes were planned and executed, and the cleverness shown by appellants during their flight across America and through Europe in eluding the arresting officers and disposing of the stolen securities, that they are per-

sons of keen intelligence, and therefore it may be fairly inferred that the condition of mind above described in which they claimed to have found themselves after being arrested and returned to San Francisco for trial was nothing more serious than would be expected to result naturally from a realization of the grave consequences with which they were confronted after having committed a theft involving \$100,000 worth of property.

[2] Furthermore, in view of the evidence adduced at the hearing, the trial court was fully justified in believing that there was no reasonable doubt of appellants' guilt. So far as the record shows they did not deny the theft of the bonds, the only defense suggested by their counsel at the hearing being obviously a technical one. The evidence with respect to appellants' guilt shows that soon after Detective Proll arrived in London and after appellants had exhausted their remedies in the British courts to avoid extradition, appellants freely confessed their guilt, stating the details of how and where they had sold or otherwise disposed of the stolen bonds, some being converted in San Francisco, others in eastern states, in Canada, England, and on the continent, and the remainder, or the proceeds derived from the sale of them, being deposited by them in certain banks in Zurich and elsewhere. They also declared their intention to make restitution as far as possible, and in furtherance of such intention wrote letters authorizing the San Francisco bank's representative to take control of certain bank accounts standing in their names. Thereafter, on the return voyage across the Atlantic, appellants reduced their confessions to written form, setting forth in the beginning and at the conclusion thereof that the same were freely and voluntarily made. So far as the record discloses, the truth of the statements made in these various confessions has never been denied.

[3] The foregoing facts prove without dispute that when appellants entered their pleas of guilty they were neither laboring under mistake nor misunderstanding as to the effect of such pleas, nor under any misconception as to the nature of the charge, and they also fairly support the inference that said pleas were interposed for the purpose of speculating upon a chance of gaining probation, and that when the hope or expectation thereof appeared to be futile they sought to escape a term of imprisonment by withdrawing their pleas and standing trial before a jury on a technical defense. Under such circumstances it would seem to require no discussion to demonstrate that there is an entire lack of grounds upon which this court could justify a declaration that the trial court abused its discretion in denying appellants' motion. *People v. Manriquez*, supra; *People v. Breshi*, 44 Cal. App. 307, 186 P. 361; *People v. Brown*, 38 Cal. App. 46, 175

P. 85; *People v. Junod* (Cal. App.) 259 P. 101. As said in *People v. Manriquez*, supra:

"The fact that a defendant, knowing his rights and the consequences of his act, hoped or believed, or was led by his counsel, or others, to hope or believe that he would receive a milder punishment by pleading guilty than that which would fall to his lot after trial and conviction by a jury, presents no ground for the exercise of the discretion necessary to permit a plea of guilt to be withdrawn."

It is doubtless true that where, as in the case of *People v. Schwarz* (Cal. Sup.) 257 P. 71, it appears without conflict that a defendant has been induced to plead guilty by promises of immunity made directly to him by officials who are charged with the enforcement of the law, such as an authorized member of the grand jury and representatives of the district attorney's office, the trial court upon learning of such promises should allow the defendant to withdraw his plea and stand trial when it appears that such promises cannot be fulfilled. But there are no such circumstances here. Appellants admit that the representatives of the district attorney's office made no promises whatever and all of the other persons mentioned by appellants as having indicated the granting of probation have denied having done so. Even though, as appellants claim, the officials of the surety company had intimated that they would not oppose probation, such attitude on their part would not be controlling upon officials charged with the administration of the criminal laws.

[4, 5] Appellants contend in support of their appeal from the judgment that the second count was demurrable upon the ground that the stolen property was not described with sufficient certainty. We find no merit in the point. The property was described as "ten (10) Norsk 5½% Stats. Loan 1918 bonds of the value of \$21,000 in gold coin of the United States of America." The Code provides that in an indictment for the larceny of valuable securities it is sufficient, if it be alleged and proved that the subject of the larceny was valuable securities without specifying and proving the particular number, denomination, or kind thereof. Sections 967 and 1131, Pen. Code. Furthermore, the law requires merely that a person charged with a criminal offense be informed in plain, intelligent language of the specific act he is alleged to have committed. Here the appellants apparently understood the identity of the bonds alleged to have been stolen with sufficient clearness to plead guilty to the charge.

[6, 7] Nor are we able to sustain appellants' final contention that they have been extradited on one charge and convicted of another in violation of treaty provisions existing between the governments of the United

States and Great Britain. The record shows that the extradition proceedings were grounded upon the charge contained in the second count; and even assuming, as appellants contend, that the bonds therein described were of less value than the amount alleged, such variance as to value was immaterial in view of the fact that the same were otherwise correctly described. Moreover, appellants have doubtless waived all question of variance by pleading guilty to the charge.

The judgment and order appealed from are affirmed.

We concur: TYLER, P. J.; CASHIN, J.

87 Cal. App. 105

NEW YORK INDEMNITY CO. v. INDUSTRIAL ACCIDENT COMMISSION et al.★
(Civ. 5737.)

District Court of Appeal, Second District, Division 1, California. Nov. 23, 1927.

Hearing Denied by Supreme Court Jan. 19, 1928.

1. Master and servant ⇨375(2)—Injury to truck driver, driving own car to place of employment, held not to arise "in course of employment."

Injury to truck driver, while driving his own automobile to another city to report for work held not to arise in the course of his employment.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Course of Employment.]

2. Master and servant ⇨375(1)—Employee's injury is not compensable unless service rendered at time of injury grows out of and is incidental to employment.

For employee to be entitled to compensation, it is necessary not only that injury grow out of and be incidental to employment, but that service being rendered at time of injury should grow out of and be incidental to employment.

3. Master and servant ⇨375(2)—Accident occurring while employee is going to place of work does not occur "in course of employment."

Where accident causing injury to employee occurs while he is going to place of work and is doing no errand for his employer, it does not occur "in course of employment."

Proceeding to recover workmen's compensation by William E. Geiger, Jr., employee, opposed by the Lang Transportation Company, employer, and the New York Indemnity Company, insurer. To review an award of compensation by the Industrial Accident Commission, the New York Indemnity Company petitions for certiorari. Award annulled.

E. Herbert Herlihy, of Los Angeles, and Howard W. Hamner, of Burbank, for petitioner.

G. C. Faulkner, of San Francisco, for respondent Commission.

CONREY, P. J. [1] Respondent William E. Geiger, Jr., presented to the Industrial Accident Commission his application for an award of compensation for injuries received by him as an employee of Lang Transportation Company. An award was made against the insurance carrier, New York Indemnity Company, on whose petition the writ of review herein was issued.

Petitioner contends that the evidence did not justify the findings of fact, and that the commission acted in excess of its powers in this, that there is no evidence to sustain the finding that the applicant, Geiger, was injured while in the course of his employment.

The evidence bearing upon the issue thus presented may be summarized in a very few sentences. The Transportation Company as a part of its business owned a number of trucks, and in the use of these trucks employed truck drivers. The principal office was at Los Angeles. Prior to the 24th day of July, 1926, Mr. Geiger, although not in continuous employment of the Transportation Company, was on call there as an extra man to whom work was given, at a stated price per hour, on occasions when his services were needed. In July, 1926, the Transportation Company had several trucks in use under a contract for transportation of materials for the Associated Oil Company, at Oil Center, in Kern county. On July 23d, at Los Angeles, the manager of the Transportation Company, having learned that one of his drivers at Oil Center had given up his job, directed Geiger to report for work at Oil Center in order to take out a truck by 7 o'clock on the morning of July 24th. According to the testimony of Geiger, the manager Mr. Smith, at Los Angeles, on the afternoon of July 23d, gave Geiger a letter to Mr. Faust, superintendent of Associated Oil Company, at Oil Center, saying:

"Referring to your letter of July 19th, stating driver Honas had resigned, we are sending driver W. E. Geiger, who will take this vacancy."

Geiger testified that Mr. Smith did not say anything to him about the method he should employ in going from Los Angeles to Oil Center, other than that it did not matter how Geiger got there just so he was there at 7 o'clock. Acting under these instructions, Geiger left Los Angeles that night in his own automobile, and while driving northward, at a point about a mile from Newhall, his machine was hit by a truck trailer, so that Geiger was thrown out and received certain severe injuries.

[2, 3] We are of the opinion that the injuries received by the applicant in the described accident did not occur in the course of employment of said applicant. The right to an award is not alone founded upon the fact

that the injury grew out of and was incidental to the employment, but also upon the fact that the service the employee is rendering at the time of the injury grows out of and is incidental to the employment. "For instance, it is the rule that an employee going to and from his place of employment is not rendering any service, and begins to render such service only when he arrives at the place of his employment, and proceeds to use some instrumentality provided, by means of which he immediately places himself in a position to perform his task." Cal. Cas. Indem. Exchange v. Indus. Acc. Com., 190 Cal. 433, 435, 213 P. 257, 258. We think that the present proceeding has not been brought within any of the exceptions to the rule last above stated. The employee was not making the trip at his employer's expense, nor on his employer's time. He was not even acting under his employer's direction, except in the sense that one goes to the employer's place of business or place where work is to be done. But until the employee begins or is ready to do something which is in the nature of a rendition of service to the employer, liability for compensation does not arise. The mere act of the employee in transporting himself to the place of work, when such transportation is unaccompanied by the performance of any other errand for the employer, does not establish a condition under which the happening of an accident can be said to occur in the course of the employment. Cal. Highway Com. v. Indus. Acc. Com., 61 Cal. App. 284, 214 P. 658; Eby v. Indus. Acc. Com., 75 Cal. App. 280, 242 P. 901.

The award is annulled.

We concur: HOUSER, J.; YORK, J.

87 Cal. App. 44

HOWELL et al. v. SAN JOAQUIN LIGHT & POWER CORPORATION. (Civ. 3354.) ★

District Court of Appeal, Third District, California. Nov. 19, 1927.

Hearing Denied by Supreme Court Jan. 16, 1928.

1. Electricity ☞9(1)—Order of railroad commission as to elevation of heavy voltage power lines held to apply to subsisting lines.

Order of railroad commission, requiring power lines carrying heavy voltage to have specified minimum clearance, although having no retroactive effect, held to include all lines then subsisting as well as lines thereafter constructed.

2. Electricity ☞16(3)—Power company's failure to maintain high voltage line at elevation required by railroad commission's order held negligence per se.

Failure of power company to maintain its high voltage line with minimum clearance required by order of railroad commission held to constitute negligence per se.

3. Electricity ☞19(8)—Negligence of power company in maintenance of high voltage, un-insulated wire only 19 feet above ground held question for jury.

Maintenance by power company of high voltage, uninsulated power line over agricultural lands at an elevation of only approximately 19 feet held to make question of its negligence, in death of one electrocuted when portion of pipe line which he was removing came in contact with wire, one for jury.

4. Electricity ☞19(12)—Contributory negligence of one electrocuted when pipe came in contact with uninsulated high voltage wire held for jury.

In action for death of one electrocuted when portion of pipe line which he was removing came in contact with uninsulated high voltage power line, contributory negligence of deceased held for jury.

5. Appeal and error ☞1170(9)—Instruction as to knowledge of power company of custom of standing water pipes on end in community where power line was maintained, though in-applicable, held harmless (Const. art. 6, § 4½).

In action for death of one electrocuted on contact of portion of water pipe line with uninsulated, high voltage power line running over agricultural land, instruction, as to knowledge of power company of common practice of persons laying pipe lines to stand them upon end for purpose of cleaning, although inapplicable, held harmless, and not to have resulted in miscarriage of justice, in view of Const. art. 6, § 4½.

6. Electricity ☞14(2)—Power company must keep high voltage lines over agricultural land in safe manner by constant oversight and repair.

Power company maintaining high voltage power lines over agricultural land must use due care and caution to keep such power lines in safe, substantial manner by constant oversight and repair.

7. Trial ☞250, 261—Instructions which were inapplicable or incorrectly stated law were properly refused.

Instructions requested by defendant which were either inapplicable or contained incorrect statements of the law were properly refused.

Appeal from Superior Court, Tulare County; W. B. Wallace, Judge.

Action by Ruth L. Howell and another against the San Joaquin Light & Power Corporation. Judgment for plaintiffs, and defendant appeals. Affirmed.

Lindsay & Conley and Carl E. Lindsay, all of Fresno, for appellant.

Russell & Heid, of Tulare, for respondents.

PLUMMER, J. This action is prosecuted by Ruth L. Howell as the surviving widow and Eldon B. Howell as the surviving son of J. B. Howell, deceased, whose death is alleged to have been caused through the negligence

of the defendant in maintaining an uninsulated highly charged electric wire in too close proximity to the ground on which the deceased was working at the time he met his death.

The record shows that in May, 1920, the defendant erected a power line in the agricultural section of Tulare county over a certain alfalfa field owned by one S. H. Ginder. All the premises involved in this section are agricultural in character and are located about 11 miles southwest of the city of Tulare, in the county of Tulare. The complaint sets forth, and the evidence supports, the following facts: That prior to the 6th day of November, 1922, the appellant had constructed, and on that day was maintaining, a power line, the wires of which were uninsulated and were carrying approximately 13,000 volts of electricity; that the main line of said company ran along the line of a county road; that the line involved in this action was run from the main power line to a pumping plant over an alfalfa field approximately 200 feet from a certain right-angle turn in the line running from the main line; that at the point where said line turned at right angles, it was supported by a pole which at the time of its construction was held in a perpendicular position, and the power line to said pumping plant was held taut and at a fixed distance from the ground by means of a guy wire extending from the top of the pole to the ground, and which said guy wire was held taut by means of a strut extending from the said pole to said guy wire; that prior to the 6th day of November, 1922, the strut had fallen from its place above mentioned, and, in so doing, allowed the pole to be drawn over by the wire, and that the pole on which said wire was suspended, after the falling out of said strut, had leaned over to such an extent that the power line was permitted to sag and come nearer to the ground than originally constructed; that the line in question, at the time of the accident, was only 19 feet and 3 inches from the surface of the ground; that on the 1st day of May, 1922, the railroad commission, by its general order No. 64, had ordered that all construction, reconstruction, and maintenance of overhead electrical supply and signal lines, including power lines, should have a vertical clearance above the ground along streets, roads, highways, and alleys, in rural districts and across areas capable of agricultural development, of at least 25 feet, where such lines carried an electrical energy of 750 volts, up to and including 17,000 volts. It is further alleged in the complaint that the defendant negligently allowed the strut which supported the pole, to which we have herein referred, in an upright position, to remain out of place and the pole unsupported, and also allowed the supply wire to carelessly and negligently drop lower to the ground than

it was when originally constructed. The testimony is to the effect that when originally constructed the wire had a clearance of approximately 23 feet. On the 6th day of November, 1922, the deceased, J. B. Howell, who prior to that time had been residing on a dairy ranch about four miles from the premises involved in this action, went to the Ginder place and to the alfalfa field where he met his death for the purpose of taking up and relaying a certain pipe line to be used in conveying water from a water tank on the Ginder place to an adjoining pasture upon which the deceased and Ginder had cattle grazing; that the deceased went to work upon said premises at the hour of about 9 o'clock a. m. in taking up and relaying the pipe line just referred to, and that on the same day, between the hours of 1 and 2 p. m., the deceased took up a section of the pipe line 20 feet and 6 inches in length immediately beneath the power line herein mentioned; that in taking up the different sections of the pipe line referred to, the deceased and the witness Ginder had raised each section perpendicularly, jounced the same up and down upon a board for the purpose of removing all rust or obstruction that might be within the section of the pipe line being taken up and relaid; that in taking up the 20-foot section just referred to the deceased in some manner raised it up perpendicularly for the purpose of removing the rust therefrom, in the manner just indicated, and by some means the pipe line was brought in contact with the uninsulated power wire, and electrocution immediately followed. It further appears from the testimony that on the day that the said J. B. Howell was electrocuted, an employee of the defendant, at the request of Mr. Ginder, had gone to the Ginder ranch to replace a burned-out fuse on the transformer situated on a pole near the pumping plant operated on the Ginder premises.

This witness testified that he saw Mr. Howell at work and called to him to be careful in the handling of the water pipe. The testimony does not show that the deceased heard this warning, although the witness testified that at the time Howell was distant from him only about 75 feet. On this point there is contradictory testimony, however, as the witness Ginder testified that at the time the employee of the defendant was at work replacing a burned-out fuse on the transformer, Howell was distant some 300 or 400 yards. On the part of the defendant it is claimed that the deceased was familiar with the premises. The contrary is maintained by the respondents. The testimony as set forth in the transcript simply shows that the deceased went to the alfalfa field, where he met his death, about 9 o'clock a. m. on November 6, 1922. So far as the record is concerned, there is not a word of testimony showing that the deceased knew anything about the power line, its location, that he had

ever seen it, or that he had ever been there preceding the day of his death. The evidence also further shows, without any substantial conflict, that the strut in question which supported the pole where the power line made the right-angle turn had been out of place for a period of at least two weeks preceding the 6th day of November, and was out of place on the day that the employee of the company was there replacing the burned-out fuse. There is no substantial conflict in the testimony that the wire had also been allowed to droop by reason of the leaning of the pole from its original height of about 23 feet to an elevation above the surface of only 19 feet and 3 inches. Among other witnesses placed upon the witness stand by the plaintiff was one Carl H. Holley, a consulting engineer, who testified that he had had 23 years' experience in the construction of electrical power plants and systems; that he had had experience with the Yuba Power Company at Marysville, was construction engineer for the Bay Counties Power Company at Colgate, was superintendent and engineer for the Mount Whitney Power Company, and later superintendent and engineer for the Tulare Power Company. This witness testified that power lines over lands or fields capable of agricultural development carrying 11,000 volts of electricity should be at least 25 feet in elevation above the surface, and that a greater distance was desirable. This witness gave the height of the line in question, at the time of his measurement shortly after the accident, as 19 feet 2½ inches above the ground, and that the line had been allowed to sag at least 4 feet on account of the leaning over of the pole from which the strut or brace had become misplaced. The strut was a piece of timber 4x4 originally fastened to the post at one end and the other against the guy wire holding the pole at the right-angle turn in an upright position in such a way as to hold the guy wire taut. When this strut fell from its position the guy wire consequently hung loose and no longer supported the pole in its original position. Over the objection of the defendant the plaintiffs were allowed to introduce in evidence a duly certified copy of general order No. 64 of the railroad commission of the state of California relative to the construction, reconstruction and maintenance of overhead power lines. The finding and order of the railroad commission, as introduced in evidence, is as follows:

"An investigation having been instituted on the commission's own motion as to the reasonableness of certain proposed uniform standards of overhead line construction, a hearing having been held, and the matter submitted and ready for decision:

"The railroad commission of the state of California hereby finds as a fact that the proposed rules and regulations for overhead line construction as modified and set forth in this commission's general order No. 64, are reasonable and just, and that compliance with the same will

result in improved service and greater safety.

"Basing its order on the above finding of fact: It is hereby ordered that:

"(1) All construction, reconstruction and maintenance of overhead electrical supply and signal lines coming within the jurisdiction of this commission, done on and after July 1, 1922, shall conform to the rules of overhead electric line construction prescribed by the railroad commission of the state of California in its general order No. 64.

"(2) General order No. 64 is hereby approved and ordered effective July 1, 1922.

"The foregoing opinion and order are hereby approved and ordered filed as the opinion and order of the railroad commission of the state of California.

"Dated at San Francisco, California, this 1st day of May, 1922.

H. W. Brundige,
"H. D. Loveland,
"Irving Martin,
"Chester H. Rowell,
"H. S. Benedict,
"Commissioners."

In connection with the foregoing there was read in evidence a table referred to in order No. 64, as follows:

"Table 1, case No. 4, Vertical Clearance above the ground of wires along streets, roads, highways or alleys in rural districts or across areas capable of agricultural development, supply lines, 750-17,000 volts, 25 feet."

At the conclusion of plaintiffs' testimony, the defendant moved for a nonsuit on the ground that the testimony showed no negligence on the part of the defendant, and also on the ground that, assuming negligence on the part of the defendant, the testimony established contributory negligence on the part of the deceased. This motion was denied, as, likewise, the motion for a directed verdict.

[1-3] The jury found in favor of the plaintiffs, and upon this appeal it is insisted that there is no evidence of negligence on the part of the defendant, that the deceased was guilty of contributory negligence, and that the order of the railroad commission relative to the construction, reconstruction, and maintenance of power lines carrying an energy of between 750 and 17,000 volts had no application to the line in question, although it carried an energy of 11,000 volts, for the reason that the defendant's line was constructed in 1920, and so antedated the order of the railroad commission for a considerable period of time. It is further urged in this particular that the order of the railroad commission refers only to lines that should be constructed and reconstructed after July 1, 1922, and does not refer to or affect the maintenance of lines which were constructed and in operation prior to the 1st day of July, 1922. The general order in question was dated May 1, 1922; it became effective on July 1, 1922, 60 days after its promulgation. The electrocution of the deceased occurred on the 6th day of November, 1922, a little over six months after the promulgation of the or-

der. There is no contention made upon this appeal that a sufficient time had not elapsed to enable the defendant to comply with the order of the railroad commission relative to the clearance of power wires carrying a voltage equal to that carried by the line under consideration. The contention is simply that the order of the railroad commission did not require any elevation of that line, and that the defendant could, in accordance with the order of the commission, continue to maintain said line at the elevation disclosed by the testimony in this case. It is urged that the order of the railroad commission had no retroactive effect, and a number of cases are cited by the appellant holding that acts of the Legislature are not to be given a retroactive effect unless the plain import of the language used necessitates such holding. We agree with the appellant in this contention, that the order of the railroad commission did not have any retroactive effect and was not intended to have any retroactive effect, but we differ from the construction placed upon the order of the railroad commission by the defendant after July 1, 1922, in that we think the order plainly and directly applies to the maintenance of power lines and supply lines carrying the heavy voltage referred to in the order and that on and after July 1, 1922, the maintenance by the defendant of the power line carrying 11,000 voltage with a clearance of a trifle over 19 feet was in direct disregard of the order of the railroad commission. By the order of the railroad commission the defendant was allowed 60 days within which to elevate its line, and a period of a little over four months additional expired, with nothing having been done by the defendant to comply with the order of the commission relative to the maintenance of its line. The very word "maintenance" applies as directly to line already constructed as to one that was thereafter to be constructed or reconstructed. It certainly cannot be reasoned that the railroad commission, after finding, upon investigation, that safety required such heavily charged power lines to have a clearance of 25 feet, that it would then proceed to promulgate an order which required such a clearance only of lines thereafter to be constructed, and how they should be maintained after construction in order to insure safety, and then provide that lines already constructed, having a clearance of 6 feet below the point of safety, might lawfully be maintained. Such a construction leads to the absurdity that a power company across one field might, in accordance with the rules and regulations of the railroad commission, maintain a highly charged power line several feet below the line of clearance, which would be unlawful if constructed and maintained across an adjoining field on and after July 1, 1922. Ordinary safety and protection of life and property seems to us to demand that the general order of the railroad commission as to the main-

tenance of power lines so highly charged should apply to all lines maintained so highly charged after the 1st day of July, 1922. The word "maintenance" cannot be eliminated from the order, nor can it be held that the word "maintenance" applies to one line and not to another without convicting the railroad commission of the absurdity of providing that an instrumentality dangerous in its character could not and should not be lawfully maintained over one field of alfalfa less than with a minimum clearance of 25 feet, while at the same time concluding that such an instrumentality, equally dangerous to life and property, might lawfully be maintained over another field with a clearance of only 19 feet. If reasonable safety requires a clearance of 25 feet over one particular agricultural tract of land, it certainly requires the same clearance over the agricultural tracts of land. That the railroad commission had the power to make the order in question appears not to be controverted. We may, however, add that it has such power, and this is clearly shown by the authorities set forth supporting the text in 37 Cyc. p. 1636, where the subject of the change, location, etc., of electric wires, is considered. That the word "maintenance," in relation to the future operation and control of electric power lines, as mentioned in order No. 64 of the railroad commission, applied directly to the line maintained by the defendant as well as to lines that should be subsequently constructed, has, in principle, been directly decided in this court in the case of *Morris v. Sierra & San Francisco Power Co.*, 57 Cal. App. 281, 207 P. 262. The court in that case, considering the powers of the railroad commission as conferred by sections 22 and 23 of article 12 of the Constitution and the legislation had in pursuance thereof, was dealing with two wires, both of which were constructed prior to the order of the railroad commission, then and there involved. Order No. 26 of the railroad commission, among other things, provided that there should be at least a clearance of two feet between wires; that this order applied to both the plaintiff and the defendant in that case. The order became effective January 1, 1913. Neither one of the parties to that action took any steps to so adjust their lines as to give the clearance required by the order of the commission. This court held, speaking through Justice Hart, that such failure was "obviously a violation of order No. 26 above referred to prescribing the minimum clearance between telegraph and telephone wires where the same cross each other," etc. It was held in that case that, admitting the negligence of the defendant in not changing its wires to conform to the order of the railroad commission, the plaintiff was also guilty of negligence in not so reconstructing and maintaining, after January 1, 1913, the line owned by him so as to give the requisite clearance.

The order referred to, which became effective as herein stated, and known as general order No. 26, so far as applicable here, reads as follows:

"Telegraph, telephone and signal lines at crossings with other telegraph, telephone or signal lines shall have a minimum clearance above or below such lines of two feet, unless suitably supported to prevent contact."

A hearing by the Supreme Court in that case was denied, and we think the reasoning set forth in the opinion of *Morris v. Sierra, etc.*, Power Co., *supra*, is conclusive here, and definitely decides that an order of the railroad commission, specifying that highly charged power lines, in areas such as that involved here, shall have a minimum clearance of at least 25 feet, and were to be so maintained on and after July 1, 1922, and included all lines then subsisting, as well as lines that should thereafter be constructed in like territory. Likewise, as held in the case of *Morris v. Sierra, etc.*, Co., *supra*, and as also held in the case of *Sickles v. Mt. Whitney Power & Electric Co.*, 177 Cal. 278, 170 P. 599, the failure of the power company to maintain its line carrying 11,000 voltage with a minimum clearance of 25 feet, as provided by the order of the railroad commission, and its disregard of the order of the railroad commission in this respect, must be held as showing negligence per se on the part of the defendant. Under the constitutional provision to which we have referred, and the acts of the Legislature passed in pursuance thereof, the order of the railroad commission relative to the lawful manner in which certain power lines could be maintained became obligatory upon the defendant, and this duty appears to have been disregarded by the defendant for a number of months, on the theory that it was not a binding order upon the defendant and did not require the defendant to elevate its line so as to give the clearance found necessary for safety by the railroad commission. The evidence shows conclusively that had the line in question been maintained with a clearance equal to that specified in general order No. 64 of the railroad commission, the deceased would not have been electrocuted. The pipe which the deceased had in his hand was 20 feet 4 inches in length. The mark upon the pipe, as testified to by witnesses, where it came in contact with the electric wire, was about 16 or 18 inches from one end thereof, showing clearly that if the wire had been maintained with a clearance of 25 feet, no fatality would have followed. The wire in question was uninsulated. It was maintained, as we have shown, at an elevation of only 19 feet and 3 inches, and irrespective of the order of the railroad commission requiring a clearance of at least 25 feet, the question of maintaining an uninsulated wire so close to the ground over agricultural lands where farmers, workmen, dairymen, and

others who might lawfully go there and the agricultural implements which they might use, including water pipe and other instrumentalities which the farmers of that section were accustomed to use and employ and where contact with the unprotected wire might readily be made, presented a question of fact as to the negligence of the defendant, to be submitted to the jury.

[4] The appellant further argues that, even though admitting the negligence as alleged in the complaint, the deceased was guilty of contributory negligence and therefore no recovery can be had. No person witnessed the accident. What occurred can only be gathered from the surrounding circumstances. There is nothing in the testimony to show that the deceased had or did not have knowledge of the current being carried by the wire on the 6th day of November, 1922. So far as the testimony shows, it indicates that the deceased went upon the alfalfa field in question for the first time on the day that he met his death. Again, there is nothing indicating that the iron pipe, when held in the hands of the deceased, was or was not blown against the electric wire without any fault on his part.

As bearing upon the question of the deceased's alleged contributory negligence, we think the language of the Supreme Court in the case of *Giraudi v. Electric Improvement Co.*, 107 Cal. 120, 40 P. 108, 28 L. R. A. 596, 48 Am. St. Rep. 114, applicable. That case involved the question of negligence of the injured person going upon the roof of a building and coming in contact with an electric wire, and the court said:

"Even had he observed the wires during his short visit to the roof it would be a question for the jury to say whether it was the want of ordinary care for him not to have it in mind on that occasion. It is said that, if one was aware of a fact which should have put him upon his guard, he cannot rebut the presumption of contributory negligence by showing that he momentarily forgot it. This is true as a general proposition, but, like all other rules upon this subject, it must have a reasonable construction. To forget is not negligence, unless it shows the want of ordinary care, and it is a question for the jury. Illustrations of this proposition are found in the cases of brakemen who are injured by obstructions over or near the track of the road. They have been allowed to recover, although it is shown that they knew of the obstruction, on the ground that they cannot be expected to retain, at all times, a complete outline of the track, and because, in the hurry of their work, they would not be likely to keep these things in mind. That is, to forget under the circumstances, did not prove absence of ordinary care"—citing *Dorsey v. Phillips Co.*, 42 Wis. 583.

The case of *Andrews v. Valley Ice Co.*, 167 Cal. 12, 138 P. 699, cited by the appellant upon the question which we are considering, differs from the case at bar because the deceased in that case was not in the course of

his employment, and had been directly and specifically warned not to go to the place where he was injured. The deceased in the case at bar was where he had a right to be, and where the work that he was performing necessitated his being.

Again, in the case of *Shade v. Bay Counties Power Co.*, 152 Cal. 10, 92 P. 62, relied upon by the appellant, where it is said that "in an action to recover damages for personal injuries alleged to have been the result of the negligence of the defendant in which the defense of contributory negligence is interposed, if the facts are clear and undisputed, and no other inference than that of contributory negligence can be drawn from them, the court is not required to submit that question to the jury, but may itself make the inference," the facts show that the plaintiff, on a public road, discovered an electric wire hanging down to within a few feet of the ground; that as he approached the wire he was cautioned by a witness in the following language: "Don't touch the wire, Chester, whatever you do"—and the deceased replied: "There's no danger of my doing that; I wouldn't think of doing that." Nevertheless, the deceased took a short cord, threw it over the wire, and in drawing the wire to one side came in contact with it and received a fatal shock. Even in that case there was a very strong dissenting opinion on whether the question of contributory negligence should or should not have been submitted to the jury. Ordinarily, the language of the court in *Williams v. Pacific Electric Co.*, 177 Cal. 235, 170 P. 423, applies. It is there said:

"The question of contributory negligence is one of fact for the jury to solve under proper instructions, * * * save in those cases in which, judged in the light of common knowledge and experience, there is a standard of prudence to which all persons similarly situated must conform."

And as said in section 141, 19 California Jurisprudence, p. 735:

"Where contributory negligence is set up as a defense, it seldom happens that the question is so clear from doubt that the court can undertake to say, as a matter of law, how the jury shall find upon the issue. As, with the negligence of the defendant, the question of contributory negligence of the plaintiff is ordinarily one of fact for the jury"—citing many authorities.

Under the facts of this case we think the question of contributory negligence was one for the jury and not for the court, and that the finding of the jury thereon, adversely to appellant, as must necessarily be concluded from the verdict, is conclusive upon this appeal.

[5] It is finally urged that the court erred in its instructions given to the jury and in denying certain instructions requested by the appellant. Following the case of *Fair-*

bairn v. American River Electric Co., 179 Cal. 157, 175 P. 637, the trial court, at the request of the plaintiff, gave the following instruction:

"If you find from the evidence that it was a common practice in the community where defendant was maintaining the power line involved in this action of persons laying pipe lines and in laying pipes of standard lengths to stand them upon end for the purpose of cleaning them before laying, then you are instructed that it was the duty of defendant to have ascertained such fact and to have maintained its wires across lands capable of agricultural development and where such pipe lines were likely to be laid, at such height that there was no likelihood that such pipes would come in contact with its power lines, and if you find that defendant failed in this case to maintain the power line in question according to this requirement, defendant is guilty of negligence and you should so find."

This instruction we think inapplicable. The circumstances here disclose no visible objects such as were frequently in evidence in the territory where the American River Electric Company was maintaining its power lines and which was involved in the case just cited. Water pipes, as shown by the testimony, are taken up only at infrequent intervals. They are not objects visible to any one visiting the premises in question, nor were there agricultural implements visible, like hay derricks, which are necessarily moved about from place to place where hay is being raised, baled or stacked. The circumstances are not like maintaining a power line across either a public or a private highway where hay derricks were being moved from field to field. There is no showing in the testimony that water pipes had ever before been laid under electric power lines. The fact that some of the witnesses testified that it was the usual practice, in removing the rust from sections of water pipe, to stand the same on end, does not bring the situation within the principle involved in the Fairbairn Case. The Fairbairn Case involved the transportation of large, visible objects, of which any one may reasonably be said to have knowledge, and to take notice. However, we do not think that the jury was misled by the instruction under consideration, and that section 4½ of article 6 of the Constitution applies. The wire in question, as we have seen, was not maintained in accordance with general order No. 64 of the railroad commission, and was maintained uninsulated with a clearance of 19 feet 3 inches, which was only a trifle more than the length of an ordinary fence board, so that the jury was given ample ground for concluding that the wire was being maintained in a negligent manner, irrespective of whether the company knew anything about the custom of dairymen, when changing pipe lines, to stand the different sections on end. The wire was so low that contact might be made therewith with many different instru-

mentalities used on farming lands, so that the instruction objected to, even though inapplicable, was absolutely harmless. Nor did the trial court err in giving plaintiff's requested instruction No. 22, which reads:

"If the defendant failed to comply with the order of the railroad commission of the state of California relative to the maintenance of the power line in question, such fact is prima facie evidence of negligence, and if you believe from the evidence that a failure to comply with said order was the direct and proximate cause of the death of J. B. Howell, and that such death was caused without fault on his part, you are instructed to return a verdict for the plaintiffs."

The authorities which we have cited show that failure to comply with the orders of the railroad commission in the construction and maintenance of the electric power lines is negligence per se, and therefore makes out a prima facie case.

[6] Complaint is likewise made of the giving of plaintiff's requested instruction No. 14, which reads:

"You are instructed that it is the duty of the defendant corporation, after the construction of its power line leading to the pumping-plant on the Ginder premises, to use due care and caution to keep said power line in a safe, substantial manner by constant oversight and repair."

It is sufficient to say that this instruction was approved in Robinson v. Western, etc., Co., 184 Cal. 401, 194 P. 39, and is substantially the same as the instruction approved by this court in the case of Tackett v. Henderson Bros. Co., 12 Cal. App. 658, 108 P. 151.

[7] The instructions, as a whole, given by the court, clearly and fairly presented to the jury all the issues involved in this case. As to the instructions requested by the defendant and refused by the court, an examination shows that they are either inapplicable or contain incorrect statements of the law. Thus, in instruction A, as so designated in appellant's brief, the question of the negligence of the defendant relative to supporting the pole in a perpendicular position, which had leaned over and allowed the wire to sag, is made to rest upon knowledge acquired by the defendant of the leaning posture of the pole, and omits all reference to the duty of the company to properly inspect its wires to ascertain if they are in a safe condition. Instruction B is a modified form of the instruction condemned in the case of Foley v. Northern Power Co., 14 Cal. App. 401, 112 P. 467. Instruction labeled C is based upon the case of Andrews v. Valley Ice Co., 167 Cal. 11, 138 P. 699, where the facts were different, and therefore, even if applicable in that case, is inapplicable here, because of the want of testimony upon which to base such an instruction.

It would serve no useful purpose to summarize the various requested instructions refused by the trial court, and we content our-

selves with the statement that those not referred to specifically herein have been examined, and no error in their refusal has been called to our attention. We may say, however, that several of them were requests that the jury should be instructed that no negligence had been shown on the part of the defendant, that contributory negligence on the part of the plaintiff was established, and requests for a directed verdict.

Finding no error justifying a reversal herein, the judgment of the trial court is affirmed.

We concur: FINCH, P. J.; HART, J.

87 Cal. App. 295

PEOPLE v. MELLODY. (Cr. 1405.)

District Court of Appeal, First District, Division 1, California. Dec. 6, 1927.

1. Criminal law $\S$ 485(2)—**Testimony of professional alienist on hypothetical questions that defendant was sane when committing robbery some two years previous held admissible.**

In prosecution for robbery, testimony of professional alienist in response to certain hypothetical questions *held* admissible to prove fact that at time crime was committed some two years previously defendant was sane, since circumstances under which crime was committed would indicate to a trained mind whether perpetrator was conscious of wrongful nature of act committed.

2. Criminal law $\S$ 740—**Legal responsibility of accused at time of committing robbery is question of fact for jury.**

Question of whether defendant was legally responsible at time of commission of robbery constitutes a question of fact for the jury to determine.

3. Criminal law $\S$ 938(1), 1156(3)—**Motion for new trial for newly discovered evidence is addressed to court's discretion, and ruling will not be disturbed but for abuse.**

Motion for new trial based on newly discovered evidence as to mental condition of defendant is addressed to sound discretion of trial court, and ruling thereon will not be disturbed, in absence of abuse of such discretion.

Appeal from Superior Court, City and County of San Francisco; E. N. Rector, Judge.

William Melody was convicted of robbery, and he appeals. Affirmed.

E. H. Lomasney, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Lionel B. Browne, Deputy Atty. Gen., for the People.

TYLER, P. J. [1-3] Appellant was, with others, charged by indictment with the crime

of robbery, alleged to have been committed on or about the 2d day of March, 1925. He was tried, convicted, and sentenced to the state prison at San Quentin. A motion for a new trial was made and denied, and this is an appeal from the order and judgment. Briefly the evidence shows that defendant entered the office of one Dr. Koenigsstein, struck him on the jaw, and, by putting him in fear through the display of a revolver, robbed him of his watch, valued at \$250, a diamond ring valued at \$1,200, a diamond pin valued at \$325, and \$45 in cash. After being relieved of his property, the doctor was thrown to the floor, his hands and legs were tied, and he was gagged and left there, being threatened with death if he moved. A short time after the commission of this offense appellant was committed to a detention hospital for the purpose of being examined as to his sanity and later was committed to the state hospital at Stockton, from which institution he escaped. At the trial Dr. Catton, a professional alienist, was called as a witness both on behalf of the defense and the prosecution. He testified he had examined the defendant and that he was sane at the time of his trial. He further testified he had not examined defendant at the time of the commission of the offense, which was almost two years prior thereto. He had, however, made a thorough examination of the case. He had interviewed the defendant and became familiar with the history of his life and his various ailments. Certain hypothetical questions, which included the mode and manner in which the crime was committed, were addressed to this witness, and in response thereto he gave it as his opinion that defendant was sane at the time he committed the offense. It is here claimed that this evidence was inadmissible to prove this fact. We do not think so. The circumstances under which the crime was committed would indicate to a trained mind whether the perpetrator was conscious of the wrongful nature of the act committed. Whether accused was legally responsible at the time he committed the act was a question of fact for the jury to determine as was also the weight of the evidence. *People v. Sloper*, 198 Cal. 238, 244 P. 362. The further point is urged that the court erred in denying defendant's motion for a new trial. The motion was based upon newly discovered evidence as to the mental condition of defendant at the time of his arrest. Such motions are addressed to the sound discretion of the court, and, in the absence of abuse the determination of the trial court, will not here be disturbed. *People v. Feld*, 149 Cal. 464, 86 P. 1100.

The order and judgment are affirmed.

We concur: KNIGHT, J.; CASHIN, J.

87 Cal. App. 297

HILL v. WAITING MINING CO. et al.
(Civ. 6056.)

District Court of Appeal, First District, Division 2, California. Dec. 6, 1927.

1. Corporations ⚡398(2)—**Purported assignment of corporation's agreement by stockholders held of no legal significance.**

Purported assignment of corporation's agreement by stockholders of corporation without execution of any document by corporation had no legal significance.

2. Assignments ⚡110—**Original parties to agreement, having assigned rights thereunder, are not interested parties entitled to judgment in subsequent litigation.**

Where original parties to agreement had assigned their interest and parted with all rights, they were no longer interested parties and were not entitled to judgment in their favor in subsequent action involving such agreement.

3. Specific performance ⚡28(2)—**Terms of agreement to convey certain rights and use of surface in case of profitable mining held too uncertain to authorize enforcement (Civ. Code, § 3390, subd. 6).**

Terms of agreement for conveyance of rights of way, timber, water, and surface use of land around mining shafts in case minerals could be profitably mined held, under Civ. Code, § 3390, subd. 6, not sufficiently certain to authorize its enforcement, since general nature of conveyance and terms were such that most court could do would be to say they rested in conjecture.

4. Specific performance ⚡73—**Agreement to prospect cannot be specifically enforced; "personal service" (Civ. Code, § 3390, subd. 2).**

Under Civ. Code, § 3390, subd. 2, agreement to prospect cannot be specifically enforced in that it constitutes an agreement to render personal service.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Personal Service.]

Appeal from Superior Court, Santa Clara County; J. R. Welch, Judge.

Action by Albert E. Hill, administrator, against the Waiting Mining Company and others. Judgment for defendants, and plaintiff appeals. Reversed.

Edward R. Eliassen and Walter H. Eliassen, both of Oakland, for appellant.

R. H. Chamberlain, Jr., of Oakland, for respondents.

STURTEVANT, J. The plaintiff commenced an action against the defendants to obtain a decree quieting title to real estate. The defendants appeared and answered. The trial court made findings in favor of the defendants, and from a judgment based thereon the plaintiff has appealed.

On September 5, 1907, Albert J. Caswell and wife, as the owners, and C. M. Jensen and Angus Matheson executed a writing by which the owners granted "the parties of the second part permission to work for minerals" on the land in suit. It was further provided:

"First. If said parties of the second part succeeded in getting minerals in paying quantities, the parties of the first part will give said parties of the second part a one-half interest in 10 acres of above-described property, as an inlet to the vein and all profits shall be divided one-half to parties of the first part and one-half to parties of the second part after all expenses have been paid, one-half by parties of the first part and one-half by parties of the second part. Second. If said parties of the second part do not get the mineral in paying quantities, all expenses shall be paid by said parties of the second part without any cost whatsoever to said parties of the first part, and this agreement shall become null and void."

The record does not disclose that Jensen and Matheson at any time succeeded "in getting mineral in paying quantities." Without any further consideration, on June 21, 1920, A. J. Caswell, C. M. Jensen, and Angus Matheson executed a writing, hereinafter called the second agreement, which recites that it is in lieu of the first agreement.

[1] On July 1, 1920, the parties of the second part assigned the second agreement to the Waiting Mining Company. The shaft hereinafter mentioned was sunk, but no further proceedings were had under said assignment except as will presently be noted. On December 15, 1921, the stockholders of that company, as a body of stockholders, made a purported assignment of the second agreement to the Los Gatos Lime Company. No document of any kind purporting to be the indenture of the Waiting Mining Company was executed. The purported assignment by the stockholders had no legal significance. *Gashwiler v. Willis*, 33 Cal. 11, 19, 20, 91 Am. Dec. 607; *Hotaling v. Hotaling*, 193 Cal. 369, 376, 377, 224 P. 455. Therefore the Los Gatos Lime Company took nothing, and no judgment should have been rendered in its favor.

[2] Jensen and Matheson had assigned to the Waiting Mining Company and had parted with all of their rights and were no longer interested parties in this litigation. Therefore no judgment should have been rendered in their favor. The Waiting Mining Company received its assignment July 1, 1920, but it has never agreed to be bound by the burdens of it.

By the terms of the second agreement the parties agreed to form a corporation having a capital of \$50,000 divided into 50,000 shares of \$1 each; the owner agrees (1) to sell for 5,000 of those shares all minerals of every kind contained in the owner's land; (2) to grant conveyances of rights of way for roads of ingress and egress to said minerals; (3) to grant all timber for domestic and mining

purposes; (4) to grant all water so required; and (5) to grant the surface use of 5 acres centered around each shaft so long as mining thereat continues or so long as the operators may desire and require the same for mining operations; and the second parties agree to begin the mining operations as soon as practicable.

There is some evidence that the stock was issued, but a conveyance was not executed because there was some work to be done by the grantees which had not been done. There is no evidence that such work was done before this action was commenced. Finally, if that company wants a conveyance there are no facts in the record from which the terms of that conveyance can be ascertained. The decedent owned a quarter section. It is clear that the entire tract was not mineral land in the technical meaning of that term. There is absolutely no evidence as to what portion was mineral land. There is evidence that an 80-foot shaft has been sunk, but no evidence as to where it is. There is no evidence where the rights of way were to commence, where they were to end, or what lands they were to pass over. There is no evidence at what place water was to be taken or in what manner or quantity. There is no evidence as to the shape, or boundaries, or of the location of the 5-acre tract, or tracts, or how many of those tracts there were to be. The evidence shows that the grantees or assigns were to prospect. If successful, they were to mine and they were to continue the mining as long as minerals could be mined at a profit. But, if minerals could not be mined at a profit, the evidence is without conflict that the "agreement shall become null and void." The grantees were to commence operations "as soon as practicable," but the record is wholly silent as to the term of years within which they should perform the contract.

[3] Among the points made by the plaintiff he asserts that the terms of the alleged agreement held by the defendants are not sufficiently certain to make the precise act which is to be done clearly ascertainable. That the rule contended for obtains in this state is settled beyond dispute. Civ. Code, § 3390, subd. 6; *Morrison v. Rossignol*, 5 Cal. 64; *Minturn v. Baylis*, 33 Cal. 129, 133; *Co-operative Assn. v. Phillips*, 56 Cal. 539, 546; *Breckinridge v. Crocker*, 78 Cal. 529, 21 P. 179; *Talmadge v. Arrowhead Reservoir Co.*, 101 Cal. 367, 35 P. 1000; *Beal v. United Properties Co.*, 46 Cal. App. 287, 293, 189 P. 346. When all the evidence tending to establish such contract leaves the terms thereof in doubt, it cannot be specifically enforced, and where, on appeal, giving full credit and weight to all evidence affirmatively tending to establish such agreement, disregarding all conflicting evidence, it appears that the terms of such agreement are not clearly ascertainable, then the action of the trial court enforcing such uncertain agreement may be reversed. *De*

Kahn v. Chase, 177 Cal. 281, 283, 170 P. 608. Applying the foregoing rules to the facts which we have recited, it is patent that plaintiff's decedent agreed to execute a conveyance of some kind, but not a deed. *Graciosa Oil Co. v. Santa Barbara*, 155 Cal. 140, 144, 99 P. 483, 20 L. R. A. (N. S.) 211. But the terms of the conveyance and the general nature of the conveyance were such that the most the court can do is to say they rest in conjecture.

[4] The plaintiff also makes the point that the agreement was an agreement to prospect and in that behalf to render personal service. Thereupon the plaintiff contends that such an agreement will not be specifically enforced. He cites and relies on Civil Code, § 3390, subd. 2; *Los Angeles, etc., Co. v. Occidental Oil Co.*, 144 Cal. 528, 78 P. 25; *Cooper v. Pena*, 21 Cal. 403; *Sturgis v. Galindo*, 59 Cal. 28, 43 Am. Rep. 239; *Poultry Producers, etc., v. Barlow*, 189 Cal. 278, 208 P. 93. The authorities clearly support the contention.

The judgment is reversed.

We concur: KOFORD, P. J.; NOURSE, J.



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17, 1922, *held* in irreconcilable conflict, though court found electrical work done after June 1, 1922, in order to obtain final inspector's certificate of city electrician, was "trivial imperfection," under section 1187.

2. Trial $\S$ 395(5)—Finding of ultimate fact is invalidated, if probative facts on which it must rest lead to repugnant conclusion.

If probative facts on which the ultimate fact found by the court must rest lead to conclusion repugnant to finding of ultimate fact, it must be held that finding of ultimate fact is invalidated.

3. Mechanics' liens $\S$ 5—Mechanics' liens must be liberally construed (Const. art. 20, $\S$ 15).

Liens of mechanics and materialmen, protected by Const. art. 20, $\S$ 15, being remedial in character, are to be liberally construed, with a view to effect the object of the Constitution and promote justice.

4. Mechanics' liens $\S$ 132(8)—Electrical work costing \$193.50, required to obtain inspector's certificate, held to mark completion of building as to materialman filing lien, not mere "trivial imperfection" (Code Civ. Proc. $\S\S$ 1183-1199, 1187).

Electrical work required to be completed in construction of \$13,500 flat building, by putting in more and heavier wires in order to obtain final inspector's certificate of city electrician, where done at reasonable cost of \$193.50, *held* not mere "trivial imperfection," within Code Civ. Proc. $\S$ 1187, but fixed date of completion of building, entitling materialman to foreclose lien filed within 90 days thereafter, where owner failed to file notice of completion under sections 1183-1199.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Trivial Imperfection.]

Department 1.

Appeal from Superior Court, Los Angeles County; Harry A. Hollzer, Judge.

Action by the Hammond Lumber Company against the Barth Investment Corporation, Claus Due, and others. From a portion of the judgment adverse to it, plaintiff appeals. Reversed.

R. L. Horton, of Los Angeles, for appellant.

Constan Jensen, of Los Angeles, for respondents.

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HAMMOND LUMBER CO. v. BARTH INV. CORPORATION et al. (L. A. 8925.)

Supreme Court of California. Dec. 13, 1927.

Rehearing Denied Jan. 12, 1928.

1. Mechanics' liens $\S$ 290(5)—Finding that building was completed before June 1, held in conflict with finding that electrical work required to obtain inspector's certificate was finished on June 17 following (Code Civ. Proc. $\S\S$ 1183-1199).

In action by materialman to foreclose mechanic's lien, in which no notice of completion of building was filed by owner under Code Civ. Proc. $\S\S$ 1183-1199, finding that building was completed prior to June 1, 1922, and that electrical work in building was finished on June

SEAWELL, J. The court below gave a default judgment for the plaintiff, Hammond Lumber Company, a corporation, against defendants Barth Investment Corporation, Isaac Barth, and A. Barth for \$3,041.59, the contract price of building materials furnished and labor performed by plaintiff in connection with the construction of a building on premises situate in the city of Los Angeles and owned by defendant Claus Due, but denied the prayer of plaintiff's complaint that it be adjudged to have a lien upon the said building for said contract price, by vir-

⌘ For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

tue of having furnished said materials and labor, and that the court direct the foreclosure of said lien as by law provided. From that portion of the judgment decreeing that plaintiff was without a right of lien, it appeals on the judgment roll alone. The sole question involved is whether plaintiff has lost its right to assert a lien by reason of a failure to file its claim of lien within the 90-day period following the completion of the building, which is allowed in cases where the owner fails to file a notice of completion as required by the law relating to mechanics' and materialmen's liens. Sections 1183-1199, Code Civ. Proc.

[1] All of the facts involved in the case, both ultimate and probative, are set forth in the findings, which are in irreconcilable conflict. By finding VI the court found:

"That it is true that said building or structure was completed prior to June 1, 1922; that prior to said June 1, 1922, said defendant Claus Due took possession of said building or structure and of said premises, and occupied the same, and ever since has continued to occupy the same; that no notice of completion of said building or structure has been filed of record."

By finding VIIa the court found:

That the electrical work, which was included in the building contract and described by the plans and specifications, was done or performed in May and June, and "was finished on the 17th day of June, 1922."

The probative facts found therein, as to the necessity of the completion of the electrical work in order to conform with the building plans and specifications and to meet the requirements of the ordinances of the city of Los Angeles, are fully set forth. It is apparent that these facts do not support the ultimate findings that the building was finished or completed prior to June 1, or that the incompleting work may be classified as a trivial imperfection. Finding VIIa follows:

"That* the electrical work in said building was originally subcontracted to one Roscoe A. Coffman, but the said subcontractor Coffman installed said work improperly and some time in May, 1922, ceased labor upon said electrical work, and left the same in a partially unfinished condition, and thereafter the contractors, acting by and through Isaac Barth, employed one Everett Ingraham, an electrical contractor, to complete said work in a proper manner. The said Ingraham, while said owner was in the use, occupation, and possession of said structure, did 95 hours' work upon said Due building, to correct and complete said electrical work in accord with the plans and specifications and the requirements of the city ordinances of the city of Los Angeles, at a reasonable cost of \$193.50; that said work was all done in May and June, 1922, and was necessary to correct and complete the work in accord with the plans and specifications; that said work consisted generally of putting in more and heavier wires, and drawing out wires not heavy enough to carry the load, and putting in necessary materials to

correct and complete said work; that said work done by the said Ingraham was finished on the 17th day of June, 1922; that, without the work done by said Ingraham, the city electrician's office of the city of Los Angeles refused to accept said work and furnish a final inspector's certificate; that said acceptance by the city and final certificate of acceptance was not issued by the city until after the 17th day of August, 1922. The original contract for the construction of said building contained the following: 'All work to be installed in accordance with city ordinances, furnishing electrical inspector's certificate before work will be accepted.' The city permit granted to said subcontractor Ingraham to do this work was dated and issued on the 5th day of June, 1922. The court finds that the above work constituted a trivial imperfection; that the contract cost of construction of said flat was \$13,500, and the original contract cost for the installation of the electrical work was approximately \$357."

[2, 3] The findings above set forth dispose of all the facts to be found in the case. Therefore, if the probative facts upon which the ultimate fact must rest lead to a conclusion repugnant to the ultimate fact found, the latter must be held to be invalidated by the former. 24 Cal. Jur. 972. If the electrical work was completed, as found by the court, on June 17th, and was not a trivial imperfection, the appellant's lien was filed within time, and it is valid. The "trivial imperfection" provision of section 1187, Code of Civil Procedure, was added to the Code in 1897 for the benefit of the lien claimants, and not as a hindrance to the enforcement of materialmen's liens. Liens of mechanics and materialmen are protected by section 15, article 20, of the state Constitution, and, being remedial in character, are to be liberally construed with a view to effect the object of the Constitution and promote justice. *Continental Building & Loan Association v. Hutton*, 144 Cal. 609, 78 P. 21; *McClung v. Paradise, etc.*, 164 Cal. 517, 129 P. 774; *Martin v. Becker*, 169 Cal. 301, 146 P. 665, Ann. Cas. 1916D, 171.

[4] Neither does the amount, value, and character of the materials required to be furnished and labor performed to place the building in a completed state appear to us to be of that trivial character as to impel a holding that the claimant has thereby lost his lien. A test that has been applied in this class of cases and which has the sanction of judicial approval was thus stated in *Hammond Lumber Co. v. Yeager*, 185 Cal. 355, 197 P. 111:

"Are the imperfections in the performance of the work so trivial in character as to permit the contractor to recover for substantial performance?"

We think that the findings set out in VIIa impel a negative answer.

The judgment is reversed.

We concur: PRESTON, J.; CURTIS, J.

202 Cal. 606

HAMMOND LUMBER CO. v. BARTH INV. CORPORATION et al. (L. A. 8926.)★

Supreme Court of California. December 13, 1927.

Rehearing Denied Jan. 12, 1928.

1. **Mechanics' liens** ⇨132(4)—Time for filing mechanic's lien runs from completion of building, where owner neglects to file notice of completion (Code Civ. Proc. § 1187).

Where owner of building neglects to file for record notice of completion of improvement contract or cessation of labor on building, question whether materialman's lien is filed within statutory time, under Code Civ. Proc. § 1187, depends on time when building was completed.

2. **Trial** ⇨395(5)—Finding of ultimate fact is invalidated, where probative facts on which it is based, disposing of all facts involved in pleadings, are repugnant.

Findings of ultimate facts are not generally impeached by findings of probative facts, but will be invalidated when ultimate fact is based on probative facts, and is entirely overcome thereby, provided findings of probative facts dispose of all facts involved in pleadings.

3. **Trial** ⇨404(4)—Specific findings control over general findings in event of inconsistency.

Where court, in addition to general findings, makes specific findings as to averments of pleadings, specific findings control, in event of inconsistency.

4. **Trial** ⇨404(2)—General finding, amounting to mere conclusion of law, is insufficient.

A general finding, which is in effect but a conclusion of law, is insufficient.

5. **Mechanics' liens** ⇨132(8)—Electric work costing \$260.61, required as condition to obtaining inspector's certificate, held to mark completion of building as to materialmen filing lien and not mere "trivial imperfection" (Code Civ. Proc. § 1187).

Remaining electric work by way of putting more and heavier wires into \$13,500 flat building, required to be done as condition of issuance of final inspector's certificate by city electrician's office, where of reasonable value of \$260.61, was not mere "trivial imperfection," within Code Civ. Proc. § 1187, such that materialman's lien filed within 90 days after finishing such work could not be considered as filed within 90 days after completion of improvement.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Trivial Imperfection.]

6. **Mechanics' liens** ⇨132(7)—Requirement that trivial imperfection in work should not prevent filing lien must be liberally construed in favor of lien claimant (Code Civ. Proc. § 1187; Const. art. 20, § 15).

Code of Civ. Proc. § 1187, providing that trivial imperfections in work shall not be deemed lack of completion of building, so as to prevent filing of lien, is intended for benefit of lien claimant, and should be given reasonably liberal construction to effect its purpose, in view of Const. art. 20, § 15.

7. **Mechanics' liens** ⇨5—Constitutional provision giving right to assert mechanic's lien should be liberally construed, and right cannot be defeated without showing grave reasons therefor (Const. art. 20, § 15).

Under Const. art. 20, § 15, right to assert mechanic's lien is remedial in its character, and should be liberally construed in its entirety, with a view to effect its objects and to promote justice, and right cannot be destroyed or defeated, either by Legislature or courts, unless grave reasons are shown.

8. **Mechanics' liens** ⇨132(7)—"Trivial imperfections," as respects time for filing lien, are those of nature not preventing contractor's recovery for substantial performance (Code Civ. Proc. § 1187).

Test of trivial imperfection in work of constructing building, as respects time for filing of mechanic's lien under Code Civ. Proc. § 1187, is whether imperfections in performance of work are so trivial in character as to prevent contractor from recovering for substantial performance.

9. **Mechanics' liens** ⇨132(7)—Owner's secret acceptance of uncompleted building from contractor does not constitute completion as to materialman claiming lien (Code Civ. Proc. § 1187).

Mere fact that owner of uncompleted building notifies contractors that he accepts the building does not amount to such completion of building as to defeat lien claimant, under Code Civ. Proc. § 1187, for failure to file lien within 90 days thereafter, where it does not appear that acceptance was communicated to materialman, or that he had any knowledge thereof.

10. **Mechanics' liens** ⇨132(7)—Where construction work is suspended and later resumed, materialman has 90 days from final completion for filing lien, where owner fails to file notice of completion (Code Civ. Proc. § 1187).

If work in constructing building is suspended for a time, and later resumed in execution of original contract, and no notice of completion is filed, materialman is entitled to 90 days after work is finally completed in which to file his lien, under Code Civ. Proc. § 1187.

11. **Mechanics' liens** ⇨290(4)—Finding that owners accepted building from contractors did not amount to finding of building's completion as respects materialman claiming lien, where findings showed building was subsequently completed (Code Civ. Proc. § 1187).

In materialman's action to foreclose mechanic's lien, court's finding that owners notified contractors that they accepted building did not amount to finding that building under Code Civ. Proc. § 1187, was actually completed on date of acceptance, so as to bar lien claim 90 days later, where it appeared from findings that building was actually completed thereafter.

Department 1.

Appeal from Superior Court, Los Angeles County; Harry A. Holzer, Judge.

Action by the Hammond Lumber Company against the Barth Investment Corporation

and others. From a portion of the judgment adverse to it, plaintiff appeals. Portion of judgment appealed from reversed.

R. L. Horton, of Los Angeles, for appellant.

Constan Jensen, of Los Angeles, for respondents.

SEAWELL, J. This appeal, which is from the judgment roll, involves some questions of law similar to those decided in *Hammond Lumber Company, a Corporation, v. Barth Investment Corporation, a Corporation* (L. A. 8925) 262 P. 29, this day filed, and as to such questions that case is decisive. Carl Hellman and Anna Hellman were owners of a lot situated in the city of Los Angeles. C. A. Barth and Barth Investment Corporation contracted with said owners to erect upon said lot a flat at the cost of \$13,500 to said owners. The action was commenced to foreclose a materialman's lien and for a personal judgment against said contractors in the sum of \$3,000.17. Judgment went by default against said contractors, but in favor of respondents Hellman for costs of suit. This appeal is taken from that portion of the judgment entered in favor of said respondents.

[1] The questions presented are whether or not the asserted lien of appellant, the materialman, was filed within the statutory time prescribed by section 1187, Code of Civil Procedure, and also as to the conclusiveness of certain ultimate findings which are in conflict with certain findings of probative facts. That question is dependent upon the time the building was completed, inasmuch as the owner neglected to file for record notice of the completion of said improvement contract or a cessation of labor thereon as provided by said section 1187, *supra*. The building contract provided for certain electrical construction or equipment as a part of the building. The electrical work was subcontracted, but the subcontractor, soon after entering upon the performance of his contract, abandoned work thereunder and left it, as found by the court, in "a partially incomplete and unfinished condition." Thereafter the original contractors employed an electrical contractor, one Ingraham, to complete said work. The court further found, as set forth in finding VIIa, that:

"The said Ingraham, while said owners were in the use, occupation and possession of said structure, did 95 hours' work upon said Hellman flats to correct and complete said electrical work in accord with the plans and specifications and the requirements of the city ordinances of the city of Los Angeles, at a reasonable cost of \$260.61; that said work was done partially in July, 1922, and was necessary to correct and complete the work in accordance with the plans and specifications; that said work consisted generally of putting in more and

heavier wires, and drawing out wires not heavy enough to carry the load, and putting in necessary materials to correct and complete said work; that said work done by the said Ingraham was finished on the 11th day of July, 1922, except six hours' work that was done on August 16, 1922, and five hours' work on August 17, 1922; that, without the work done by said Ingraham, the city electrician's office of the city of Los Angeles refused to accept said work and furnish a final inspector's certificate; that said acceptance by the city and the final certificate of acceptance was not issued by the city until after the 7th day of August, 1922. The original contract for the construction of said building contained the following: 'All work to be installed in accordance with city ordinances furnishing electrical inspector's certificates before work will be accepted.' The court finds that the above work constituted a trivial imperfection, that the contract cost of construction of said flat was \$13,500 and that the original contract cost for the installation of the electrical work was \$357. The city permit granted to said Ingraham to do his work was dated and issued June 5, 1922."

[2-4] By preceding ultimate findings the court found that said owners did not file for record a notice of the completion of said building, and that said building contract was completed on June 8, 1922. If the ultimate finding as to the completion should not be permitted to prevail over the conclusion which must be drawn from the probative facts specifically found by the court, and which lead in a contrary direction, the lien of appellant must be held to be a valid and subsisting lien and a reversal of the case must be ordered. The question, therefore, is whether the electrical work performed within the period of 90 days immediately preceding the day on which appellant's lien was filed, to wit, September 15, 1922, constituted the correction of trivial imperfections merely, as found by the court (section 1187, Code Civ. Proc.), or whether, as contended by appellant, said work was a material part of the contract, which must be performed before it may be claimed that the contract was completed, in the sense that the lien claimant is deprived of its lien. "As a general rule findings of ultimate facts may not be impeached, controlled, limited, or modified by findings of probative facts, but will control in case of any conflict between them. Findings of probative facts invalidate a finding of an ultimate fact only when the latter is based on the former and is entirely overcome thereby and when the findings of probative facts dispose of all the facts involved in the pleadings." 24 Cal. Jur. 972; *Lee v. Hibernia Savings & Loan Society*, 177 Cal. 656, 171 P. 677; *Steele v. Scott*, 192 Cal. 521, 221 P. 342. So, too, it is the rule that "where the court, in addition to general findings, makes specific findings as to particular averments of the pleadings the latter control in the case of inconsistency." 24 Cal. Jur. 974. A general finding which is in effect but a

conclusion of law is insufficient. See footnote 16, 24 Cal. Jur. 974.

[5] The findings in the instant case present and dispose of all the facts in the case and the ultimate fact is uncontrovertibly based upon the probative facts as specifically set out by the court. If, then, the probative facts, as found by the court, are repugnant to the ultimate fact, that said building was completed prior to the months of July or August, 1922, the latter is invalidated by the former. The question squarely presented is whether, as a matter of law, the greater part of labor done and materials furnished for the completion of the electrical work according to the plans and specifications of the contract, and performed in July and August, was of the kind and character and of sufficient contractual importance to warrant a finding that the building contract, so far as the materialman's lien was affected thereby, was not completed without the additional labor and material which it was necessary to employ and furnish at a cost of \$260 in order to comply with the plans and specifications of the original contract. We are of the view that the work necessary to be done to complete the electrical construction was in no sense a "trivial imperfection." The portion of section 1187, Code of Civil Procedure, which the trial court held to be determinative of appellant's rights, provides:

"Any trivial imperfection in the said work, or in the completion of any contract by any lien claimant, or in the construction of any building, improvement or structure, * * * shall not be deemed such a lack of completion as to prevent the filing of any lien. * * *"

[6, 7] This provision of the act was added to the earlier act for the *benefit of the lien claimant*, as its language plainly implies, and was enacted in the interest of and for the better protection of the lien claimant against inconsequential imperfections that could be conveniently urged as sufficient reasons to defeat the claimant's lien. So far as the provision affects the lien claimant it must be given a reasonably liberal construction with a view to effect its purpose. In fact, liens of mechanics and materialmen are protected by section 15, article 20, of the state Constitution. The right to assert such a lien is remedial in its character and should be liberally construed in its entirety, with a view to effect its objects and to promote justice. *Continental Building & Loan Association v. Hutton*, 144 Cal. 609, 78 P. 21; *McClung v. Paradise, etc., Co.*, 164 Cal. 514, 129 P. 774; *Martin v. Becker*, 169 Cal. 301, 146 P. 665, Ann. Cas. 1916D, 171. The function of the Legislature is to provide a system through which the right of mechanics and materialmen may be carried into effect, and this right cannot be destroyed or defeated either by the Legislature or courts, unless grave reasons be shown therefor. *Martin*

v. Becker, supra; *Hughes Bros. v. Hoover*, 3 Cal. App. 145, 84 P. 681.

The original contract cost of the electrical work was \$357. The cost of labor and material necessary to complete it and put it in condition to conform with the plans and specifications was \$260.61, a sum \$96.39 short of the original cost for the whole work. The court found that the work was done partially in July and was "necessary to correct and complete the work in accordance with the plans and specifications," and further found the work was completed July 11, except 6 hours' work was done on August 16 and 5 hours' was done on August 17. It is reasonably certain from the language of the findings that the greater part of the 95 hours work, equaling 11½ days of 8 hours each, was performed subsequent to June 17, which would bring the appellant within the 90-days statutory requirement. The permit from the city, which was necessary to be obtained before the work was commenced, was not issued to Ingraham until June 5, and the certificate of acceptance of the work by the city was not issued until August 17. Any work performed or materials furnished between June 17 and September 16, the day on which the lien was filed, must be considered as being within section 1187; the only other question is whether it was performed in correcting a trivial imperfection. The work as described in the findings was as necessary and essential to a completion of the contract as any other inside work that was to be done in or upon the building.

[8] The test in such cases is thus stated in *Hammond Lumber Co. v. Yeager*, 185 Cal. 355, 197 P. 111:

"Are the imperfections in the performance of the work so trivial in character as to permit the contractor to recover for substantial performance?"

Applying this test to the completion of the contract as it stood on the 8th day of June, it cannot be doubted that a negative answer must be made to the interrogatory. The work done and the materials furnished in the months of July and August were not to correct *imperfections*, but were necessary to *complete* the work as called for by the plans and specifications.

[9-11] It is true that the court found that the owners on June 8 "notified said contractors that they *accepted said building*." No finding is made that this acceptance was in any wise communicated to the materialman, or that it had any knowledge of said acceptance, or that the building was accepted as *completed*. Of course a secret acceptance by the owner from the contractor of an uncompleted building could not defeat the lien claimant. If in cases where no notice of completion is filed work should be suspended for a time and later be resumed in execution of the original contract, as in the

instant case, the materialman would be entitled to ninety days after the work was finally finished in which to file his lien. But the question of "acceptance" of the building cannot be regarded as a finding that the building was actually completed on June 8 for the reason that the contractors, as shown by the findings, did in fact *thereafter* complete said building by performing the work and furnishing the materials necessary "to correct and complete the work in accord with the plans and specifications." Therefore, from the findings themselves, the building could not have been accepted as *completed* on June 8.

That portion of the judgment appealed from is reversed.

We concur: PRESTON, J.; CURTIS, J.

202 Cal. 612

In re FINCH'S ESTATE.

FINCH et al. v. FINCH.

(L. A. 9276.)

Supreme Court of California. Dec. 14, 1927.

1. Executors and administrators §510(3)—Legatees who had assigned their rights in bequests prior to decree approving account of executrix could not appeal; "aggrieved parties."

Persons who assigned all their right, title, and interest in bequests to them prior to decree settling and approving second current account of administratrix are not "aggrieved parties" so as to be entitled to appeal.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Aggrieved Party.]

2. Executors and administrators §504(2)—**Trusts** §366(1)—Beneficiary under testamentary trust may contest account of executrix or participate in any proceeding affecting property which might impair his beneficial interest (Code Civ. Proc. §§ 369, 378).

A beneficiary under trust created by will has right, as party beneficially interested, to appear and contest second current account of administratrix, or to participate in any other proceeding affecting property of estate which might impair his beneficial interest in trust, for, while trustee may, under Code Civ. Proc. § 369, appear without joining beneficiary, this does not prevent beneficiary from becoming party under section 378.

3. Executors and administrators §510(8)—Error in current account of executrix in not covering full period held not prejudicial, where omitted period was covered by petition for sale of property (Code Civ. Proc. §§ 1537 and 1636).

Error in second current account of executrix, in that it did not cover full period inter-

vening between settlement of first account and filing of second, held not prejudicial, where omitted period was covered by schedules and exhibits of petition for sale of property filed by executrix, under Code Civ. Proc. §§ 1537 and 1636.

4. Executors and administrators §349(1), 513(9)—Matters included in approved account, or passed on in making decree of sale, cannot again be contested in probate proceeding.

Any claim against estate or other expenditure made by executor or administrator, and included in account, which account, after due and legal notice of hearing, has been allowed and approved, cannot be contested, and same rule applies to matters passed on on making decree of sale.

5. Executors and administrators §349(1)—Order on hearing, after due and legal notice of petition by executrix for sale of property, is binding, even on those not appearing or not parties.

Where petition of executrix for sale of real and personal property was regularly set for hearing, and due and legal notice given, order made on such hearing was binding on all persons interested in estate, even though they may not have personally appeared in such proceeding and made themselves actual parties thereto.

6. Executors and administrators §349(1)—One who, as legatee, contested petition of executrix for sale of property, is bound by order granting petition both individually and as trustee.

Where party filed objections to petition of executrix for sale of property, as legatee under will, order granting petition of sale was binding on him, not only in individual capacity, but also in representative capacity as trustee of others.

In Bank.

Appeal from Superior Court, Los Angeles County; John M. York, Judge.

In the matter of the estate of Allen Finch, deceased. From a decree approving a second current account of Mary L. Finch, executrix, Jay A. Finch and others appeal. Affirmed.

Dwight V. Maurice, formerly Guy E. Maurice, and B. A. Finch, both of Los Angeles, for appellants.

Ray Howard and Chas. M. Easton, both of Los Angeles, for respondent.

CURTIS, J. [1, 2] This appeal is from a decree approving the second current account of Mary L. Finch, executrix of the last will and testament of Allen Finch, deceased. Allen Finch died on the 31st day of December, 1914, leaving a last will and testament, by the terms of which Mary L. Finch, the wife of said deceased, was devised and bequeathed one-half of the entire estate of the testator, and was also appointed executrix of his will. The appellants, J. A. Finch, Essie Sherewood, Jay A. Finch, and D. W. Finch, were each be-

queathed the sum of \$100. Said appellant W. G. Finch was given \$1,000, "through B. A. Finch as trustee." The appellant B. A. Finch was given \$3,000, with the express directions to pay to said J. A. Finch, who was testator's father, the sum of \$25 per month during the lifetime of the latter, and B. A. Finch was devised and bequeathed the rest and residue of said estate. After the filing by said executrix of said second current account, and before the final hearing thereon, the appellants Essie Sherewood, Jay A. Finch, and D. W. Finch, in consideration of the sum of \$100 paid to each of them by the said Mary L. Finch, assigned and transferred to said Mary L. Finch all their right, title, and interest in the bequests of \$100 each, to which they were respectively entitled under the will of said deceased. The point is now made that these three parties to this proceeding, having conveyed to the respondent all their interest in the estate, are not in a position to further participate in this litigation, and are not proper parties appellant on this appeal. We think this point is well taken. Having conveyed all their right, title, and interest in the estate prior to the decree of the court settling and approving said account, they are not aggrieved parties within the provisions of the code section specifying those entitled to appeal from an order or judgment of the court, and have no standing in any proceeding instituted to reverse or modify said decree. As to appellant J. A. Finch, it will be noticed that he is bequeathed by the terms of the will, not only the sum of \$100, but is also made a beneficiary under the trust of \$3,000 created under said will. While B. A. Finch, as trustee for J. A. Finch, might have appeared in said proceeding, and have contested said account without joining his beneficiary (Code Civ. Proc. § 369), yet this right of the trustee does not prevent his beneficiary from becoming a party to said proceeding, either by joining with his trustee, or independent of said trustee. Code Civ. Proc. § 378; *Stackpole v. Pacific Gas & Electric Co.*, 181 Cal. 700, 186 P. 354; *Horseshoe Pier, etc., Co. v. Sibley*, 157 Cal. 442, 108 P. 308. Respondent testified that she had paid to said J. A. Finch the sum of \$100 in full payment of the devise in that amount in his favor and had his receipt therefor. He may not, therefore, as a direct legatee under said will, be a proper party to these proceedings, for the reason that his bequest has been fully paid. As a beneficiary under the trust created under said will in his favor, he has the right, as a party beneficially interested, to appear and contest said account, or to participate in any other proceeding affecting the property of said estate, and which might tend to impair his beneficial interest in the trust created in his favor.

With these preliminary matters disposed of, we will now pass to the consideration of the main questions arising upon this appeal. Some two years or more after her appoint-

ment as executrix of the last will of said deceased, said Mary L. Finch, as such executrix, filed and presented to said probate court her first current account. This account covered the period of time beginning with her appointment as such executrix, and extending to, and including, the 20th day of October, 1917. After proceedings duly had in the matter of said estate, said account was duly approved and allowed by said court. The correctness of this account is in no way questioned in this proceeding. The account showed a balance of cash on hand chargeable to said executrix of \$13,336.17 at the time of the rendition thereof. The second current account, the validity of which is the subject of the present controversy, was filed on the 10th day of February, 1925, and purports to cover a period of time from the 1st day of October, 1918, to and including the 30th day of December, 1924. This account showed the amount of cash on hand at the commencement of said period of time as \$5,946.06. The account further showed that, subsequent to the first account, said executrix had filed and presented to said court her petition for the sale of real and personal property, and, in connection therewith, and as a part thereof, there was set forth claims and expenses of administration amounting to the sum of \$7,468.85, and that, upon a hearing of said petition for the sale of real and personal property, the court passed upon and approved said claims and expenses, and further that the court found the amount of money then in the hands of said executrix and belonging to said estate to be the sum of \$5,946.06. This petition bore date, and was filed on, December 3, 1918. It was further set forth in said petition that the family allowance theretofore ordered to be paid to the surviving wife of said deceased amounted on October 1, 1918, to the sum of \$2,475, and the court on said hearing found that all the allegations of said petition were true. The second current account contains an allegation to the effect that the family allowance on October 1, 1918, amounted to said sum of \$2,475, "so that said executrix begins this account as of October 1, 1918, and charges herself with said gross amount of \$5,946.06," although the actual date of the order of the court granting said petition to sell said real and personal property was not entered until July 30, 1919. It appears from the record before us that, upon the filing of said petition for the sale of said real and personal property, the appellant B. A. Finch, as a legatee under the will of said deceased, interposed and filed in court his written objections to the granting of said order. At about the same time said B. A. Finch, in his capacity as a legatee under said will, filed in said probate court a petition for the removal of the said executrix. To this petition the executrix filed her answer, and the two proceedings—one for leave to sell real and personal property, and the other for the removal of said executrix—were heard by

said court, and resulted in two orders of court, one an order granting said petition to sell said real and personal property, and the other an order denying the petition of the said B. A. Finch for the removal of the said executrix. In each of these two proceedings the said B. A. Finch claimed, among other things, that the payment by said executrix of a certain claim of \$6,500 in settlement of a judgment rendered against said estate in favor of C. M. and Mary E. Easton was illegal, and was not a proper charge against said estate, and, in his opposition to the petition of the executrix for leave to sell real and personal property, the said B. A. Finch denied that the sum of \$2,475, or any sum whatever, was due, owing, or unpaid on the family allowance. The court expressly found in each of said proceedings "that the particular claim of \$6,500, the payment of which was objected to in said objections and by said beneficiaries, was a valid claim against the estate of said deceased at the time of the payment thereof." It further found in the matter of the petition to sell said real and personal property that all of the allegations of said petition were true, one of which was that the amount due on family allowance up to October 1, 1918, was the sum of \$2,475. In their objections to the settlement and allowance of the second current account of said executrix the appellants herein again sought by proper allegations contained in their amended objections to the said second current account to attack the validity of the payment by said executrix of said claim of \$6,500 in settlement of said judgment against the estate in favor of C. M. and Mary E. Easton, and also the amount of the family allowance, claiming that the only allowance ever made by the court in said estate for the support of the family of the deceased was for \$75 per month for the period of one year only, amounting in the aggregate to the sum of \$900. The probate court, upon the hearing of said second current account, and of said objections thereto of appellants, made its decree approving said account. From this decree this appeal has been taken by appellants.

[3] Appellants first contend that said decree is erroneous, for the reason that the second current account fails to cover the full period of time intervening between the settlement of the first account and the filing of said second account, and for that reason it contains no statement of the receipts and expenditures of the said executrix during said period of time omitted from said account. As already stated, the first account covers the period of time from the appointment and qualification of said executrix up to and including the 20th day of October, 1917. The second account covers the time commencing on the 1st day of October, 1918, up to and including the 30th day of December, 1924. It is apparent, therefore, that there is no

account rendered covering the time commencing on October 20, 1917, and ending on the 1st day of October, 1918. Respondent contends that this omitted period, that is, the period of time from October 20, 1917, to October 1, 1918, is covered by schedules and exhibits contained in, and made a part of, the petition for the sale of real and personal property filed by said executrix on the 3d day of December, 1918. In other words, the respondent claims that the two accounts, together with the petition for the sale of real and personal property, cover the entire period of her administration of said estate from the date of her appointment up to the 30th day of December, 1924. No authority is presented by respondent in support of her contention that a petition for the sale of property may also serve as an account of the administration of the executrix for the period of time covered by said petition. The general practice of the profession, we think, is unquestionably against such a procedure. Accounts current and annual are, as a rule, intended to cover the entire period of administration of an estate by an executor or administrator. We think, therefore, that the procedure adopted by the executrix in this estate was an innovation that finds sanction neither in the general practice nor in any of the provisions of the Code of Civil Procedure governing the administration of estates of deceased persons. We are not prepared to say, however, that this departure from the general procedure prescribed by the Code was such an error as resulted in any prejudice to the rights of appellants. Section 1636 of the Code of Civil Procedure designates the matters in an account filed by an executor or administrator which may be contested by the heirs. This section provides that:

"All matters, including allowed claims not passed upon on the settlement of any former account, or on rendering an exhibit, or on making a decree of sale, may be contested by the heirs. * * *

[4] The obvious intent of this section is to permit the heirs to contest certain matters included in an account, but to withhold such permission in matters already passed upon on the settlement of a former account or on rendering an exhibit, or on making a decree of sale. It is well settled that any claim against the estate or other expenditure made by an executor or administrator and included in an account, which account, after due and legal notice of the hearing, has been allowed and approved by the court, cannot again be contested by an heir, or any person interested in the estate. From the terms of section 1636 the same rule applies to any claim, item, or expenditure or other matter passed upon by the probate court "on making a decree of sale." In the petition for the sale of real and personal property filed herein, as we have already seen, there was set forth therein as the law then required (section 1537, Code

Civ. Proc.), under the head of "the debts outstanding against the said decedent," the judgment of *C. M. Easton et al. v. Finch*, together with the statement that, under order of said court, made on the 11th day of July, 1918, it had been paid and settled in full by the payment by said executrix of the sum of \$6,500. There was also set out in said petition of sale, as then required by said section 1537, "the amount due on the family allowance," which amount was stated in said petition to be the sum of \$2,475. This petition, after due notice, came on regularly for hearing, and was approved by the court, and an order was made authorizing the executrix to sell the real and personal property then in her hands. The validity of the *Easton* judgment and the payment of said sum of \$6,500 in satisfaction and settlement thereof were therefore directly passed upon by the court at the hearing of said petition of sale, and could not again be questioned or contested, even if the same were again included in an account filed by said executrix. The same must be said regarding the family allowance. We are therefore of the opinion that appellants were not prejudiced by the omission of these items from said second current account, if we assume they should by law have been included therein. They had been once passed upon and approved by the court, and we find no authority for any further consideration of their validity as legal claims against said estate.

[5, 6] Appellants contend, however, that they were not bound by the order of court granting the petition of said executrix to sell said real and personal property. The petition was regularly set for hearing, and due and legal notice of said hearing was given, as required by law. The order of court, therefore, made upon said hearing, was binding upon all persons interested in said estate, even though they may not have personally appeared in said proceeding and made themselves actual parties thereto. *Miller v. Pitman*, 180 Cal. 540, 182 P. 50. But in this case the record shows that the appellant B. A. Finch, as legatee under the will of said deceased, filed written objections to said petition for the sale of real and personal property, in which he objected specifically to the item of \$6,500 paid out by said executrix in payment and settlement of the *Easton* judgment, and also to the amount alleged to be due on said family allowance, claiming that the order of court decreeing said family allowance provided that the same should be for one year only, and said B. A. Finch, in his said written objections, claimed that there was only \$900 due on said family allowance. Said petition, together with the written objections thereto filed by said B. A. Finch, came on for hearing, and, after the same had been duly considered by the court, together with the evidence produced by the respective

parties, the court granted said petition, and ordered the sale of said property. In said order of sale the court expressly found, as we have before stated, "that the particular claim of \$6,500, the payment of which was objected to in said objections and by said beneficiaries, was a valid claim against the estate of said deceased at the time of the payment thereof, and that all of the allegations of said petition are true." This order of the court granting said petition of sale, and finding all of the allegations of said petition to be true, which included the item of \$2,475, as due on the family allowance, was unquestionably binding upon said B. A. Finch, who had expressly made himself a party to said proceedings by filing said written objections, and thereby contesting said petition. It was binding upon him, not only in his individual capacity, but also in his representative capacity as trustee of J. A. Finch and W. G. Finch. He appeared "as legatee under said will." As such legatee he took certain of the property of said estate as his own individual and personal property, and he took other portions of said property as trustee for his father, J. A. Finch, and brother, W. G. Finch. When, therefore, he appeared "as a legatee under said will," he represented, not only himself, but also the beneficiaries under the trust created by said will of which he was made trustee. He is therefore bound both in his individual and representative capacities by all lawful orders made by the court in all proceedings in which he appeared as a party therein. "If one sues as trustee, and afterwards in his individual capacity in respect of the same subject-matter, he is bound by the decree in the former suit. For if, at that time, he owned the subject of the trust he was representing himself. * * *" 2 Black on Judgments (2d Ed.), § 536. As was said in *Williams v. Southern Pac. Co.*, 54 Cal. App. 571, 578, 202 P. 356, 359:

"Without multiplying authorities, it may be stated as a general rule that, where one appears in a representative capacity in one action and in his individual capacity in another action, involving the same subject-matter, without any change in his relation to that subject-matter, a judgment in the one case is conclusive of his rights in the other."

If, therefore, he was bound by said decree in his representative capacity as trustee of J. A. Finch and W. G. Finch, the beneficiaries of said trust were also bound by said decree.

It is hardly necessary to refer also to the proceedings instituted by B. A. Finch as "legatee under the will of Allen Finch, deceased," to remove said Mary L. Finch as executrix of said will. Among the acts of said executrix complained of by said B. A. Finch, and which were the basis of his claim for her removal, was that she had illegally paid said sum of \$6,500 in settlement of the *Easton* judgment.

After a spirited contest in which the validity of said judgment was thoroughly gone into and considered, the court denied the petition to have said executrix removed, and in the order denying the same found and directed "that the particular claim of \$6,500, the payment of which was objected to in said objection and by said beneficiaries, was a valid claim against the estate of said deceased at the time of the payment thereof." This adjudication of the validity of said claim was in a proceeding in which all of the appellants, properly appearing herein, were represented as parties thereto, and accordingly conclusively established its legality as against said parties. Thus it appears that the matters which the appellants sought to litigate by their objections to said second current account had as to one of said matters—the validity of the Easton judgment—been twice before the court, and its legality established by orders of said court duly and regularly made and entered, and, as to the other matter, the amount of the family allowance, the court had duly and regularly held in a proper proceeding in which all of said appellants, properly appearing herein, were represented, that it was not limited to one year, but that the amount due at the time of the filing of said petition for the sale of real and personal property was the sum of \$2,475. These matters were therefore, as far as said appellants were concerned, *res adjudicata*, and could not again be contested on the hearing of said second current account.

The decree therefore approving said account is affirmed.

We concur: WASTE, C. J.; RICHARDS, J.; SEAWELL, J.; PRESTON, J.; SHENK, J.; LANGDON, J.

87 Cal. App. 537

FIRST NAT. PICTURES, Inc., v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al. (Civ. 5945.) ★

District Court of Appeal, Second District, Division 1, California. Dec. 13, 1927.

Hearing Denied by Supreme Court Feb. 9, 1928.

Master and servant ⇐387—Awarding compensation for injury by willful and serious misconduct of employer's foreman held proper (Workmen's Compensation, Insurance, and Safety Act of 1917, § 6[b], as amended).

Under Workmen's Compensation, Insurance, and Safety Act of 1917, § 6(b), as amended by St. 1919, p. 912, § 2, and St. 1923, p. 376, awarding employee compensation for injury from willful and serious misconduct of employer's foreman, was proper.

Proceeding under the Workmen's Compensation Act by John Beckler, claimant, opposed by the First National Pictures, Inc., employer, and the Employer's Liability As-

urance Corporation, Limited, of London. To review an order of the Industrial Accident Commission of California awarding the claimant compensation, the employer applies for certiorari. Writ denied.

Loeb, Walker & Loeb, of Los Angeles, for petitioner.

G. C. Faulkner, of San Francisco, for respondent Industrial Accident Commission.

CONREY, P. J. It appearing that the petition as filed is erroneously entitled, the title of this proceeding is hereby amended to read as above stated, and the clerk is directed to amend the register and index accordingly.

From the evidence as indicated by the petition and answer, it appears that the accident and the injury to the employee, John Beckler, resulted from the willful and serious misconduct of one Doble, foreman of the carpenter department of the employer. Under the provisions of section 6 (b) of the Workmen's Compensation, etc., Act of 1917 (as amended by St. 1919, p. 912, § 2, and St. 1923, p. 376), the employer is responsible for this misconduct if Doble was "an executive or managing officer or general superintendent thereof." According to the rule established by the decision of the Supreme Court in *Gordon v. Industrial Accident Commission*, 199 Cal. 420, 249 P. 849, it seems necessary to hold that Doble was a "managing officer" of the employer, within the meaning of the language used in said section 6 (b).

For this reason the petition for a writ of review is denied.

We concur: HOUSER, J.; YORK, J.

87 Cal. App. 290

OCEAN ACCIDENT & GUARANTEE CORPORATION v. INDUSTRIAL ACCIDENT COMMISSION et al. (Civ. 5736.)

District Court of Appeal, Second District, Division 1, California. Dec. 5, 1927.

I. Master and servant ⇐367—Whether a person was "employee" or "independent contractor" is usually determined by power of control as to result of work, means, and method (Workmen's Compensation, Insurance and Safety Act 1917, § 8, subs. a and b).

In determining whether person was "employee" within Workmen's Compensation, Insurance and Safety Act 1917 (St. 1917, p. 831), particularly section 8, subs. (a) and (b), or "independent contractor," determinative factor is usually who had power of control, not only as to result of work, but as to means and method by which it was accomplished.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Employé; Independent Contractor.]

2. Master and servant $\Rightarrow$ 417(7)—Court must uphold finding of Industrial Accident Commission, unless there is entire absence of evidence (Workmen's Compensation, Insurance and Safety Act 1917, § 8, subds. [a] and [b]).

It is duty of court to uphold finding of Industrial Accident Commission that decedent was employee within Workmen's Compensation, Insurance and Safety Act 1917 (St. 1917, p. 831), particularly section 8, subds. (a) and (b), rather than independent contractor, unless there is entire absence of evidence to support finding.

3. Master and servant $\Rightarrow$ 405(2)—Evidence held to sustain finding of Industrial Accident Commission that one collecting dues of society was "employee," not "independent contractor" (Workmen's Compensation, Insurance and Safety Act 1917, § 8, subds. [a] and [b]).

Evidence held to sustain finding of Industrial Accident Commission that decedent who was engaged by society to make collections of monthly dues from its members for a commission of 10 per cent. on all dues received by society was an employee within Workmen's Compensation, Insurance and Safety Act 1917 (St. 1917, p. 831), particularly section 8, subds. (a) and (b), rather than an independent contractor.

Proceeding under the Workmen's Compensation, Insurance and Safety Act 1917 by Anna M. C. Florcken, claimant, for the death of her husband, the employee, opposed by the Turn Verein Germania, employer, and the Ocean Accident & Guarantee Corporation, insurer. To review an award of compensation, the insurer brings certiorari. Award affirmed.

R. P. Wisecarver and Redman & Alexander, all of San Francisco, for petitioner.

G. C. Faulkner, of San Francisco, for respondent Industrial Accident Commission.

HOUSER, J. As a brief outline, the facts appear to be that one Florcken was employed by a society known as the Turn Verein Germania to make collections of monthly dues from its members, for which service Florcken was to be paid a commission of 10 per cent. on the total amount received by the society from such source, whether or not personally collected by him. While acting in the course of and arising out of his employment, Florcken sustained injuries which subsequently resulted in his death. On application by his widow to the respondent commission to adjudge compensation alleged to be due to her under the provisions of the Workmen's Compensation, Insurance and Safety Act (Stats. 1917, p. 831), an award was made, and it is by way of writ of review that petitioner herein seeks to have such award annulled.

It is the contention of petitioner herein that the relationship which existed between Florcken and the society was such that in a legal sense Florcken was not an employee of the society, but that he was an independent contractor, and as such neither he nor his de-

pendent was entitled to any benefits arising from the provisions of the so-called Workmen's Compensation Act.

By the terms of section 8(a) of the act in question, an employee includes every person in the service of an employer under any appointment or contract of hire, and the presumption (section 8[b]) is that "any person rendering service for another, other than as an independent contractor," is an employee.

In order to determine the contractual relationship which existed between the parties, in addition to adjudicated cases in which the relationship of master and servant and that of owner and independent contractor have been discussed and decided, it becomes necessary to consider further details regarding the situation of the parties herein one toward the other. At the hearing before the respondent commission, it was shown in evidence that, following the resignation of a former collector of dues for the society, on resolution of the board of directors thereof, Florcken had been elected to the position, to hold same during the pleasure of the board; that in connection with his work he was bonded as a collector and was furnished by the society with stationery, books, receipts, and, with the exception of postage, with all other supplies necessary in the proper discharge of his duties; that during the two years of his engagement with the society, although he had no other employment, no restrictions, as such, were placed upon him as to the time when, or the manner in which, his work should be performed, and that as a matter of fact he kept his books at his home, worked such hours in the daytime as he chose, and generally operated from his home. However, although not particularly specified as a part of his duty, he was expected to attend meetings of the members of the society and thereat make such collections as were possible. His work was performed in the name of the society, and all collections were retained by him until his monthly accounting was made, at which time he delivered to the society the full amount collected by him, and thereafter 10 per cent. of such sum was returned to him in compensation for his services. The account between the society and Florcken was kept on the books of the society under the heading "Commission and Dues." Another account kept by the society was entitled "Labor and Compensation," under which head appeared the moneys paid to salaried officers and general help. The evidence showed that the trustees of the society supervised Florcken's work, and that at any time they might dismiss him by action of the board of trustees in the event that his work was unsatisfactory.

One of the witnesses, in response to questions propounded to him at the hearing, testified as follows:

"Q. Mr. Haeckel, is it your understanding that the board of directors might have at any time given Mr. Florcken directions as to how he should change his method of doing business, or that he should do it in a different manner, and that he would be obliged to do so? A. Yes; it was my understanding that by bringing it up at a board of directors' meeting they could ask him about collections that year; it had to come on the meeting nights or the class nights, and only on the days while the members were there. Q. Did you ever know of that actually being done to any collector? A. Yes; I have heard it suggested that, upon the collector's complaint that the members were not mailing in the dues, it was suggested that he come on those meeting nights when the members were there and then he could approach them. Q. What I mean is, in the event the collector was not satisfactorily getting the dues in, was there ever anything said to him about it? Was he called on the carpet, in other words, about it? A. Yes, sir. Q. Do you know of any such instance? A. Yes, sir; I have heard the trustees do it. Q. Mr. Haeckel, is it not true that as a matter of fact, at the request of the trustees of the board, Mr. Florcken attended meetings about four nights every week, in order that those collections might be gone after to their satisfaction? A. It was suggested, yes. * * * Q. Then he actually attended on Tuesdays, Wednesdays, Thursdays, and Fridays? A. Yes; I have seen him there the four nights out of the week. * * * Q. Mr. Haeckel, these meetings that you have just referred to, that the deceased attended, they were attended practically so that he could make his collections? A. That was his only purpose, except probably on Wednesday night, to which class he personally belonged; he was class leader and would take part in the exercises. Q. As a matter of when he should attend and how often attend, that was left pretty much to his own judgment, was it not? A. It was. He could miss a night and catch up the next time."

[1] In the case of *Fidelity & Casualty Co. v. Industrial Accident Commission*, 191 Cal. 404, 407, 216 P. 578, 579 (43 A. L. R. 1304), where the authorities are cited, it is said:

"In determining in any given case whether a person was an employee or an independent contractor, there are usually present various circumstances which are persuasive to one conclusion, and other circumstances persuasive to the opposite conclusion. But an analysis of the cases makes it plain that the determinative factor is usually found in the solution of the question, Who has the power of control, not as to the result of the work only, but as to the means and method by which such result is accomplished? * * *"

[2] In the case of *Hillen v. Industrial Accident Commission*, 199 Cal. 577, 250 P. 570, a man had been engaged to lay shingles at a fixed price per thousand. At times he employed other men to help in the work. The evidence showed that the general contractor had instructed his superintendent to "let it (the shingling) out on a contract." In the course of the opinion, it is said:

"* * * Whether or not the relation of employer and employee existed in this case, under

the oral contract entered into, is a question of mixed law and fact, to be proved like any other question. The finding of the commission, in effect, that the relation existed between Hillen and Downing is binding on this court. *Pacific Gas & Elec. Co. v. Industrial Accident Com.*, 180 Cal. 497, 499 [181 P. 788]. Unless there is such an entire absence of evidence in the record as to render the finding unreasonable, or in excess of the powers of the commission, the court is not empowered to set it aside. *Eastman v. Industrial Accident Com.*, 186 Cal. 587, 598 [200 P. 17]. The award of the commission may be annulled only if there is no substantial evidence in support of its findings. *Press Pub. Co. v. Industrial Accident Com.*, 190 Cal. 114, 124 [210 P. 820]."

See, also, *New York Indemnity Co. v. Industrial Accident Com.* (Cal. App.) 252 P. 775; *Montezuma Mountain Ranch School v. Industrial Accident Com.* (Cal. Sup.) 258 P. 84.

The rule is announced in the case of *Archbishop v. Industrial Accident Commission*, 194 Cal. 660, 667, 230 P. 1, 4, as follows:

"Whether a workman is an employee within the Workmen's Compensation Act or an independent contractor is a question of fact upon which the judgment of the Industrial Commission is conclusive where the facts are in dispute, and becomes a question of law only when but one inference can reasonably be drawn from the facts.' *Federal Mining & Smelting Co. v. Thomas* [99 Okl. 24] 225 P. 967. It was said in *Western Pacific R. R. Co. v. Industrial Acc. Com.*, 193 Cal. 413, 224 P. 754: 'It is the rule that, where from the evidence two opposing inferences may be drawn, that inference which is accepted by the commission must be sustained if there is evidence in the record to support it and if it is a reasonable inference to be drawn from that evidence. *Eastman v. Industrial Acc. Com.*, 186 Cal. 587, 589, 200 P. 17; *Polar Ice, etc., Co. v. Mulray*, 67 Ind. App. 270, 119 N. E. 149.' See, also, *Tartar v. Industrial Acc. Com.*, 191 Cal. 703, 218 P. 39; *Employers' Liability Assur. Corp. v. Industrial Acc. Com.*, 182 Cal. 612, 187 P. 42."

[3] Considering that the record in the instant case contains substantial evidence tending to establish the ultimate facts that Florcken might have been discharged from his position at any time, and that the manner in which he operated was subject to the direction of the board of trustees of the society, it is clear that, as between Florcken and the society, the "determinative factor" of power of control lay with the latter, not only as to the result proposed to be obtained, but as well to the means and method by which such result was to be accomplished. *Fidelity & Casualty Co. v. Industrial Acc. Com.*, 191 Cal. 404, 407, 216 P. 578, 43 A. L. R. 1304. Under the general rule as announced in the Hillen Case, 199 Cal. 577, 250 P. 570, and particularly in the Archbishop Case, 194 Cal. 660, 667, 230 P. 1, in effect that, unless there is an entire absence of evidence the finding by the Commission must

be upheld, we are constrained to rule that the award herein should be affirmed. It is so ordered.

We concur: CONREY, P. J.; YORK, J.

87 Cal. App. 429

HAUGHY-RED BLUFF SAW & MACHINE WORKS v. WALLER. (Civ. 3205.)

District Court of Appeal, Third District, California. Dec. 9, 1927.

1. Bills and notes $\S$ 179—Note payable to order of, and indorsed by, maker, is good against him in any hands.

Note payable to order of maker, and indorsed by him, is good as against maker in any hands into which it falls.

2. Bills and notes $\S$ 524—Plaintiff producing note, payable to order of, and indorsed by, maker, is presumed to be owner thereof.

Plaintiff producing note, payable to order of, and indorsed by, maker, at trial of suit thereon, is presumed to be owner thereof.

3. Patents $\S$ 196—Note for patent interests held not void for failure of consideration because of failure to establish factory to manufacture patented articles.

Note for balance of subscription for interests in patents, not shown to be worthless, held not void for failure of consideration because of failure to establish factory for manufacture of patented articles where maker transferred such interests, fund, or property created by subscription, and all rights of action against patentee to one agreeing to deliver and tendering stock in new factory for such note and cash payment.

4. Bills and notes $\S$ 527(1)—Maker's testimony as to transferring patent interests, for which note was given, on promise of stock in corporation to be organized, negated claim that corporation agreed to cancel note.

Maker's testimony as to transferring patent interests, for which note was given, on transferee's promise of stock in corporation to be organized, held to negative claim that such corporation agreed to cancel note.

Appeal from Superior Court, Tehama County; H. D. Gregory, Judge.

Action by the Haughy-Red Bluff Saw & Machine Works against A. P. Waller. Judgment for plaintiff, and defendant appeals. Affirmed.

Fred C. Pugh, of Red Bluff, for appellant.

J. M. Lee and W. P. Johnson, both of Red Bluff, and J. B. Zimdars, of San Francisco, for respondent.

WEYAND, Justice pro tem. On January 13, 1921, the appellant, Waller, made and executed his promissory note for \$375, payable

six months after date, with interest. This note was payable to the order of the maker, and was by Waller immediately indorsed and delivered to one G. D. Martin, whose connection with the matters in controversy will be presently explained.

With the above note defendant, Waller, also executed a writing worded as follows:

"Jan. 13, 1921. To Any Bank or Banker: You are at liberty to purchase my note of this date for \$375.00 or to loan money against it, given to Red Bluff National Bank, if you desire. There are no offsets or conditions against the note. [Signed] A. P. Waller. Address Red Bluff, Calif."

This writing was likewise delivered to said Martin.

Appellant affirmatively alleges that both Martin and Waller signed a document in the following terms, to wit:

"No. ———. Jan. 13, 1921.

"I hereby subscribe and contract for six thirtyieths of one equity of the two thousand (2000) parts of undivided equities in Bessolo patent pipe and nut wrenches filed in the United States Patent Office as follows: [here follows a description of the alleged patents] as per bill of conveyance bearing my signature to subscription on back of same of even date, and for myself, my heirs, administrators, executors and assigns, I agree to all conditions of the bill of sale.

"[Signed] A. P. Waller.

"Address Red Bluff, Cal.

"Received \$125.00.

"Due \$375.00 6 months from date.

"[Signed] G. D. Martin, Conveyor."

The evidence taken in the case discloses that one William Louis Bessolo claimed to own some valuable patents on a new and useful wrench, and it appears that said Bessolo had, prior to the date of the note, transferred a certain interest in these patents to the "name" of said G. D. Martin, which individual was to act as "conveyor" thereof to the several purchasers who might subscribe for interests therein. Martin was acting with Bessolo and a committee of citizens of Red Bluff in the promotion of a factory proposed to be erected at Red Bluff, Cal., for the manufacture of wrenches under the Bessolo patents. This committee was composed of H. P. Stice, R. L. Douglas, A. L. Conard, and H. P. Jerrett.

Waller's total subscription was \$500, of which \$125 was paid in cash, and the balance thereof was covered by the above note.

The cash obtained by Martin from Waller, together with the note and the other writing executed by Waller, were all delivered by Martin to the above-described committee, and were by said committee in turn placed in the Red Bluff National Bank; the money being deposited in the name of the committee, and the note being, on or about March, 1921, used by said committee as collateral.

Many citizens of Red Bluff and vicinity bought like interests in the Bessolo patents,

all for the purpose of aiding in the establishment of the wrench factory. Some subscribers paid their subscriptions in cash, and some paid partly in cash, but in a larger proportion of cash than was paid by Waller. Their several subscriptions were dealt with by this committee in the same manner as Waller's money and note were dealt with. The fund obtained, either from cash payments by subscribers, or from a deposit of the notes of the subscribers, was used by this committee in the purchase of a factory site, and in the erection thereon of a building for factory purposes.

The committee of citizens had a disagreement with Bessolo over matters in connection with the establishment of the wrench factory, some time prior to April, 1922, and the scheme to establish the proposed wrench factory wholly failed. Thereupon the said committee endeavored to establish another factory, of a similar nature, on the site purchased, and with a salvage of the assets of the proposed wrench factory.

In April, 1922, while defendant's note was outstanding, in the hands of the committee, or in the bank above named, Waller, by an instrument in writing, transferred his interest in the Bessolo patents, which he received from Martin on January 13, 1921, to one J. C. Haugby, this paper being worded as follows:

"For value received, each of the undersigned hereby assigns, transfers and conveys to J. C. Haugby, of Red Bluff, California, the rights, interest and properties, to wit:

"All those certain interest and rights in and to those certain letters patent issued to William Louis Bessola, and which were heretofore sold by said Bessolo to the undersigned respectively, and which are particularly described as follows, to wit;

"That certain number set opposite our respective names of equities of the 2000 parts of undivided equities in United States patents covering pipe and nut wrenches as follows: [Here follows description of the Bessolo patents.] Also all of the interest of the undersigned respectively in any and all of the funds or property paid or transferred by the undersigned respectively for the said rights and interest hereinabove described and hereby transferred to said J. C. Haugby and the property into which the same may have been converted; and all rights of action and claims of every kind and character which the undersigned respectively have or may have against said William Louis Bessolo growing out of said transaction.

"In witness whereof we have hereunto signed our respective names this — day of April, 1922.

"Name, A. P. Waller. Number of units of equities transferred, 6. Number of units or equities transferred in dollars—Paid."

It will be here noted that Waller assigned to Haugby any and all funds that he had theretofore paid and any claim or right of action against Bessolo, on account of the transaction. Haugby then gave to Waller a document, from which we will, on account of its

great length, take but sufficient of the contents to show its bearing on the present situation. This document is dated February 5, 1922, and first recites the fact of original ownership by Bessolo of the patents, describing them, the sale of interests therein, to Red Bluff citizens, the different steps taken in the attempt to establish the wrench factory, the failure of this attempt to establish such factory, and the fact of disagreements with Bessolo, and said writing then contains a proposal by said Haugby to establish another factory with the assets of the previous factory venture.

Haugby agrees to organize a new corporation with a capital stock of \$100,000 shares of the par value of \$1 per share, and to issue stock to the subscribers to the Bessolo factory, in the proportion of their subscription, to the wrench factory, in exchange for said subscribers' interests in the funds and property created by their former subscription to the Bessolo venture; Haugby to have 51 per cent. of the stock, the subscribers to have a share for each dollar they had subscribed, and the balance of the stock, if any, to be sold as treasury stock for the benefit of the new corporation. The Bessolo factory subscribers, who had given notes for their former subscriptions, which notes were yet unpaid, and who chose to make an assignment to Haugby, were to pay their notes at the Red Bluff National Bank, and receive their shares of stock in the new concern. There was in this agreement a provision worded as follows:

"That he (the said James C. Haugby) will thereupon cause to be issued out of the remaining 49 per cent. of said stock to each of said equity holders making such transfer, shares of stock of said corporation to the number of the dollars each equity holder has paid or agreed to pay for the equity so by him transferred to James C. Haugby; such shares of stock when issued shall be delivered by the corporation for each of such equity holders to the Red Bluff National Bank, and in those cases where such equity holders' subscription for such equity has not been fully paid, or is still partly represented by a promissory note, the shares to be so issued to such equity holder shall remain in escrow with said bank until such balance or such promissory note has been paid, and, in the event the same be not paid on or before July 1, 1922, such shares of stock shall revert to said corporation."

While allegations of fraud were made by appellant in his answer and in his briefs herein, yet on the trial there was no showing that there was any fraud in these transactions, and, upon oral argument before this court, appellant conceded there was no fraud proven.

Appellant never paid the note, and hence this suit was brought for the collection thereof.

Appellant answered and denied ownership of the note in plaintiff. He further alleged

a total failure of consideration. By a second affirmative answer he alleged fraud in the obtaining of the note. By a third affirmative defense Waller averred that, in consideration of his assignment of the Bessolo patents to "plaintiff," the "plaintiff" agreed to cancel this note.

On the conclusion of the evidence plaintiff moved for an instructed verdict, which motion was granted, judgment was rendered for plaintiff, and defendant, Waller, appeals to this court.

[1-4] While the statement of facts is lengthy, yet we regard the matter as quite simple. We will take up the contentions of appellant in their order: (1) As to ownership of this note, it being payable to the order of the maker, and being by the maker indorsed, we are of the opinion the note was good, as against the maker in any hands it fell. Plaintiff actually produced it at the trial, and there was no proof that it was not the owner. Plaintiff was presumed to be such owner. (2) Upon the defense of failure of consideration, there was no proof in the record that the Bessolo patents were worthless. For aught that appears, they were of a value commensurate with the price paid by Waller. Waller, however, by his own act, parted with his title to the interests in the patents by transferring them to J. C. Haughey. It appears in the testimony that Haughey retransferred them to Bessolo. Waller, in addition to making transfer of the interest in the patents to Haughey, also assigned to Haughey the fund or property his subscription had created, and also any right of action he might have had against Bessolo on account of the transactions. Still, in addition to all this, Haughey, by his agreement of February 5, 1922, was to deliver to Waller stock in the new factory, for his note and cash payment, which stock the plaintiff tendered to defendant, Waller, and which Waller refused to accept. The testimony of Waller, as we think, clearly shows his acceptance of this agreement. There is no proof that the new stock was worthless. (3) The defense of fraud is entirely waived by the defendant. (4) Coming, then, to the claim that "plaintiff," in consideration of an assignment to it of the patent interests, agreed to cancel the note in suit, we find that defendant by direct testimony shows that, when he signed this transfer to Haughey (not to plaintiff), he did so on the promise by Haughey of stock in the new company, and that he would be entitled to such stock when it was organized. As stated above, this stock was issued by plaintiff and tendered to Waller. A still further answer to the claim as made by the third affirmative answer is this: Waller claims that "plaintiff" made these promises in consideration of the cancellation of the

note. In the nature of things, this was not possible. The plaintiff company was not in existence at the time of the Haughey assignment, nor for months thereafter.

We can see no reason for the citation of authority in support of these conclusions.

While there may have been errors committed in the rejection of testimony offered by appellant, there was no ruling that affected any substantial right of defendant, to his prejudice.

The judgment of the lower court is affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

87 Cal. App. 282

OLSCHEWSKI v. HUDSON. (Civ. 6064.) *

District Court of Appeal, First District, Division 2, California. Dec. 5, 1927.

Hearing Denied by Supreme Court Feb. 2, 1928.

1. Master and servant $\S$ 60—Agent in charge of laundry route is bound to exercise utmost good faith toward employer (Civ. Code, $\S\S$ 1983-1988).

Agent of laundry company in charge of laundry route, as such confidential agent, is bound to exercise utmost good faith in behalf of employer, and not to take advantage of trade knowledge and information secured in course of employment to use it for his personal benefit, under Civ. Code, $\S\S$ 1983-1988.

2. Injunction $\S$ 56—List of laundry customers is "intangible property right," which may be appropriately protected.

List of laundry customers is property right, which may be appropriately protected, even by injunction in court of equity, but it is not tangible right which may be handled and transferred, being more akin to good will of business, in view of Civ. Code, $\S$ 655.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Intangible Property.]

3. Trover and conversion $\S$ 2—Action of "trover" or "conversion" will not lie for unlawful interference with laundry route by agent's sale thereof.

Action in trover or conversion will not lie for unlawful interference with laundry route by agent who had charge of it, and who attempted to sell it, since only objectionable acts of agent were violation of trust as confidential agent; "conversion" being wrongful appropriation of goods of another, and "trover" being action for damages where goods are retained against plaintiff's claim.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Conversion; Trover.]

4. Trover and conversion $\S$ 2—"Trover" lies only for wrongful appropriation of personal property specific enough to be identified.

Action of trover or conversion lies only for wrongful appropriation of goods, chattels, or

[4] And in 26 R. C. L. 1105, it is said:

"An action in trover is not maintainable for the conversion of a bill or note unless the plaintiff can show that he was entitled to the possession of the specific property in question."

From the foregoing authorities it appears that the action of trover or conversion lies only for the wrongful appropriation of goods, chattels, or personal property which is specific enough to be identified, and not to such indefinite, intangible, and uncertain property rights as the mere good will of a business, or trade secrets (*Roystone v. Woodbury*, 67 Misc. Rep. 265, 122 N. Y. S. 444), or a newspaper route (*Boehm v. Spreckels*, 183 Cal. 239, 191 P. 5), or a licensed market stall for transacting trade (*Meier v. Wilkens*, 15 App. Div. 97, 44 N. Y. S. 274).

Appellant relies upon the case of *Payne v. Elliot*, 54 Cal. 339, 35 Am. Rep. 80, as authority for the contention that conversion lies for the wrongful appropriation of every character of property contained within the classification of personal property. That case in fact does say:

"The fiction on which the action of trover was founded, namely, that a defendant had found the property of another, which was lost, has become, in the progress of law, an unmeaning thing, which has been by most courts discarded; so that the action no longer exists as it did at common law, but has been developed into a remedy for the conversion of every species of personal property."

This language is also quoted in 24 Cal. Jur. 1030, § 7, which text is supported only by the one authority above mentioned. But this is too broad a statement as to the application of the doctrine of conversion or trover, and it was unnecessary to the determination of the issue in that case. All that was involved in the *Payne* case, supra, was the question as to whether conversion would lie for the unlawful appropriation of shares of stock in a mining company. Shares of stock are represented by certificates which are evidence of a definite interest in the assets of a company. Shares of stock are tangible, and may be identified. It is the uniform rule of law that shares of stock in a company are subject to an action in conversion. 26 R. C. L. 1105; 7 R. C. L. 197, § 166; *Ralston v. Bank of California*, 112 Cal. 208, 213, 44 P. 476; *Jacks v. Bacon*, 63 Cal. App. 463, 468, 218 P. 1027; *People v. Flanagan*, 60 Cal. 2, 44 Am. Rep. 52.

[5] It is true as contended by appellant, that personal property consists of "every kind of property that is not real. * * *" Civ. Code, § 663. And section 3336 of the Civil Code provides that:

"The detriment caused by the wrongful conversion of personal property is presumed to be: (1) The value of the property at the time of the conversion. * * *"

But this section does not declare that an action in trover will lie for the conversion of personal property of every character. It merely purports to fix the measure of damages for the wrongful appropriation of such personal property as is subject to the action of conversion. No statute of California purports to state just what character of personal property is subject to this action.

In the case of *Boehm v. Spreckels*, 183 Cal. 239, 191 P. 5, it is held that a contract between a newspaper publisher and a carrier, for the exclusive control of a newspaper route, created a mere agency, and conveyed no interest in property. The characteristics of this newspaper route were similar to those of the laundry route in the instant case. The deceased, as the agent of the laundry company, acquired no title to the property, and, having none, his attempt to transfer the route to an alleged purchaser would convey no title. The title of the Eagle Laundry Company was therefore in no wise affected by this alleged sale. Its former customers of this route were privileged to continue to patronize appellant's business, regardless of the attempted sale. The only acts of the deceased of which appellant may complain were the violation of his trust as confidential agent, and the consequent damage to their business on account of a possible loss of customers. Under such circumstances the remedy is not found in an action for conversion, and the demurrer was therefore properly sustained.

The judgment is affirmed.

We concur: KOFORD, P. J.; STURTEVANT, J.

87 Cal. App. 471

FRED W. HAUGER MOTORS CO. v. REIDY
et al. (Civ. 6024.)★

District Court of Appeal, First District, Division 1, California. Dec. 12, 1927.

Hearing Denied by Supreme Court Feb. 9, 1928.

Appeal and error $\Rightarrow$ 1010(1)—Findings of trial court, sufficiently supported by evidence, cannot be disturbed on appeal.

Where evidence, though conflicting, sufficiently supports trial court's findings, they cannot be disturbed on appeal.

Appeal from Superior Court, City and County of San Francisco; John L. Hudner, Judge.

Action by the Fred W. Hauger Motors Company against P. M. Reidy and another. From a judgment for plaintiff, the named defendant appeals. Affirmed.

See, also, 253 P. 1114.

I. Henry Harris, of Los Angeles (A. M. Finley, of Pasadena, of counsel), for appellant.

R. L. McWilliams and H. H. McPike, both of San Francisco, for respondent.

CASHIN, J. An appeal from a judgment entered against defendant P. M. Reidy in an action for money had and received. The appeal is presented on the judgment roll with a bill of exceptions.

It is contended by appellant that the findings are unsupported, and that certain rulings of the court made in the course of the trial were prejudicially erroneous.

According to the testimony of witnesses for the plaintiff corporation, the F. B. Stearns Company had stored in a warehouse 25 automobiles, which, under a contract with the plaintiff, were consigned to the latter. Defendant Reidy desired to purchase the automobiles from the Stearns Company at a price less than the invoice price to the plaintiff, and, in order to complete the purchase, the consent of the latter was necessary. The plaintiff had obligated itself to sell and deliver five of the automobiles to various purchasers, and it was agreed by the parties that, in consideration of the consent of plaintiff to cancel its contract with the Stearns Company, said defendant would deliver the five automobiles contracted to be sold and pay to plaintiff all sums received therefor above the cost of the automobiles to him. The automobiles were delivered by defendant, and, according to this testimony, the total amount received therefor over and above the cost thereof to defendant exceeded the amount found by the trial court. Defendant denied that a profit was derived from the transaction, but the evidence, although conflicting, sufficiently supports the findings of the court, which cannot therefore be disturbed (Southern California Iron & Steel Co. v. Amalgamated Ass'n of Iron, Steel & Tin Workers, 186 Cal. 604, 200 P. 1), and a review of the rulings on objections by defendant discloses no prejudicial error.

The judgment is affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

87 Cal. App. 310

WAGNER v. HAVARD. (Civ. 5884.)★

District Court of Appeal, First District, Division 2, California. Dec. 7, 1927.

Hearing Denied by Supreme Court Feb. 2, 1928.

Landlord and tenant §291(1) — Lessor giving 30-day notice of forfeiture, making month to month tenancy, without subsequent 3-day notice, could not maintain unlawful detainer (Civ. Code, §§ 789-791).

Under lease for term of years, providing that lessor might declare lease forfeited for violation of covenants, in which event holding should be construed as month to month tenancy, lessor, who merely gave 30-day notice of termination without 3-day notice required by Civ. Code, § 791, at end of 30-day period, was not entitled to maintain unlawful detainer proceedings, notwithstanding sections 789, 790.

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by George Wagner against A. Havard. Judgment for plaintiff, and defendant appeals. Reversed.

Hugh K. McKevitt and P. A. Bergerot, both of San Francisco (Joseph De Martini and Jack M. Howard, both of San Francisco, of counsel), for appellant.

L. M. Hoeffer and Finlay Cook, both of San Francisco, for respondent.

KOFORD, P. J. This is an appeal from a judgment in favor of plaintiff in an action of unlawful detainer. The points raised by appellant relate to the giving of the statutory notice.

The defendant occupied the premises under the terms of a written lease for a term of years. The lease contained a clause providing that, if the lessee violated any of its covenants, the lessor might by notice in writing declare the lease forfeited, and in that event the holding thereafter should be construed to be a tenancy from month to month only and for the same monthly rental as stated in the lease. The lessors, on account of certain claimed specified breaches of covenants, on May 27, 1926, served written notice upon defendant declaring the said lease forfeited; "said forfeiture to take effect June 1, 1926, on and after which date your further holding of such premises will be a tenancy from month to month only. * * *" This was the only notice served on defendant. The action was thereafter commenced on July 12, 1926.

The complaint alleged:

"That on the 1st day of June, 1926, defendant was in possession of the premises at 2791 Sixteenth street, San Francisco, Cal., under a month to month tenancy from plaintiff as landlord. That on the 27th day of May, 1926, plaintiff served notice on defendant that the said month to month tenancy would be terminated to take effect June 30, 1926."

The answer denied holding under a month to month tenancy, denied any termination of such tenancy, set up the lease, and alleged faithful performance by defendant.

The court found that the lease had been violated by defendant, and gave plaintiff judgment in unlawful detainer and \$500 damages.

Appellant claims that the 30-day notice of termination of the month to month tenancy commencing June 1st was prematurely given, because it was given May 27th, several days before the month to month tenancy began, as was said in Stoppelkamp v. Mangeot, 42 Cal. 316. He furthermore claims that, before this special proceeding of unlawful detainer could be commenced, it was necessary

personal property which is 'specific enough to be identified.

5. Trover and conversion — **2—Character of property which is subject to trover action is not stipulated by statute (Civ. Code, §§ 663, 3336).**

No statute of California purports to state just what character of personal property is subject to action for trover, notwithstanding Civ. Code, §§ 663 and 3336.

Appeal from Superior Court, City and County of San Francisco; Walter Perry Johnson, Judge.

Action for damages for conversion of a laundry route brought by Frederick Olschewski, trustee in bankruptcy of the estate of the Eagle Laundry Company, bankrupt, against W. G. Hudson, executor of the estate of James W. Murphy, deceased. Judgment for defendant and plaintiff appeals. Affirmed.

Joseph E. Bien, of San Francisco, for appellant.

Cullinan & Hickey, of San Francisco (William T. Sweigert, of San Francisco, of counsel), for respondent.

THOMPSON, Justice pro tem. This is an appeal from a judgment entered against plaintiff for failure to amend after the sustaining of a demurrer on the ground that the complaint failed to state facts sufficient to constitute a cause of action. The effect of the challenged ruling upon the demurrer was to hold that an action for conversion does not lie for the alleged appropriation and sale by an agent of a laundry route.

Plaintiff is trustee in bankruptcy of the estate of the Eagle Laundry Company, a bankrupt corporation. Defendant is the executor of the estate of James T. Murphy, deceased. Prior to his death the deceased had been the agent of said laundry company in charge of route A in San Francisco, working for a compensation of \$35 per week. The complaint alleges that on September 17, 1924, the Eagle Laundry Company was adjudged a bankrupt, and plaintiff was duly appointed and qualified as trustee thereof; that, for a period long prior to August 2, 1924, the deceased was employed and acted for said company in charge of route A in San Francisco, and as such agent "was given charge and control of numerous customers * * * to collect for and deliver * * * laundry * * * for the purpose of washing, ironing, etc., and * * * to collect the money due for such service * * *"; that about July 28, 1924, the assignee in bankruptcy of said laundry company negotiated a sale of said laundry route, together with seven other routes alleged to have belonged to said Eagle Laundry Company, and thereupon demanded of said agent that he deliver to said purchaser of said route A all "memoranda and

the list of customers, * * * and all laundry and washing collected * * *"; that said agent refused to comply with said demand, but, upon the contrary, on August 4, 1924, purported to sell said route A to the Crystal Laundry Company of San Francisco, a competitive laundry company, and agreed to "turn over all work and laundry collected upon said route A to said alleged purchaser, the Crystal Laundry Company," in consideration of a certain percentage of the gross business thus arising from said route; that thereafter said agent acted as the "outside driver" for said Crystal Laundry Company; that said acts of appropriation and purported sale of said route A on the part of said agent constituted a conversion of said property rights of said bankrupt estate, to its damage in the sum of \$2,500. Subsequently James T. Murphy died, and, upon proceedings duly had, the defendant was appointed and qualified as executor of the estate of said deceased, and this action for damages for conversion was thereupon instituted against the estate of said deceased.

[1] Apparently said laundry route consisted of a number of customers of said bankrupt estate who resided in a certain district of San Francisco designated as route A. It must be assumed that, as an agent and employee in charge of this route for said company, the deceased was possessed of knowledge of the list of individuals residing in said district who were accustomed to patronize his employer, although it is not affirmatively alleged that he had a list or memorandum of the names of customers, either written or otherwise, or that he had access to any such list. However, as such confidential agent, he was bound to exercise utmost good faith in behalf of his employer, and not take advantage of his trade knowledge and information secured in the course of his employment, to use it for his personal benefit. Civ. Code, §§ 1983-1988. In the case of *Empire Steam Laundry v. Lozier*, 165 Cal. 99, 102, 130 P. 1180, 1182 (44 L. R. A. [N. S.] 1159, Ann. Cas. 1914C, 628), it is said:

"There can be no question, * * * but that defendant's agency was one of trust and confidence. * * * The names of the customers of a business concern whose trade and patronage have been secured by years of business effort and advertising, and the expenditure of time and money, constituting a part of the good will of a business which enterprise and foresight have built up, should be deemed just as sacred and entitled to the same protection as a secret of compounding some article of manufacture and commerce."

Manifestly a laundry route does not consist solely of a specific district or territory, nor does it consist of a vested right to, or monopoly of, the patronage of all the residents of said district. Competing laundry com-

panies may possess independent lists of customers residing in the same house, block, or district. Obviously, a customer of one laundry company to-day, for good and valid reasons, or for no reason whatever, may become the customer of a competing company tomorrow. For friendship, whim, better service, or cheaper prices, a customer may change his laundry at will. No laundry company may have a vested property right to claim, as customers, particular individuals, nor all the residents of a specific district. The field is open for fair competition on the part of any and all who desire to solicit patronage. In *New Method Laundry Co. v. MacCann*, 174 Cal. 26, 161 P. 990, Ann. Cas. 1918C, 1022, it is said:

"To restrain a person lawfully engaged in a laundry business from receiving unlaundered goods from certain former patrons is to sanction, to that extent, the establishment of a trade blacklist, thereby depriving such patrons, without any fault on their part, of the right to have their laundry work done where they will. The constitutional guaranties of liberty include the privilege of every citizen to freely select those tradesmen to whom he may desire to extend his patronage, and equity cannot invade or take away this right, either directly or indirectly."

[2] It is, however, the duty of a laundry route agent to extend uniform courtesy and fair treatment, and take no undue advantage of his trade knowledge, so that he may retain the good will and patronage of the individual customers for the benefit of his employer. A list of laundry customers is a property right which may be appropriately protected, but it is not a tangible right which may be handled and transferred like stocks, bonds, personal effects, household goods, or animals. The property right of a laundry route is akin to the good will of a business. *Empire Steam Laundry v. Lozier*, supra. The good will of a business is susceptible of ownership. Civ. Code, § 655. Unlawful interference with property rights in the good will of a business, or the benefits of trade and patronage of a specific list of customers in a definite route, may be protected by injunctive relief in a court of equity. 14 Cal. Jur. 189, § 17; *New Method Laundry Co. v. MacCann*, supra; *Cornish v. Dickey*, 172 Cal. 120, 155 P. 629; *Empire Steam Laundry v. Lozier*, supra; *Mackechnie Bread Co. v. Huber*, 60 Cal. App. 539, 213 P. 285. But there is nothing definite or tangible in the character of the ordinary list of laundry customers which makes an effort to transfer the district in which they live subject to an action of conversion.

[3] No authority has been furnished which sustains the maintenance of an action in trover or conversion for the unlawful interference with a laundry route, or any similar property right. Clearly the proceeding in conversion was not intended to reach so in-

tangible, uncertain, and indefinite a property right. The very meaning of the word "conversion," as it is used in this sense, is to "change into another form, substance or state; to transform, or change, as in law, the wrongful appropriation to one's own use of the goods of another." *Standard Dictionary*. The very definition of the word presupposes the existence of tangible goods or chattels in a form capable of being changed or transformed, turned over, delivered, or appropriated for the use and benefit of the wrongdoer. In 38 Cyc. 2011, it is said that conversion lies for "every species of tangible personal property which is the subject of private ownership." In this case conversion is used as a term synonymous with trover. *Black's Law Dict.* 1174. Trover comes from a French word meaning to find, and is defined as "a form of action which lies to recover damages against one who has, without right converted to his own use goods or personal chattels, in which the plaintiff has a general or special property. * * * It was originally an action of trespass on the case where goods were found by the defendant and retained against the plaintiff's rightful claim. The manner of retaining possession soon came to be disregarded, as the substantial part of the action is the conversion to the defendant's use; so that the action lies whether the goods came into the defendant's possession by finding or otherwise, if he fails to deliver them upon the rightful claim of the plaintiff. It differs from detinue and replevin in this, that it is brought for damages and not for the specific articles; and from trespass in this, that the injury is not necessarily a forcible one, as trover may be brought in any case where trespass for injury to personal property will lie." 3 *Bouv. Law Dict.* (3d Rev.) 3326. Various authorities confine the application of the proceeding of trover or conversion to the wrongful interference with specific tangible goods or chattels. "In substance it (trover) is a remedy to recover the value of personal chattels wrongfully converted by another to his own use." 1 *Chit. on Pl.* (14th Am. Ed.) 146. It is "a generic name applied to those torts arising from" the wrongful conversion of "any particular piece of personal property * * * owned by another." *Spellman v. R. Co.*, 35 S. C. 475, 14 S. E. 947, 28 Am. St. Rep. 858. "In form it is a fiction, in substance a remedy to recover the value of personal chattels wrongfully converted by another to his own use." 1 *Burr.* 31. "Trover lies for specific chattels wrongfully converted, and not for money had and received for payment of debts. It does not operate on chattels generally, but specifically, such as money in coin or bills, animals or other property capable of identification as being the actual property or thing wrongfully taken and converted." *Kerwin v. Balhatchett*, 147 Ill. App. 561, 566.

for plaintiff to follow the 30-day notice of termination with a 3-day notice of re-entry, under Civil Code, § 791, citing *Martin v. Splivalo*, 56 Cal. 128; *King v. Connolly*, 51 Cal. 181; *Smith v. Hill*, 63 Cal. 51; *Diggs v. Porteus*, 5 Cal. Unrep. 753, 33 P. 447.

Respondent's answer to this second point is substantially that the last-cited decisions should be overruled. The apparent inconsistency of permitting an unlawful detainer proceeding without the 3-day notice where the tenancy terminates by expiration of the term provided in the lease, and, on the other hand, requiring the 3-day notice where an estate at will is terminated by a 30-day notice under Civil Code, § 789, is pointed out (15 Cal. Jur. 806, § 221), but these decisions have never been overruled, and they are binding authority. The distinction is said to rest upon the meaning of the word "re-entry" as used in Civil Code, §§ 790 and 791. *Earl Orchard Co. v. Fava*, 138 Cal. 76, 79, 70 P. 1073.

During June, 1926, defendant held as a tenant at will from month to month and not for a fixed term, as contended by respondent. It would be reasoning in a circle to state that a month to month tenancy was converted into a tenancy for a fixed definite term by the notice of termination and then hold for that reason that the 3-day notice is not required. That could just as well have been done in the cases above cited. The plaintiff's complaint here definitely alleged a month to month tenancy. The peculiar provision of the lease here did not give the right of re-entry upon breach of covenant, but only the right to convert the leasehold estate into a month to month tenancy, and the complaint was not based upon right of re-entry for breach of covenants or conditions under subdivision 3 of the Code of Civil Procedure, § 1161.

Under the authorities cited, the plaintiff could not maintain unlawful detainer proceedings without following the 30-day notice of termination with a 3-day notice to surrender, and the judgment is therefore reversed.

We concur: STURTEVANT, J.;
NOURSE, J.

87 Cal. App. 375

**PENNELL v. SUPERIOR COURT IN AND
FOR LOS ANGELES COUNTY et al.**
(Civ. 5896.)

District Court of Appeal, Second District, Division 1, California. Dec. 8, 1927.

I. Judgment §243—Judgment for payment of fees directly to attorney of party is void.

A judgment or order for payment of fees directly to an attorney for one of the parties,

being in favor of person not party to the suit, is irregular, and void.

2. Contempt §21—Court cannot punish for contempt for failure to obey void judgment.

Judgment and order for payment of fees to the attorney of a party being void, the court is without jurisdiction to punish for contempt on account of failure to obey the same.

3. Contempt §54(4)—Affidavit for contempt not stating sufficient facts, court does not have jurisdiction of the person.

If affidavit, filed as basis for contempt proceeding, does not state facts sufficient to charge a contempt, the court does not have jurisdiction of the person therein sought to be charged with contempt.

4. Prohibition §10(2)—Further proceedings in contempt without jurisdiction will be stayed by prohibition, where it is manifest that otherwise court will proceed.

Further proceedings for contempt will be stayed by writ of prohibition, where, notwithstanding lack of jurisdiction, it is manifest from the court's finding petitioner guilty of contempt, and continuing sentence to a subsequent day, that otherwise it will proceed.

5. Judgment §485—Judgment void on face may be attacked collaterally, notwithstanding motion to vacate, denial, and no appeal.

Judgment for payment of fees to attorney of party, being void on its face, may be attacked collaterally in contempt proceeding, notwithstanding there was a motion to vacate it on the ground of want of jurisdiction, and this was denied, and no appeal was taken.

Application by W. C. Pennell for writ of prohibition to the Superior Court of Los Angeles County and James H. Pope, Judge. Writ granted.

E. O. Leake, of Los Angeles, for petitioner.
Duke Stone, of Los Angeles, for respondents.

McLUCAS, Justice pro tem. This is an application for a writ of prohibition to prevent the respondents from conducting any further proceedings on account of an order to show cause why the petitioner should not be punished for contempt of court for failure to pay attorney's fees in a divorce action, as ordered and adjudged by the respondent court.

It appears from the pleadings that an interlocutory judgment of divorce was granted by respondent court on December 28, 1925, wherein it was ordered as follows:

"It is further ordered that W. C. Pennell pay to Duke Stone, Esquire, attorney for plaintiff, Alice Pennell, the sum of \$200, attorney's fees, payable forthwith."

Immediately thereafter the defendant in said action gave notice of motion to vacate the said judgment, including that portion

thereof providing for the payment of attorney's fees, on the ground that such provision was in excess of the jurisdiction of the court, and void. This motion was denied, and the defendant was ordered to pay Duke Stone, attorney for plaintiff, the sum of \$50 additional fees for appearance on the hearing of said motion. No appeal was taken. On August 29, 1927, an order to show cause, based upon the affidavit of plaintiff, alleging the issuance of the said order and judgment to pay the sums of \$200 and \$50 to plaintiff's attorney, Duke Stone, was issued by the respondent court ordering the defendant to appear in said court and show cause why he should not be punished for contempt of court for failure to abide by said order and judgment for the payment of attorney's fees. At the hearing of the order to show cause defendant objected to the jurisdiction of the court to issue said order to show cause or to conduct a hearing thereon, upon the ground that the said order contained in said interlocutory judgment for payment of attorney's fees and said supplemental order for the payment of attorney's fees were in excess of the jurisdiction of the court, and were wholly void on their face. The objections were overruled, and, on September 23d, defendant was found guilty of contempt, and sentence continued until October 3d. On October 1st this application for writ of prohibition was filed, and an alternative writ was issued by this court on said date.

[1-4] The rule is well settled that a judgment or order for the payment of fees directly to an attorney for one of the parties is a judgment in favor of persons not parties to the suit, and for that reason irregular and void. *Sharon v. Sharon*, 75 Cal. 1, 39, 16 P. 345; *In re Levinson*, 108 Cal. 450, 458, 41 P. 483, 42 P. 479; *Sullivan v. Gage*, 145 Cal. 770, 79 P. 537; *Chavez v. Scully*, 62 Cal. App. 6, 216 P. 46. In the latter case it is said (page 8 [216 P. 47]):

"Statutes similar to the section of the Code now under consideration have frequently been before the Supreme Court of this state, and that court has invariably held that, where the court is given authority to allow attorneys' fees in certain actions or proceedings, such allowance must be made to the party to the action and it has annulled and declared void in every instance, as far as our information goes, orders and decrees made directly in favor of the attorneys. In a divorce action under the authority of section 137 of the Civil Code, the court ordered attorneys' fees paid to the plaintiff's attorneys. The Supreme Court set aside the order and in doing so used the following language: 'Section 137 regulates the matter in this state, and that section contemplates an order to pay to the wife. * * * When awarded, either by statute or upon general principles, "suit money" is awarded to her; and by section 137 counsel fees, if ordered to be paid, are ordered as part of her necessary expenses for prosecuting or defending the action for di-

voice. * * * The order here was a direct judgment for money in favor of persons not parties to the suit, and to that extent was irregular and void.' *Sharon v. Sharon*, 75 Cal. 1 (16 P. 345)."

In the instant case, the judgment and order for the payment of fees to the plaintiff's attorney being wholly void, the respondent court was without jurisdiction to punish the petitioner herein for contempt of court on account of his failure to obey such void order and judgment. If the affidavit filed with the trial court does not state facts sufficient to charge a contempt of court, that court would not have jurisdiction of the person therein sought to be charged with contempt. *Commercial Bank of Spanish America v. Superior Court of California in and for City and County of San Francisco*, 192 Cal. 395, 396, 220 P. 422, and cases cited. The remedy for such an excess of jurisdiction ordinarily is by writ of certiorari or by habeas corpus, where the person is committed to imprisonment by an order void because of excess of jurisdiction. *Commercial Bank of Spanish America v. Superior Court of California in and for City and County of San Francisco*, supra; 4 Cal. Jur. 1030, § 10. The trial of contempt proceedings has been stayed by writ of prohibition, where it is manifest from previous orders or decisions of the court that it will proceed, notwithstanding the lack of jurisdiction. *Commercial Bank of Spanish America v. Superior Court of California in and for City and County of San Francisco*, supra. In the present case it was manifest that the court would proceed notwithstanding lack of jurisdiction, since the petitioner was found guilty of contempt, and sentence continued to a subsequent date.

[5] Respondent contends that, since the judgment was attacked directly by the motion to vacate on the ground of lack of jurisdiction, which motion was denied, and no appeal taken from the judgment, the question of jurisdiction was thereby finally adjudicated, and therefore cannot be raised collaterally. The rule is well recognized that judgments void on their face may always be attacked either directly or collaterally. In *Estate of Pusey*, 180 Cal. 368, 374, 181 P. 648, 650, it is said, quoting from *Forbes v. Hyde*, 31 Cal. 342, 348:

"A judgment absolutely void may be attacked anywhere, directly or collaterally whenever it presents itself, either by parties or strangers. It is simply a nullity, and can be neither a basis nor evidence of any right whatever." See, also, *Pioneer Land Co. v. Maddux*, 109 Cal. 638, 42 P. 295, 50 Am. St. Rep. 67, and *Adams v. Adams*, 154 Mass. 290, 28 N. E. 260, 13 L. R. A. 275."

Moreover, the affirmance of a void judgment on appeal does not make it valid. *Ball v. Tolman*, 135 Cal. 375, 67 P. 339, 87 Am. St.

Rep. 110; *Pioneer Land Co. v. Maddux*, 109 Cal. 633, 42 P. 295, 50 Am. St. Rep. 67. In the present case there was no appeal, but the judgment was void as to payment of attorney's fees to an attorney who was not a party to the action.

A peremptory writ of prohibition will issue prohibiting respondent from conducting further proceedings against the petitioner for contempt.

We concur: CONREY, P. J.; HOUSER, J.

87 Cal. App. 634

PEOPLE v. HALL. (Cr. 1000.)

District Court of Appeal, Third District, California. Dec. 16, 1927.

1. Criminal law §539(1)—Exclusion of transcript of testimony at preliminary examination held not error, in absence of claim that it would impeach witnesses at hearing to determine degree of offense.

Where witnesses, testifying at preliminary examination, testified at hearing to determine degree of robbery after plea of guilty, and were cross-examined by defendant's counsel, exclusion of transcript of testimony taken at preliminary hearing held not error, in view of lack of claim that it would impeach such witnesses.

2. Robbery §24(1)—Evidence that defendant's weapon was loaded held to support conviction for first degree robbery (Pen. Code, § 211a).

Evidence that defendant's weapon with which he committed robbery was loaded held to support conviction for first degree robbery, under Pen. Code, § 211a.

3. Robbery §24(1)—Defendant's acts and language held to constitute implied assertion that weapon was loaded, making offense first degree robbery (Pen. Code, § 211a).

In prosecution for robbery, defendant's acts and language held to constitute admission by conduct and implied assertion that weapon was loaded, making offense first degree robbery within Pen. Code, § 211a.

4. Criminal law §273—Plea of guilty to charge of robbery held conclusive admission that taking was accomplished by means of force or fear (Pen. Code, § 211).

Under Pen. Code, § 211, plea of guilty to charge of robbery held to preclude inquiry as to whether victim was put in fear, since plea was conclusive admission that taking was by means of force or fear.

Appeal from Superior Court, Merced County; E. N. Rector, Judge.

George Hall was convicted of first degree robbery, and he appeals. Affirmed.

C. H. McCray, of Merced, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

FINCH, P. J. The defendant entered a plea of guilty to a charge of robbery, and the court thereupon took evidence to determine the degree of the crime, and adjudged the defendant guilty of robbery of the first degree. The defendant has appealed from the judgment.

"All robbery which is perpetrated by torture or by a person being armed with a dangerous or deadly weapon is robbery in the first degree. All other kinds of robbery are of the second degree." Pen. Code, § 211a.

[1] Appellant contends that the court erred in refusing to admit in evidence the transcript of the testimony taken at the preliminary examination of the defendant. The witnesses who testified at the preliminary examination also testified at the hearing in the superior court to determine the degree of the crime, and were there cross-examined by counsel for defendant. In offering such transcript in evidence, counsel for defendant said: "I don't say that it will impeach them (the witnesses) in any respect." No foundation was laid for impeachment of any of the witnesses. The ruling was not error.

[2, 3] It is also contended that the evidence does not show that the gun used by defendant in committing the crime was loaded. The men who were robbed testified that the defendant drew a gun on them, ordered them to hold up their hands, and lined them up with their faces to the wall, and then took their money from their persons. These men did not know whether the gun was loaded. It was stipulated that the sheriff of Tuolumne county, if called as a witness, would testify that "he took a 38 caliber magazine from a 38 automatic revolver from Blackie Kennedy * * * on the night of the 19th of April, 1927," and kept the magazine, but left the revolver in Kennedy's possession. The robbery charged in this case was committed April 26, 1927. The defendant testified that the revolver used in the robbery was given to him by Kennedy a few days before the robbery; that it did not have a magazine at that time; that Kennedy said "that I could find one for it"; and that it had no magazine at the time of the robbery. It also appears that the defendant had possession of the revolver when he was arrested, about six weeks or two months after the robbery, and that it had no magazine at that time. It is not difficult to procure a magazine for such a weapon, and the defendant may have procured one after the revolver was given to him, if it was so given to him. The only evidence in support of the defendant's contention that the revolver was not loaded is his own testimony to that effect. Few criminals would ever be convicted if their explanations were always accepted as gospel truth. They do not usually arm themselves with unloaded guns when they go out to com-

mit robberies, and in this case the court was not bound to accept the defendant's statement that the gun was unloaded when the circumstances indicated the contrary. The defendant's acts and the language used by him in the commission of the robbery constituted an admission by conduct, an implied assertion that the gun was loaded. *People v. Montgomery*, 15 Cal. App. 315, 114 P. 792; *People v. Seawright*, 72 Cal. App. 414, 237 P. 796. It has been held that an unloaded revolver is a dangerous weapon within the meaning of section 211a of the Penal Code. *People v. Egan*, 77 Cal. App. 279, 246 P. 337; *People v. Shaffer* (Cal. App.) 254 P. 666.

[4] Appellant contends that the evidence shows that the particular man he is charged with having robbed "was not afraid." Whether or not the victim of the robbery was put in fear was not a subject of inquiry at the hearing before the court. The defendant's plea of guilty precluded any such inquiry, because such plea was a conclusive admission that the taking was "accomplished by means of force or fear." Pen. Code, § 211.

The judgment is affirmed.

We concur: PLUMMER, J.; HART, J.

87 Cal. App. 151

TOON v. MACK INTERNATIONAL MOTOR TRUCK CORPORATION. (Civ. 4499.)

District Court of Appeal, Second District, Division 2, California. Nov. 25, 1927.

1. Appeal and error 931(1)—It is presumed that court's findings are warranted by evidence.

It is presumed on appeal that trial judge has sufficient facts before him to warrant findings.

2. Infants 58(2)—Minor over 18 who disaffirms sales contract and restores property, must pay seller amount of depreciation (Civ. Code, § 35).

Minor, who purchased personal property when he was over 18, and restores such property to seller, must pay seller amount in money found by court to be equivalent to the loss sustained by the seller by reason of depreciation while in minor's possession, as condition precedent to an effectual disaffirmance under Civ. Code, § 35.

Appeal from Superior Court, Los Angeles County; Pat R. Parker, Judge.

Action by Edward E. Toon, a minor, by R. Toon, his guardian ad litem, against the Mack International Motor Truck Corporation. Judgment for defendant, and plaintiff appeals. Affirmed.

Seth B. Smith and Vinton A. Holbrook, both of Los Angeles, for appellant.

Overton, Lyman & Plumb and George W. Prince, Jr., all of Los Angeles, for respondent.

PEAIRS, Justice pro tem. This is an appeal upon the judgment roll alone. The facts material to a consideration of this appeal, so far as shown by the pleadings and findings, are as follows: That the appellant (plaintiff below), at all times hereafter so mentioned was a minor, over the age of 18 years. That on the 12th day of January, 1921, the appellant, as purchaser entered into a contract with the respondent (defendant below), as seller, for the purchase of a five-ton A. C. Mack truck for the purchase price of \$7,540.75, payable \$1,500 in cash, which payment was made by the appellant to the respondent, and the balance was payable in eighteen payments represented by a series of notes bearing 8 per cent. interest, the first of which matured on March 1, 1921, and the other seventeen maturing one each month thereafter. That subsequently the appellant paid the sum of \$225 on the purchase price of said truck; \$216.90 being towards the principal of the first maturing note and the balance, or \$8.10, being on account of interest. That no other or further payments were made by appellant. Thus altogether the appellant paid the sum of \$1,725 to respondent. That at the time the contract was entered into, possession of the truck was delivered to the appellant, who continued to hold the same until the 14th day of June, 1921, when it was repossessed from him by the respondent for his failure to make the payments required by the contract, which contract provided that title should remain in the respondent until the truck was fully paid for, and that for failure to make such payments the respondent could repossess itself of the truck, whereupon all of the rights of the appellant should terminate. That at the time said truck was repossessed it was in a worn and dilapidated condition and had depreciated in the sum of \$2,000 in value, and the reasonable value thereof at that time was \$5,500. That subsequent to such repossession, and on the 21st day of September, 1921, the appellant in writing notified the respondent that he disaffirmed the contract and demanded back all moneys paid by him under the contract. That the appellant has delivered back to respondent the identical truck received by him and all that he received under the contract for the purchase of said truck other than the depreciated value thereof.

The appellant claims that, this being an appeal on the judgment roll alone, the only question presented for review is whether or not the findings support the judgment, and counsel agree that—

"The issue involved in this appeal is whether or not a minor over the age of 18 years, who disaffirms a contract for the purchase of per-

sonal property and restores said property to the seller, must pay to the latter the amount in money found by the lower court to be equivalent to the loss sustained by the seller by reason of the depreciation in value of the article purchased, during its possession by the minor, as a condition precedent to an effectual disaffirmance."

Section 35 of the Civil Code is as follows:

"In all cases other than those specified in sections thirty-six and thirty-seven, the contract of a minor, if made whilst he is under the age of eighteen, may be disaffirmed by the minor himself, either before his majority or within a reasonable time afterwards; or, in case of his death within that period, by his heirs or personal representatives; and if the contract be made by the minor whilst he is over the age of eighteen, it may be disaffirmed in like manner upon restoring the consideration to the party from whom it was received, or paying its equivalent."

This court has very carefully considered the arguments and citations of counsel but finds that the law invoked in this class of cases is so completely set out in the case of *Murdock v. Fisher Finance Corporation* (Cal. App.) 251 P. 319, including practically all cases in this state and some Oregon and New York cases, which have material bearing, that we feel that no considerable discussion is necessary, other than to quote certain portions of that opinion. In the case of *Rice v. Butler*, 160 N. Y. 578, 55 N. E. 275, 47 L. R. A. 303, 73 Am. St. Rep. 703, we find this language:

"It will thus be seen that the cases to which we have alluded recognize the principle which we think ought to be applied to this case, and that is, that the plaintiff, having had the use of the bicycle during the time intervening between her purchase and its return, ought, in justice and in fairness, to account for its reasonable use or deterioration in value. Otherwise she would be making use of the privilege of infancy as a sword, and not as a shield. In the absence of wanton injury to the property, the value of the use would be deemed to include the deterioration in value, and, under the evidence in this case, and, as found by the trial court, the use equaled the sum paid."

We call particular attention to the words, "to account for its reasonable use or deterioration in value," and to the words, "the value of the use would be deemed to include the deterioration in value," also to that portion of the *Murdock* opinion, *supra*, which reads as follows:

"It is the settled rule of law that, as a condition precedent to the maintenance of an action in rescission, the plaintiff must have restored the consideration or must have offered to do so. 4 Cal. Jur. pp. 764, 765; *Crouch v. Wilson*, 183 Cal. 576, 584, 191 P. 916. This rule has become so well established that it has been held that the plaintiff, seeking rescission, must allege and prove that he has either restored or offered to restore the consideration. *Crouch v. Wilson*, *supra*. There are no Cali-

fornia cases directly on the point, but the reasoning of the cases arising under section 1691 is equally applicable to those arising under section 35, and cases from other jurisdictions arising under similar statutes support the conclusion that, when a minor over 18 years of age seeks to disaffirm his contract, he must, as a condition precedent to the maintenance of an action, either restore the consideration he has received or pay its equivalent, or he must offer to do so."

We call attention also to this quotation in the *Murdock* Case, wherein the court says, referring to the case of *Petit v. Liston*, 97 Or. 464, 191 P. 660, 11 A. L. R. 487:

"*Petit v. Liston*, *supra*, involved the purchase of a motorcycle by a minor, and the opinion contains some language which is particularly appropriate here: 'We think, where the minor has not been overreached in any way, and there has been no undue influence, and the contract is a fair and reasonable one, and the minor has actually paid money on the purchase price, and taken and used the article, that he ought not to be permitted to recover the amount actually paid, without allowing the vendor of the goods the reasonable compensation for the use and depreciation of the article while in his hands. * * * We think this rule will fully and fairly protect the minor against injustice or imposition, and at the same time it will be fair to the business man who has dealt with such minor in good faith. This rule is best adapted to modern conditions, and especially to the conditions in our far Western states.'"

[1, 2] It seems to be plain, from the statements of counsel in their briefs and from the findings of the court in this case, that the plaintiff did not pay or offer to pay the consideration received by him, further than to return the truck. The court found that the truck had depreciated during the time of the possession of the plaintiff in the sum of \$2,000, and that the plaintiff had only paid to the defendants \$1,725. The quotation by our appellate court from the New York case which uses the words, "reasonable use or deterioration in value," and later says that the value of the use would be deemed to include the deterioration in value, would seem to indicate the opinion that the deterioration which may be well considered a synonym for depreciation, is at least one of the measures of the consideration received by the plaintiff. Further it is to be presumed that the judge of the superior court, in trying this case, had sufficient facts before him to warrant his findings, and that the use of the word depreciation may rightfully include the value of the use of the truck during the five months' period that it was in the possession of the plaintiff.

The fact that the plaintiff had paid \$1,725 might preclude the necessity for an offer of or payment of a consideration for the use of the truck during the five months' period, but the court, having found a depreciation in value during the possession by the plaintiff of

the sum of \$2,000, and there being no showing that any one other than plaintiff had had the use, care, or control of the truck during the period above mentioned, or that there was any other reason for depreciation, and its judgment being for the defendant, together with its costs of suit, has thus made an allowance to the defendant of the sum of \$275, the difference between \$2,000 and \$1,725 paid, which was a decision which the court was authorized to and did make. Therefore the judgment will not be disturbed.

As to the attitude of the court upon the law, and interpretation of the sections of our Code and decisions which may have more or less bearing upon the issues of this case, we believe that they have been sufficiently discussed in the case of *Murdock v. Fisher Finance Corporation*, supra.

The judgment is affirmed.

We concur: WORKS, P. J.; THOMPSON, J.

87 Cal. App. 469

McLAUGHLIN v. INDUSTRIAL ACCIDENT COMMISSION et al. (Civ. 5902.)

District Court of Appeal, First District, Division 1, California. Dec. 10, 1927.

Master and servant §417(3)—Certiorari did not lie to review award, which, if erroneous in not discharging one party, was within Industrial Accident Commission's jurisdiction.

Where compensation was awarded against petitioner, and, on rehearing on petitioner's claim that applicant for compensation was not at time of injury his employee, but was employed by corporation, award was made against corporation, but petitioner was not released, certiorari did not lie to review award, even if erroneous, since certiorari may be granted only where there is an excess of jurisdiction by tribunal exercising judicial functions, and here commission had jurisdiction of proceedings and subject-matter.

Petition for certiorari by James L. McLaughlin against the State Industrial Accident Commission and George Heine to review an order and award of the Industrial Accident Commission adjusting claim of George Heine, employee, against petitioner, as employer, and the New Amsterdam Casualty Company, insurer. Writ discharged, and proceedings dismissed.

Barry J. Colding, Theodore Hale, and Thacher & Wright, all of San Francisco, for petitioner.

G. C. Faulkner, of San Francisco, for respondents.

CASHIN, J. Certiorari to review certain proceedings had before the Industrial Accident Commission.

On December 7, 1926, George Heine filed an application with the commission for the adjustment of a claim against James L. McLaughlin, the petitioner herein, and New Amsterdam Casualty Company as insurer, and, after a hearing, an award was made against the parties last named. Subsequently a petition for rehearing was filed by James L. McLaughlin alleging that the applicant for compensation was not, at the time the injury occurred, in the employ of McLaughlin, but was employed by James L. McLaughlin Company, a corporation. The petition for rehearing was granted, and, the corporation having been joined as a party, upon a further hearing it was found that, at the time the injury occurred, the applicant was in the employ of the corporation named above. An award was accordingly made against the corporation, but contained no order discharging James L. McLaughlin, the petitioner herein, from liability, and it is claimed that, by reason of the omission, petition is entitled to relief in the present proceeding.

In order that relief by certiorari may be granted, there must have been an excess of jurisdiction by a tribunal exercising judicial functions; and an excess of jurisdiction is to be distinguished from errors of either law or fact committed by a judicial tribunal within the limits of its jurisdiction. In the Matter of Hughes, 159 Cal. 360, 363, 113 P. 684; Karry v. Sup. Ct., 162 Cal. 281, 122 P. 475, 123 P. 760. In the present case the commission had jurisdiction of the parties to the proceeding and of the subject-matter; and its failure to order the discharge of the petitioner from liability, if erroneous, was an error committed in the exercise of its jurisdiction, and is not subject to review in this proceeding.

The writ of review is discharged, and the proceeding dismissed.

We concur: TYLER, P. J.; KNIGHT, J.

87 Cal. App. 183

OCEAN SHORE R. CO. v. SPRING VALLEY WATER CO. et al. (Civ. 5450.)★

District Court of Appeal, First District, Division 1, California. Nov. 30, 1927.

Rehearing Denied with Modification Dec. 29, 1927. Hearing Denied by Supreme Court Jan. 26, 1928.

1. Easements §24—At common law, right of way, being servitude in gross, was not assignable.

At common law, a right of way, being a servitude in gross as distinguished from an easement, could not be assigned.

2. Railroads §81—Rights of way granted to railroads may be assigned.

A railroad company may assign a right of way received by it.

3. Easements Ⓒ30(1)—Nonuser of right of way does not necessarily show abandonment thereof.

While a right of way may be lost by abandonment, nonuser of it does not necessarily show abandonment.

4. Railroads Ⓒ82(2)—Intention of railroad determines whether it has abandoned right of way.

The intention of a railroad is the real matter to determine the question whether it has abandoned a right of way, and such intention is not to be inferred from the outward and public acts of the owner only, but also from its dealings with relation to its title.

5. Railroads Ⓒ82(6)—Evidence held not to sustain finding that railroad had abandoned right of way.

In railroad's suit to quiet title wherein the defense was that the company had abandoned its right of way, evidence held not to show such abandonment.

6. Estoppel Ⓒ110—In suit to quiet title, that defendant was innocent purchaser without notice, being estoppel defense, should have been specially pleaded.

In a suit by a railroad company to quiet title to land formerly used by it for a right of way, the defense of one defendant that it was an innocent purchaser for value without notice of the plaintiff's rights, being a defense on the ground of estoppel, should have been pleaded specially.

7. Vendor and purchaser Ⓒ235—In suit to quiet title, contention that defendant was innocent purchaser without notice could not be availed of in absence of showing consideration had been paid.

In suit by railroad to quiet title to land formerly used as a right of way, a defendant's contention that it was an innocent purchaser for value without notice could not be availed of in the absence of a showing that the consideration had been paid.

8. Principal and agent Ⓒ178(3)—Notice to state highway commission of railroad's claim to land over which state highway right of way was purchased was notice to state.

Notice to the state highway commission that a railroad claimed land over which the state highway had purchased a right of way from another was notice to the state of such claim.

Appeal from Superior Court, San Mateo County; John L. Hudner, Judge.

Action by the Ocean Shore Railroad Company against the Spring Valley Water Company and others. Judgment for defendants, and plaintiff appeals. Reversed.

Harding & Monroe, of San Francisco (A. E. Shaw, of San Francisco, of counsel), for appellant.

Young & Hudson and Edward Fitzpatrick, all of San Francisco, for respondent Spring Valley Water Co.

U. S. Webb, Atty. Gen., for the State.

Paul F. Fratessa, of San Francisco, for respondent California State Highway Commission.

Louis E. Goodman, of San Francisco (B. F. Rabinowitz, of San Francisco, of counsel), for respondent Lake Merced Golf and Country Club.

STROTHER, Justice pro tem. This is an action by plaintiff to quiet title to a right of way claimed by it through land of the defendant Spring Valley Water Company situated in the counties of San Francisco and San Mateo. The defendants answered jointly, setting up abandonment of the right of way by plaintiff and its reversion to the Spring Valley Water Company, ownership by defendant state of California of a right of way for a public highway established over the lands, and a contract right of the defendant Lake Merced Golf and Country Club to purchase part of the land, and that the right of way claimed by the plaintiff intersects both of the latter. Judgment went for defendants, from which plaintiff appeals upon a bill of exceptions.

The principal issue raised by the pleadings and considered at the trial was whether or not there was such an abandonment of plaintiff's right of way that the title thereto merged again into the title of the defendant water company.

Plaintiff introduced in evidence a deed by defendant water company conveying the right of way described in the complaint, for an expressed consideration of \$10, to plaintiff's predecessor in title, "its successors and assigns forever." There was some argument as to whether or not the right of way was for railroad purposes only, but it clearly appears from the deed that no other use was contemplated by the parties, and that use more than ordinarily restricted, evidently for the purpose of protecting from pollution the grantor's water supply. While a nominal consideration was expressed in the deed, it is shown by oral testimony that the actual consideration was at the rate of not less than \$1,200 an acre for the land covered by the right of way. The railroad was constructed in 1907 and operated until about the end of 1920, when, upon the application of plaintiff the Railroad Commission having granted permission to discontinue its operation, plaintiff took up the rails and disposed of them and of its rolling stock. Officials of the plaintiff corporation testified that it was expected to liquidate its affairs when the right of way and other lands owned by it were disposed of. After the removal of the rails part of the land was farmed by tenants of the water company, including the land claimed by the golf club. A highway was constructed over a right of way granted by the water company to the state, crossing

plaintiff's right of way. The golf club entered into its contract of purchase and into possession of the premises on March 1, 1922, and has been continuously in possession ever since. The deed to plaintiff's predecessor in interest was not recorded until March 29, 1922, in San Mateo county, in which the golf club's land is situate, and no actual notice to the golf club of plaintiff's rights was shown. At the time this action was brought the consideration for the purchase by the club had not been paid. If the conclusion of the trial court is correct that the rights of plaintiff were terminated by its acts as recited, that disposes of the case as to all of the defendants.

[1-4] Taking into consideration the price paid, and the agreement that no trains should stop on the land, no stations or other buildings be constructed, no debris of any kind be allowed to escape upon the land, it is evident that the right of way was not conveyed by the water company in any degree as a subsidy, or for any consideration of its usefulness to the land. The provisions of the deed rather suggest that the railroad was admitted as an unavoidable nuisance to be hedged about by conditions designed to make it as unobjectionable as possible. There was no agreement that the right of way should be used by the grantee or its successors for any specified time or at all. The right of way under consideration is as much property within its limitations as an estate in fee. It may be conveyed in writing as any other interest in real property. Rights of way granted to common carriers and other public utilities are servitudes in gross as distinguished from easements. At common law, a servitude in gross attached to a person and not to a dominant tenement. Such servitudes were not assignable and died with the owner. There seems to be a dearth of authority as to the nature of the tenure secured by public service corporations under modern conditions. Of necessity, the common-law attribute of non-assignability does not inhere in them. That is not claimed by respondents here. This plaintiff in fact acquired its title by assignment, and its original title is conceded by respondents.

The position of respondents is that the acts of the plaintiff constituted such an abandonment of the right of way as to terminate the servitude. The decisions are uniform to the effect that, while a right may be lost by abandonment, the nonuser is only one of the elements of proof from which such an abandonment may be inferred. The real question to be determined is the intention of the owner of the right. The evidence in this case clearly shows that the railroad company always considered the right of way as an asset. An option was granted by it, and was outstanding some time before the suit was begun, and was still outstanding at the time of

the trial, for the sale of the right of way. Negotiations were had with the highway commission for granting a crossing over the said right of way on condition of the state providing a local clearance over the railroad. The liquidation of the plaintiff had been held up pending disposition of this right of way. It is very doubtful whether a right of way acquired as this one was by grant in perpetuity upon payment of full value of the land to be occupied, and for no consideration of its value to the servient tenement, can be forfeited in any other manner than by prescription. But if it may be forfeited by abandonment, the intent to abandon must clearly appear.

The intention to abandon is not to be inferred from the outward and public acts of the owner only, but also from its dealings with relation to its title. "In the absence of a statute, mere nonuser for any length of time will not work an abandonment." 33 Cyc. 222; see, also, 1 Corpus Juris, 8. * * * The rule above stated is fully supported by the decisions in this state and elsewhere [citing cases]. * * * In *Moon v. Rollins* [36 Cal. 333, 95 Am. Dec. 181], in defining abandonment, the court said: 'It is a question of intention and has so held over and over again, and not a question of time; except so far as the jury are entitled to consider lapse of time in connection with other circumstances of claim, or nonclaim and acts of ownership and dominion, or a want of such acts, for the purpose of ascertaining the intention.' *People v. Southern Pacific Co.*, 172 Cal. 692, 158 P. 177.

[5] Here the whole course of dealing by appellant with the right of way as shown by its uncontroverted evidence negatives the inference that might be drawn from its public acts, and is not inconsistent with those acts. The finding of the trial court that appellant had abandoned the right of way is not sustained by the evidence.

[6, 7] Besides the arguments in which all of the respondents join in support of the judgment, it is urged on behalf of the golf and country club that it is an innocent purchaser for value without notice of appellant's right. This is a defense by way of estoppel and should have been specially pleaded. There was no evidence or stipulation that the club had paid all or any part of the consideration for the land, or had done anything more than enter into possession of it. One who claims as an innocent purchaser without notice must also show that he has paid the consideration. *Lindley v. Blumberg*, 7 Cal. App. 140, 93 P. 894.

[8] The same considerations are presented on behalf of the state of California and the state highway commission as are stated for the other respondents. They are not in the same position, however, as the club. The commission had notice of the claims of ap-

pellant through its dealings in regard to the highway crossing. The commission is the agency of the state in highway matters, and notice to the former was notice to the latter.

The judgment of the trial court is reversed.

We concur: TYLER, P. J.; CASHIN, J.

87 Cal. App. 629

PEOPLE v. GRACE. (Cr. 1558.)

District Court of Appeal, Second District, Division 1, California. Dec. 16, 1927.

1. Courts $\S$ 50—Affidavit asserting belief defendant could not secure fair trial in department where case was set did not justify transfer (Pen. Code, $\S$ 1033, 1034).

Affidavit by counsel for defendant on trial for robbery stating that there had been difficulty on previous trial in drawing jury because of local prejudice and that affiant was informed and believed that fair and impartial trial could not be secured in department where case was set held insufficient, under Pen. Code, $\S$ 1033, 1034, to justify court in finding defendant could not have fair and impartial trial, and refusal to transfer case was not error.

2. Criminal law $\S$ 1159(3)—Jury's conviction for robbery on conflicting evidence held conclusive.

Where evidence on trial for robbery was in sharp conflict, jury's verdict of conviction held conclusive.

3. Criminal law $\S$ 1153(6)—Court's determination in admitting testimony on preliminary examination, that state used due diligence to procure witness held conclusive, in absence of abuse of discretion.

Trial court's determination, on trial for robbery, in admitting testimony given by witness on preliminary examination, that state had used due diligence to procure the witness at the trial held conclusive, in absence of showing that trial court abused its discretion.

4. Criminal law $\S$ 543(2)—On robbery trial, admitting witness' testimony on preliminary examination held no error, where witness was outside state and service was not attempted while witness was in state because of her sickness.

Admitting testimony of witness given on preliminary examination held not abuse of discretion on robbery trial, where witness was outside state and service had not been attempted while she was in the state because of her sickness.

Appeal from Superior Court, Los Angeles County; James H. Pope, Judge.

Vernon Young Grace was convicted of robbery, and he appeals. Affirmed.

George E. Stoddard, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., James S. Howie, Deputy Atty. Gen., and John D. Richer, of Los Angeles, for the People.

HAHN, Justice pro tem. The defendant and appellant was found guilty of robbery upon each of three counts contained in an information filed by the district attorney of Los Angeles county.

From the judgment of conviction and an order denying his motion for a new trial, he makes this appeal and urges three grounds for a reversal.

First. That the court erred in refusing his request that the trial of his case be transferred from department 28 of the superior court, sitting at Long Beach, to some department of a superior court sitting in Los Angeles city.

Second. That the evidence in the case is insufficient to support the verdict of guilty.

Third. That the court erred in permitting the district attorney to read the testimony of one Mrs. McClure, given at the preliminary examination.

[1] Upon the first point counsel for appellant contents himself with a brief statement that:

"The facts presented upon the motion for a transfer of said cause raised an issue of fact which should have resulted in the granting of the motion for defendant."

The only facts presented on this point, according to the record, is a short affidavit of defendant's counsel that he was attorney for the defendant in a previous trial of the case, and at that time "there was great difficulty experienced in drawing a jury to try the said issue, by reason of local prejudice against the said defendant; that affiant is informed and believes, and upon such belief alleges, that it would be impossible to draw a jury from any panel drawn from the city of Long Beach, before whom this defendant could secure a fair and impartial trial."

Conceding, for the moment only, that section 1033 of the Penal Code is susceptible of the interpretation which appellant places on it, so as to entitle one about to be tried in one department of the superior court of a county that may be sitting in one portion of the county to have his case transferred for trial to another department of the same superior court sitting in another part of the county, there is lacking that showing of conditions which would prevent him from having a fair and impartial trial in the department where his case is set for trial. Section 1034 of the Penal Code requires such a showing of matters, which, if true, would justify the court in finding that the defendant could not have a fair and impartial trial. Manifestly, the affidavit presented as a basis for the motion does not begin to meet the requirements of the statute.

[2] As to the second point urged—the insufficiency of the evidence to support the verdict—appellant's argument consists in the main of an attack upon the evidence of certain witnesses for the state, claiming that little weight should be given to their testimony because of some conflict in their statements as to the occurrences at the time of the holdup, and further because of the fact that both men who committed the robbery were masked. An examination of the transcript discloses that the sole defense of the defendant was that of an alibi, and he contends that there was an insufficient identification of him as the one who committed the robbery to give support to the verdict of conviction. No good purpose would be served by a detailed consideration of the testimony and other evidence offered on this issue. It suffices to say that the evidence was in sharp conflict, and the jury evidently believed the witnesses who were present at the time of the robbery and who identified the defendant as one of the two who committed the crime, and disbelieved the defendant's own testimony with regard to his being in San Diego at the time of the robbery. Neither dissertation nor citations are necessary to support the proposition that under these circumstances this court will not set aside the finding of the jury.

[3, 4] The third point urged raises the question as to whether a sufficient foundation was laid in order to permit the reading of the testimony of a witness, Mrs. George A. McClure, for the state. Mrs. McClure was one of the persons in the room at the time the robbery was committed, and was a witness for the state at the preliminary examination. At the time of the trial the district attorney stated that Mrs. McClure was out of the state and by reason of her absence he offered her testimony given at the preliminary examination. In support of his offer the district attorney put on the stand one J. D. Hunter, who testified that he was employed by the district attorney's office as a process server; that about two weeks before the trial he received the subpoenas for service upon the witnesses for the state, among them being a subpoena for George A. McClure and one for his wife, Mrs. George A. McClure; that he called upon Mr. McClure at his office and was told by Mr. McClure that Mrs. McClure was then sick in bed; that he did not attempt to serve her at that time. On a second occasion, it does not appear how long after the first, he again interviewed Mr. McClure at his office concerning his wife's condition, and was again informed by Mr. McClure that his wife was still sick in bed. On a third occasion, again

the exact time not appearing, but apparently a week or longer before the trial, the process server again undertook to serve a subpoena upon Mrs. McClure and was then informed by Mr. McClure that his wife, Mrs. McClure, was out of the state, and would continue out of the state for some days. In addition, the district attorney put upon the stand George McClure, the husband of the desired witness, who testified that his wife at that time was in Denver, Colo.; that she had left the state of California more than a week prior to the date of the trial. The return of the subpoena issued for Mrs. McClure showed that on August 23, a week prior to the commencement of the trial, when he attempted to serve her, she was out of the state of California. The court overruled the objection of the defendant to the reading of the testimony of Mrs. McClure, and this ruling appellant assigned as error.

It conclusively appears that at the time of the trial, and for at least a week prior thereto, Mrs. McClure was out of the state of California and in Colorado, and hence not amenable to legal process that would compel her to attend as a witness in the case. *People v. Caballero*, 41 Cal. App. 146, 182 P. 321.

Appellant urges that Hunter, the process server, did not show due diligence in subpoenaing Mrs. McClure, in that he accepted the statement of Mr. McClure, her husband, two weeks before the trial, that Mrs. McClure was home sick in bed, when as a matter of diligence Hunter should have gone to the residence of Mrs. McClure and in some way served her with process before she left the state. It is well settled that the question of the exercise of due diligence in securing the attendance of a witness at a trial is one addressed to the discretion of the trial court and to be determined on the evidence introduced before the court. Unless the evidence is such as to satisfy this court that the trial court abused its discretion, its determination of the matter will not be disturbed. *People v. Frank Padilla* (Cal. App.) 254 P. 585; *People v. Lewandowski*, 143 Cal. 574, 77 P. 467.

We are of the opinion that no error was committed by the trial court in its ruling that permitted the reading of the testimony given by Mrs. McClure in the preliminary examination.

No error appearing, it is ordered that the judgment and order denying the motion for a new trial be and they hereby are affirmed.

We concur: CONREY, P. J.; YORK, J.

87 Cal. App. 199

MESSNER v. BOARD OF DENTAL EXAMINERS OF CALIFORNIA et al. (Civ. 3343.)

District Court of Appeal, Third District, California. Nov. 30, 1927.

1. Evidence $\S$ 568(1)—Statement as to what witness thought is entitled to no greater weight than facts in testimony on which it was based.

Witness' statement, in proceeding to review order of board of dental examiners, that "I thought he was the manager," being mere opinion, is entitled to no greater weight than facts to which witness testified on which opinion was based.

2. Evidence $\S$ 317(2)—Hearsay testimony as to what certain person said held of no greater value than facts to which such person testified as witness.

In proceeding to review order of board of dental examiners, hearsay testimony to effect that cashier said certain person was manager of dental firm is of no greater value than facts to which such cashier testified as witness.

3. Physicians and surgeons $\S$ 6(2)—Whether one not licensed to practice dentistry was manager of office depends on duties (St. 1915, p. 705, $\S$ 11, as amended by St. 1921, p. 236, $\S$ 3).

Whether one not licensed to practice dentistry was manager of dental office so as to be practicing dentistry within St. 1915, p. 705, $\S$ 11, as amended by St. 1921, p. 236, $\S$ 3, must be determined by duties he performed or was authorized to perform and not by what his position was called.

4. Physicians and surgeons $\S$ 6(2)—One not licensed to practice dentistry, having charge of business end of dental office, held not "manager" within statute relative to practice of dentistry; "manage" (St. 1915, p. 705, $\S$ 11, as amended by St. 1921, p. 236, $\S$ 3).

One who had charge of purely business end of dental office, who attended to advertising and books and saw to it that laboratory work was promptly delivered, but did not control or direct professional work performed, is not "manager" so as to be practicing dentistry within St. 1915, p. 705, $\S$ 11, as amended by St. 1921, p. 236, $\S$ 3, since to "manage" place of business is to exercise to some extent control or direction thereof.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Manage; Manager.]

5. Principal and agent $\S$ 131—Power to hire, discharge, and fix compensation of employee implies power to control work.

Power to hire and discharge and to fix compensation of employee usually implies power to control his work.

6. Physicians and surgeons $\S$ 2—Purpose of Dental Act is to insure skill and proficiency in practice of profession (St. 1915, p. 698, as amended by St. 1921, p. 233).

Purpose of Dental Act (St. 1915, p. 698, as amended by St. 1921, p. 233), is to bring

about and insure skill and proficiency in practice of profession within state.

7. Evidence $\S$ 60—There is presumption that act regulating practice of dentistry has been obeyed (St. 1915, p. 698, as amended by St. 1921, p. 233).

In absence of evidence, there is presumption that Dental Act (St. 1915, p. 698, as amended by St. 1921, p. 233), regulating practice of dentistry, has been obeyed.

8. Physicians and surgeons $\S$ 11(3)—In proceeding to revoke dentist's license to practice, all intendments are in favor of such dentist (St. 1915, p. 698, as amended by St. 1921, p. 233).

Dental Act (St. 1915, p. 698, as amended by St. 1921, p. 233), regulating practice of dentistry, is highly penal, and proceeding thereunder for revocation of license to practice dentistry is in nature of criminal trial, in which all intendments are in favor of accused.

9. Physicians and surgeons $\S$ 11(2)—Dentist's license cannot be suspended for aiding and abetting unlicensed person, where evidence showed such person was not "practicing dentistry" (St. 1915, p. 698, as amended by St. 1921, p. 233).

Where evidence was insufficient to show that one not licensed to practice dentistry, who was in charge of business end of dental office, was practicing dentistry within Dental Act (St. 1915, p. 698, as amended by St. 1921, p. 233), license of another cannot be suspended for aiding and abetting such unlicensed person.

Application by Karl W. Messner for certiorari to review an order of the Board of Dental Examiners of California. Order annulled.

Schweitzer & Hutton, of Los Angeles, for petitioner.

Frank J. Burke, of Petaluma, and Jesse W. Carter, of Redding, for respondents.

FINCH, P. J. This is an original application for a writ of review, by which petitioner seeks to have annulled an order of respondent board, hereinafter referred to as respondent, suspending his license to practice dentistry for a period of ten years.

The accusation upon which he was tried alleges:

"That on or about March 25, 1927, he 'did willfully and unlawfully aid and abet an unlicensed person, to wit, W. M. Cohn, to practice dentistry, * * * in that the said Karl W. Messner did then and there practice dentistry in an office managed and conducted by the said W. M. Cohn; that the said Karl W. Messner at this said time well knew that the said office was a place where dental operations were performed, and * * * that the said W. M. Cohn was the manager thereof, and that the said W. M. Cohn was participating in the profits with Ralph Mitchell and others as the proprietor thereof."

One of respondent's inspectors testified that on March 26, 1927, he visited the office "conducted by Dr. Ralph Mitchell, and known as 'Dr. Mitchell and Associated Dentists,' at 706 South Broadway in the city of Los Angeles"; that a woman at the information desk informed him that Cohn was manager, but that both Mitchell and Cohn were then absent, and referred him to a woman at another desk, Miss Olson; that Miss Olson also informed him that Cohn was manager, and made out and gave the witness a written list of the employees, in which she inserted "Mr. W. M. Cohn, manager," and "Dr. Ralph Mitchell, employer"; that he did not suggest to Miss Olson that she enter Cohn's name as manager, but "told her to put it exactly as the record showed, the time card." The witness was cross-examined by the accused, who was not represented by counsel, as follows:

"Q. Do you remember when I called you up about the paper? A. I don't remember who it was; somebody called me up * * * and said it was Dr. Mitchell's office and said that the girl had no authority to sign that, that Cohn was not the manager, and to return the paper."

Miss Olson, as a witness for the prosecution, testified that she was cashier of the office, and that at the time alleged in the accusation Cohn was bookkeeper, "superintendent of lab and to prepare the advertising"; that his duty as superintendent of the laboratory was "to see that the work went out on time"; that "all that he did was to attend to the advertising and to keep the books and * * * superintend the laboratory"; that he sometimes signed checks; that "he received dividends"; that Dr. Mitchell signed the dividend checks; that Cohn "was interested the same as the rest of the doctors"; that he purchased supplies for the office; that the receipts of the office were deposited in the bank in the name of "Dr. Ralph Mitchell, trustee"; that she never believed that Cohn was manager, but that "Dr. Mitchell was manager"; that she "inserted Cohn's name as manager because the inspector told her to do so; that she wanted to put him down as advertising manager, and he (the inspector) said, 'No; that covers everything, and so put him down as manager,' instead of writing it all out it covered that"; that Cohn "had money in the trust the same as the rest of them."

A licensed dentist, who was employed in the office at the time alleged in the accusation, was a witness for the prosecution, and he testified:

That Cohn "evidently took care of the books and the advertising and took care of the cash register and totaled it up at night and took care of the money; just general duties like that. * * * He would arrange credit for patients, and if they gave notes in payment for their work, he evidently took care of them and saw

that those notes were paid when they became due. * * * I don't know of him ever discharging anybody, but one nurse that worked for me I know he hired her. * * *

"Q. From the observation that you had of the work that was being done and the duties performed by Mr. Cohn in that office, what was your impression as to his connection with the office? A. I thought that he must be the manager. Q. Did you participate in the profits of that office or that trust agreement? A. I did. Q. Do you know whether Mr. Cohn participated in it or not? A. I think he did, yes. Q. Do you know whether or not Mr. Cohn signed that trust agreement? A. I am pretty positive that he did, yes, sir. * * * Q. By whom was that (profit) paid to you? A. Mr. Cohn."

The accused, who appeared without counsel, testified:

"I was never led to believe that Mr. Cohn was manager. I was led to believe that Dr. Mitchell was the sole owner and trustee of that office. Now that trust agreement, I didn't sign the first trust agreement, and the second I signed. * * * I did not think I was breaking the law in any way, manner, or form."

He further testified that it was his duty "to diagnose cases and fix prices"; that Cohn did not "at any time ever fix on the amount of money that was to be charged for the work"; that his "name was on a lot of my checks. They were 'Dr. Ralph Mitchell, signed by W. M. Cohn'"; that "the conduct of the office was absolutely in Dr. Mitchell's hands; it was entirely under him"; that Cohn "would buy office supplies and dental supplies"; that Dr. Mitchell would tell Cohn "what quantity of supplies were needed; * * * I am only presuming that." While the witnesses referred to a first trust agreement and a second trust agreement, neither was offered in evidence, nor was any attempt made to prove any of the terms of either except that it appears inferentially that the agreements provided for a division of profits in which Cohn was to and did share; the basis of distribution not being shown.

[1-3] It is reasonably inferable from the evidence that Cohn was credit and advertising manager, that he superintended the laboratory to the extent of seeing "that the work went out on time," that he purchased dental and office supplies, though it does not appear that he determined the grade or character of supplies to be ordered, and that he participated in the profits. The statement of a witness that "I thought he was the manager," being a mere opinion, is entitled to no greater weight than the facts to which the witness testified and upon which the opinion was based. Likewise, the hearsay testimony to the effect that the cashier said that Cohn was manager is of no greater value than the facts to which she testified as a witness for the prosecution. Whether Cohn was manager and of what he was manager must be

determined by the duties he performed, or was authorized to perform, and not by what his position was called, and on principles not unlike those which govern in the determination of whether a position or employment is a public office. In *Coulter v. Pool*, 187 Cal. 181, 186, 201 P. 120, 123, in discussing the meaning of the words "public office," it is said:

"Its definition and application depend not upon what the particular office in question may be called, nor upon what a statute may call it, but upon the power granted and wielded, the duties and functions performed and other circumstances which manifest the true character of the position and make and mark it a public office, irrespective of its formal designation."

[4] It fairly appears from the evidence that Cohn had charge of the purely business end of the dental office in question, except that of fixing prices for work, but there is no evidence that he had or exercised the slightest control or direction of the professional work performed in such office. There is an entire absence of evidence to show that such office was "managed and conducted by the said W. M. Cohn" as charged in the accusation. To manage a place of business is to exercise, to some extent at least, control or direction thereof. *Gordon v. Industrial Acc. Com.*, 199 Cal. 420, 426, 249 P. 849; *E. Clemens Horst Co. v. Industrial Acc. Com.*, 184 Cal. 180, 190, 193 P. 105, 16 A. L. R. 611. Section 11 of the statute under which the prosecution was had provides:

"Any person shall be understood to be practicing dentistry within the meaning of this act * * * who manages or conducts as manager, proprietor, conductor, or otherwise a place where dental operations are performed." Stats. 1921, p. 236.

[5, 6] This does not mean, of course, that one who merely manages a building or a room in which licensed dentists perform dental operations is practicing dentistry. A reasonable construction of the quoted provisions of the statute appears to be that, to come within the terms thereof, one must in some manner, to some extent, directly or indirectly, control or direct some professional service of the kind that dentists are licensed to render. To take charge of the advertising, the arrangement with patients for credit, the accounting and collection department, the purchase of supplies as directed, and to see that the laboratory work is promptly delivered, do not, singly or collectively, call for any of the professional skill required of a dentist but rather that of one trained in business transactions. Had it been shown that Cohn had authority to participate in the employment or discharge of those engaged to do professional work and the fixing of their compensation a different question would

arise. The power to hire and discharge and to fix the compensation of an employee necessarily implies the power to control his work. But no such power is shown to have been given Cohn. The statute does not purport to prohibit the doing by an unlicensed person of any act which the testimony shows Cohn performed. "The ultimate purpose of the Dental Act [St. 1915, p. 698, as amended by St. 1921, p. 233] is to bring about and insure skill and proficiency in the practice of the profession in this state." *Jacobs v. Board of Dental Examiners*, 189 Cal. 709, 714, 209 P. 1006, 1008.

[7, 8] The terms of the trust agreement referred to by the witnesses may be such as to show that the accused and his associates were violating the law, but, in the absence of evidence thereof, the presumption is that the law has been obeyed. The statute is highly penal, and a proceeding thereunder for the revocation of a license to practice dentistry is in the nature of a criminal trial, in which all intendments are in favor of the accused. *Osborne v. Baughman* (Cal. App.) 259 P. 70.

[9] The evidence being insufficient to show that Cohn managed or conducted a place where dental operations were performed, the order of the respondent sustaining the charge was in excess of the power conferred upon it by the Dental Act. *Garvin v. Chambers*, 195 Cal. 212, 223, 232 P. 696; *Osborne v. Baughman*, supra.

The demurrer to the petition is overruled, and the order suspending petitioner's license to practice dentistry is annulled.

We concur: PLUMMER, J.; HART, J.

87 Cal. App. 205

HUMPHREYS v. BOARD OF DENTAL EXAMINERS OF CALIFORNIA et al.
(Civ. 3345.)

District Court of Appeal, Third District, California. Nov. 30, 1927.

Physicians and surgeons § 11(3) — In proceeding to suspend dentist's license for aiding unlicensed person, occurrence of which defendant had no knowledge held immaterial.

In proceeding for suspension of dentist's license on ground that he aided and abetted unlicensed person, in which there was issue whether such unlicensed person was practicing dentistry, fact that such person, who was in charge of business end of dental office, instructed dentist in office what to charge in prospective case, is immaterial, where defendant had no knowledge of such occurrence.

Application by D. A. Humphreys for certiorari to review an order of the Board of Dental Examiners of California. Order annulled.

Schweitzer & Hutton, of Los Angeles, for petitioner.

Frank J. Burke, of Petaluma, and Jesse W. Carter, of Redding, for respondents.

PER CURIAM. This is an original application for a writ of review, by which the petitioner seeks to have annulled an order of the respondent board suspending his license to practice dentistry for a period of five years.

The accusation is in substance identical with that considered in *Messner v. Board of Dental Examiners*, 262 P. 58, this day decided by this court. Both accusations relate to the same time and the same dental office, and both charge that W. M. Cohn, an unlicensed person, was manager thereof. The evidence is substantially the same as in the *Messner Case*, except that the licensed dentist referred to in that case as a witness for the prosecution testified in this case that on one occasion Cohn told him what to charge in a prospective case. This is immaterial, however, because the evidence does not show that the petitioner had any knowledge of the occurrence. *Osborne v. Baughman* (Cal. App.) 259 P. 70.

The demurrer to the petition is overruled, and the order suspending petitioner's license to practice dentistry is annulled.

87 Cal. App. 207

LEACH v. BOARD OF DENTAL EXAMINERS OF CALIFORNIA et al. (Civ. 3346.)

District Court of Appeal, Third District, California. Nov. 30, 1927.

Evidence ⇨595—Statement that witness does not know which of two inconsistent things are true raises no inference that either is fact.

When witness states that he does not know which of two inconsistent things are true, it cannot be inferred therefrom that either the one or the other is the fact.

Application by Roy C. Leach for certiorari to review an order of the Board of Dental Examiners of California. Order annulled.

Schweitzer & Hutton, of Los Angeles, for petitioner.

Frank J. Burke, of Petaluma, and Jesse W. Carter, of Redding, for respondents.

PER CURIAM. This is an original application for a writ of review by which petitioner seeks to have annulled an order of respondent board suspending his license to practice dentistry for a period of five years.

The accusation is, in substance, the same as those in *Messner v. Board of Dental Examiners*, 262 P. 58, and *Humphreys v. Board of Dental Examiners*, 262 P. 60, this day decided by this court. The three accusations relate to the same time and the same dental office, and all charge that W. M. Cohn, an

unlicensed person, was manager thereof. The evidence herein is substantially the same as in the other cases, but, in addition thereto, a witness for the prosecution testified in this case that "there was a sign down in the entrance to the building" on which Cohn's name was listed as "superintendent" or "superintendent of the laboratory," he did not know which. If Cohn's name appeared thereon as "superintendent of the laboratory," it was consistent with the testimony given by the same witness that Cohn was in fact superintendent of the laboratory. When a witness states that he does not know which of two inconsistent things are true, it cannot be inferred therefrom that either the one or the other is the fact.

The demurrer to the petition is overruled, and the order suspending petitioner's license to practice dentistry is annulled.

87 Cal. App. 262

MASERO et al. v. BESSOLO. (Civ. 3364.)

District Court of Appeal, Third District, California. Dec. 3, 1927.

1. Judgment ⇨252(1)—Plaintiffs in equity suit to rescind deed held entitled to relief made appropriate by pleadings and testimony, regardless of relief demanded.

In equity case for rescission of deed to realty where complaint contained general prayer for relief, plaintiffs are entitled to relief made appropriate by their pleadings and testimony, irrespective of whether they were correct or incorrect as to relief which they were entitled to.

2. Judgment ⇨251(1)—Judgment fixing damages to vendor for failure of consideration may be entered under complaint for rescission and evidence showing value of property and consideration (Code Civ. Proc. § 580).

In action to rescind deed to real property in which answer was filed, and complaint alleged value of property obtained by defendant without paying therefor, value of equities in patents which defendant agreed to transfer to plaintiffs and which had not been transferred, judgment based on complaint and evidence showing value of property or consideration to be paid could have been entered, fixing damages suffered by plaintiff, under Code Civ. Proc. § 580, providing that in case where answer is filed court may grant any relief consistent with case made by complaint and embraced within issues.

3. Trial ⇨165—Trial court, on motion for nonsuit, must view case in light of every favorable presumption supporting plaintiff's claim.

On motion for nonsuit, trial court must view case in light of every favorable presumption fairly arising therefrom and inference that might arise to support plaintiff's right to relief.

4. Cancellation of instruments $\S$ 50—Testimony showing transfer of property worth \$10,000 without being paid raises inference that vendor suffered damages, as respects nonsuit.

In action to rescind deed conveying realty, *held*, that, as respects propriety of nonsuit, where testimony showing plaintiff transferred property worth \$10,000 to others without consideration being paid therefor, inference, if not necessary, at last fairly and strongly arises that plaintiff suffered damages in such amount.

5. Appeal and error $\S$ 241—Ground, not stated in motion for nonsuit, should not be considered and cannot be presented on appeal to support nonsuit.

On motion for nonsuit, ground not stated in motion should not have been considered by trial court and cannot be presented on appeal in support of order granting motion for nonsuit.

6. Pleading $\S$ 250—Vendor seeking rescission of deed for failure of consideration should not be nonsuited, but permitted to amend complaint where amendment would permit award of damages.

In action to rescind deed conveying property, where pleadings and testimony showed that grantor conveyed property valued at \$10,000 and failed to receive consideration promised by purchaser, plaintiff, if necessary, should have been permitted to amend complaint so that he may be awarded relief consistent with evidence and pleadings, and grant of motion of nonsuit, leaving plaintiffs remediless for defendant's failure to comply with agreement, was error, though rescission of deed cannot be had for subsequent failure of purchaser to comply with agreements.

Appeal from Superior Court, Los Angeles County; John L. Fleming, Judge.

Action by Joe H. Masero and others against W. L. Bessolo. From a judgment of nonsuit, plaintiffs appeal. Reversed.

John Perry Wood, of Los Angeles, for appellants.

P. El. Greer, of Los Angeles, for respondent.

PLUMMER, J. Judgment of nonsuit was entered in favor of the defendant in the above-entitled action begun and prosecuted by the plaintiffs for rescission of a certain deed of conveyance made and executed by the plaintiffs and delivered to the defendant, granting and conveying certain lands and premises set forth in the complaint. From this judgment the plaintiffs appeal.

The amended complaint, among other things, alleges that the plaintiffs were the owners of the land described in the complaint; that the defendant, with the intent to obtain the ownership in fee of plaintiffs' real property as described in the complaint, represented to the plaintiffs that the said W. L. Bessolo was the owner of patents covering the manufacture and sale of 38 different kinds of tools, including valuable big rotary tongs; that if the said plaintiffs would deed their

real property to the defendant, the defendant would use the real property in question as a factory site for the manufacture of all of said tools, including the manufacture of said valuable big rotary tongs, and that the plaintiffs would participate in a partnership with the said defendant in such manufacture and receive equities in all of said defendant's patents covering said 38 tools, including the patent covering the said valuable big rotary tongs; that the plaintiffs, believing said representations to be true, and being induced thereby, did, on the 13th day of June, 1922, grant and convey to said defendant the property described in the complaint; that said defendant, at the time of making said representations, had no intention of carrying out the same; that the defendant has not, since the 13th day of June, 1922, assigned, sold, or transferred to the plaintiffs, or either one of them, any interest whatsoever in any partnership in said valuable big rotary tongs, or the patent therefor; that the plaintiffs have received no consideration whatever on account of the transfer of their said real estate to the defendant; that plaintiffs have offered to deliver to defendant everything of value received by the defendant, and, further, demanded a reconveyance and possession of the property covered by said deed; that the defendant has refused to reconvey said property to the plaintiffs; that the real estate involved is now, and was at the times mentioned, of the value of \$10,000. The prayer of the complaint is for cancellation of the deed, and for such other and further relief as the court may deem just and equitable.

At the conclusion of the plaintiffs' case defendant interposed a motion for nonsuit on the following grounds:

"Mr. Greer (Counsel for Defendant): At this time I should like to make a motion for a nonsuit based on two grounds, first, that no offer has been shown, and, second, that lack of consideration is not a sufficient ground for the cancellation or rescission of a deed of conveyance of real property" (citing a leading case decided in bank in the Supreme Court of the state of California in 1889, the case of *Lawrence v. Gayetty*, 78 Cal. 126, 20 P. 382, 12 Am. St. Rep. 29).

Thereupon, the trial court awarded judgment of nonsuit to the defendant upon the following grounds:

"First, that no fraud has been shown; second, that lack of consideration is not sufficient ground for cancellation or rescission of a deed of conveyance of real property."

The testimony set forth in the transcript shows that, at the time of the transactions herein referred to, the plaintiffs were the owners of the premises described in the complaint; that the defendant promised and agreed to assign and deliver to the plaintiffs three equities in the 38 patents owned by

him, including the patent of big rotary tongs; that the patent covering the rotary tongs was the one of value; that the value of the equities in said patent was discussed by the defendant and the plaintiffs. The testimony of the defendant as to the value of the patents is as follows: "I told them that the patent was valued at \$6,000,000." The testimony further shows that each equity therein agreed to be transferred by the defendant to the plaintiffs was of the value of \$3000. The testimony of the plaintiffs is to the effect that the defendant told them that the transfer of the equities to be made by them to the defendant would give them an interest in the partnership and entitle them to a participation therein; that they were to have half the profits of making the tongs. The testimony of the defendant in this particular, by question and answer, is as follows:

"Q. What did you say about participation in the partnership? A. Participation in the partnership, it is in the contract that they had made, that they would have half of the profits on making the tongs.

"Q. You were very careful to state then at that time that they only were to participate as a partner with you in the profits, and not in the patent, is that true? A. The equity and the filing of the Patent Office, it was read very carefully and it was so understood; yes, sir.

"Q. Did you say that to them? A. We talked to them—we talked about it; yes, sir."

The testimony of the plaintiffs, as stated, was to the effect that they were to participate in the partnership as well as in the profits of the making of the tongs. We take the following also from the defendant's testimony:

"Q. Didn't you say to them, before they signed this contract, that you were the owner of a patent covering the rotary tongs, and that they could manufacture and sell 100 of them as per your blueprint? A. Yes, sir; I told them that rotary tong."

That the defendant did not render to the plaintiffs, or any of them, the consideration agreed upon, is established by the defendants' own testimony, to wit:

"Q. Mr. Bessolo, did you actually transfer, at any time, to Joe H. Masero and Lina Masero, his wife, any bills of conveyance in your patents at the Clearwater factory? A. I can't answer that question.

"Q. Mr. Bessolo, did you actually and personally give any equity to Frank Zamboni or Carmellina Zamboni, his wife, as a consideration for the transfer of this 10 acres to you? A. No.

"Q. Did you see any one give Frank Zamboni and Carmellina Zamboni, his wife, this one equity that you mention? A. No."

The testimony of other witnesses established the fact that no equities, as testified to, were ever transferred by the defendant to the plaintiffs. The equities referred to in the testimony are definite interests in the patents belonging to the defendant, evidence

by declaration filed in the patent office, and are and were transferable only by assignment made and filed in that office. The testimony of the plaintiffs was further to the effect that they had received no consideration whatever for the transfer to the defendant of the 10 acres of land mentioned in the complaint, and that the defendant had not retransferred said lands to the plaintiffs, or to any one of them.

[1] Upon this appeal the respondent relies simply upon the two grounds upon which the motion for nonsuit was granted, to wit, that no fraud had been shown; and that failure of consideration was not sufficient to support a judgment for cancellation or rescission of a deed of conveyance to real property. The fact that the complaint sets forth sufficient allegations, and the testimony in the record amply justifies a judgment awarding damages to the plaintiffs is unmentioned. This being an equity case, the plaintiffs were entitled to the relief made by their pleadings and the testimony, irrespective of whether they were correct or incorrect in their views as to the relief to which they were entitled. The relief to which parties may be entitled in an action for rescission is set forth in 4 California Jurisprudence, p. 797, § 29:

"In an action for cancellation, the court is not limited as to its decree by the mere offers and demands of the parties, but it may do exact justice between them all. It may decree cancellation on the basis simply of a general prayer for relief, though not on a prayer for a money judgment alone. Where the instrument is evidence of different rights or obligations, the cancellation may be as to only a part thereof, allowing the residue to stand. And where it is necessary and appropriate, the decree may take the form of a personal monetary judgment."

Other forms of the decree are set forth in the section of California Jurisprudence cited, but are not material here. The forms of relief which we have set forth are supported by numerous authorities. In the case of *Lawrence v. Gayetty*, supra, the proposition of law which we have here stated is fully set forth. That action had for its purpose the setting aside of two deeds of conveyance affecting property alleged to be of the value of \$10,000, at the time of the conveyance, and which had since increased to the value of \$40,000. The action was based upon failure of consideration, and that the defendant had not complied with the agreements made by him. The court, after holding that failure of consideration furnished no ground for the cancellation of the deed before delivered, where the consideration related to some act to be performed in the future, said:

"Leaving out of sight the question of fraud which, as we have seen, was found against the respondent by the court below, the case cited and the one before us are identical in principle. Such a rule may work hardship in individual cases, and this may be one of the cases; but

to hold that a vendee of real estate could, for a failure to pay the purchase money, repudiate his deed and recover the land would render real estate titles dangerously uncertain, and result in the most serious consequences. The judgment is not sustained by the findings. The complaint in this case and the prayer for relief were such as to entitle the plaintiff to a judgment for damages, and as his right to such recovery was not based thereupon, the judgment and order appealed from are reversed, with instructions to the court below to grant a new trial and allow the parties to amend their pleadings if they so desire."

The prayer in the case at bar, attached to the complaint which we have set forth, asked for any relief that might be just and equitable, but irrespective of the prayer, the defendant having answered the complaint and gone to trial, the plaintiffs were entitled to any relief shown by their testimony and supported by the pleadings. The same doctrine as set forth in *Lawrence v. Gayetty*, supra, is upheld in the case of *Schott v. Schott*, 168 Cal. 342, 143 P. 595. It is there held, quoting from the syllabus:

"As to the first parcel of land, the mother's remedy for the breach of the son's undertaking is, at most, an action for damages. Under all the circumstances, in the absence of fraud, actual or constructive, she has no right to rescind or to have the deed set aside."

In the case of *James v. James*, 251 P. 666, this court had before it an action prosecuted to secure the cancellation of a deed on account of the failure of the defendant to comply with certain promises involving certain acts thereafter to be performed. The plaintiff had judgment in the trial court, and that judgment was reversed in this court on the principle that under such circumstances the plaintiff was entitled only to damages.

The trial court in the case of *Lawrence v. Gayetty*, supra, having before it pleadings very similar to the ones in the case at bar, took into consideration only the two grounds upon which rescission was sought, and overlooked entirely the fact that, if rescission could not be had, redress might be granted by a court of equity as the justice of the case might require. The opinion from that case which we have quoted shows that the subject of damages was not considered, and, in sending the cause back for a new trial, leave was granted to amend the pleadings so as to fully present the question of damages to the trial court. In the case at bar the judgment of the trial court leaves in the possession of the defendant title to \$10,000 worth of property, without having paid any consideration therefor whatever. The real thing of value, which, according to the testimony it was agreed that the defendant should pay to the plaintiffs, was the transfer by the defendant to the plaintiffs of three equities covering an interest in the business, the profits of the business and interest in the patent to the big rotary tongs and

participation in the profits of its manufacture. Section 580, Code of Civil Procedure, after setting forth the relief to which a plaintiff may be entitled in the event that the complaint is not answered, further provides:

"But in any other case, the court may grant him any relief consistent with the case made by the complaint and embraced within the issue."

In the case of *Zellner v. Wassman*, 184 Cal. 80, 193 P. 84, where a nonsuit was granted, based upon a contract that could not be enforced, the Supreme Court, in reversing the judgment of the trial court, thus states the law:

"While the contract cannot be enforced, either in law or equity, we think that the plaintiff is, nevertheless, entitled to some relief under the pleadings and evidence offered in support thereof, and that, as a consequence, the judgment of nonsuit was erroneous. There being but one form of civil action in this state, a plaintiff may recover if his complaint 'states any cause of action entitling the plaintiff to any relief at law or in equity.' *Hayden v. Collins*, 1 Cal. App. 259, 261, 81 P. 1120. It is not essential that a complaint state a cause of action for the relief which plaintiff seeks, provided the facts stated show some right of recovery, and a party cannot be thrown out of court merely because he may have misconceived the form of relief to which he is entitled" (citing *Walsh v. McKeen*, 75 Cal. 519, 17 P. 673; *Rogers v. Duhart*, 97 Cal. 500, 32 P. 570; *Brown v. Anderson-Cottonwood Irrigation Dist.*, 183 Cal. 186, 190 P. 797).

Likewise, in *Nathan v. Dierssen*, 164 Cal. 607, 130 P. 12, in an action for recovery of rents, issues, and profits, where restitution of the premises was not sought, a judgment of restitution was awarded, the court saying:

"The complaint contains every allegation necessary in an action of ejectment. It alleges ownership in plaintiff, that defendant wrongfully entered and dispossessed him and that he still keeps him out of possession. No further averment was required" (citing authorities). "There was, therefore, a statement of every fact necessary to entitle the plaintiff to a judgment for possession of the premises, together with the facts essential to a demand for rents and profits. It is true that the complaint contains no prayer for the restitution of the premises. If the defendant had defaulted, judgment for such possession could not properly have been rendered, but when an answer has been filed and issues raised, the court may grant plaintiff any relief 'consistent with the case made by the complaint and embraced within the issues'" (citing a number of authorities).

[2] An answer having been filed in the case at bar, the fact that the complaint alleges the value of the property obtained by the defendant without paying therefor, the value of the three equities which the defendant had agreed to transfer to the plaintiffs, and which he had not transferred, judgment in damages,

based upon the complaint and the evidence showing the value of the property or consideration to be paid, could have been entered fixing damages suffered by the plaintiffs by reason of the failure of the defendant to comply with his promise or agreements.

[3, 4] In overlooking the question of damages the trial court, in granting a judgment of nonsuit, virtually placed the plaintiffs in a position where they are left absolutely remediless for all the wrongs suffered by them through the failure of the defendant to comply with his agreement. That wrong consists in there being transferred from the plaintiffs to the defendant real property of the value of \$10,000 or thereabouts, without consideration. In considering the evidence in this case, all of which is along the line of excerpts which we have set forth in this opinion, it was the duty of the trial court, upon a motion for nonsuit, to view it in the light of every favorable presumption fairly arising therefrom or inference that might arise therefrom to support the plaintiffs' right to relief. Thus, the testimony showing that property worth \$10,000 had been transferred by the plaintiffs to the defendant without consideration being paid therefor, the inference, if not necessarily, at least very fairly, and we may say strongly, arises that the plaintiffs have suffered damages in just that sum. The rules in relation to inferences and as to how testimony should be viewed upon a motion for nonsuit are set forth in the following excerpts which we take from the case of *Berger v. Lane*, 190 Cal. 443, 213 P. 45:

"Every favorable inference fairly deducible and every favorable presumption fairly arising from the evidence adduced must be considered as facts proved in favor of the plaintiffs. Where evidence is fairly susceptible of two constructions, or if one of several inferences may be reasonably made, the court must take the view most favorable to the plaintiffs. If contradictory evidence has been given it must be disregarded. *Estate of Arnold*, 147 Cal. 583, 82 P. 252. The plaintiff must also be given the benefit of every piece of evidence which tends to sustain his averments, and such evidence must be weighed in the light most favorable to plaintiffs' claim. * * * The evidence must be taken most strongly against the defendant, and if the plaintiff has introduced proof sufficient to make out a prima facie case under the allegations of his complaint, the motion, if made upon the close of the case, should be denied" (citing a number of authorities).

Other California cases might be cited supporting this rule, but it is too firmly established to require further citation.

[5] Our attention is also called to the fact that the nonsuit in this case was granted partly upon grounds not stated in the motion, and the ruling of the court in this particular is presented to us as an additional reason for ordering a new trial herein. The order granting the nonsuit was based upon two grounds, as we have stated, to wit, first, that no fraudu-

lent representations were shown; second, that cancellation of a deed could not be had for subsequent failure of consideration. The first ground herein stated was not included in the motion and should not have been considered by the court. In *Moore v. Moffatt*, 188 Cal. 1, 204 P. 220, in considering the question of granting a motion for nonsuit on grounds not stated, the court held as follows:

"It was a defect in the plaintiff's case which might have been remedied had attention been called to it by the motion for nonsuit, and, inasmuch as it was not made a ground for the motion for a nonsuit, it could not, upon that motion, be considered by the trial court, nor can it, for the same reason, be considered by this court in determining the merits of the motion."

A large number of cases supporting this statement are set forth on page 5 of the opinion in the case from which we are quoting. 204 P. 222, 223. The law on this subject is well stated in 9 California Jurisprudence, 548, § 33:

"It is therefore settled law that a motion for a nonsuit must point the attention of the court and counsel to the precise grounds upon which it is made" (citing, in footnotes, a large number of cases).

For the reasons which we have heretofore stated, however, we do not need to inquire whether this error of the court was of such a prejudicial character as to necessitate a reversal of the judgment, as the cause must go back for retrial for other reasons, and as the alleged failure of proof to support rescission or cancellation on the charge of fraudulent misrepresentations, as not presented to the trial court, and therefore cannot be presented here, in support of the order granting the motion for nonsuit, we will not consider that subject, further than to state that an examination of the complaint discloses apparent defects that should be remedied by proper amendments in order to properly tender the issue of fraud, and the omissions in the evidence may doubtless be supplied by proper inquiry of the different witnesses. The essential averments alleging fraud that should be in the complaint, and which are wanting here, are fully set forth in 12 California Jurisprudence, 806, § 64, and the authorities there cited, and also in the recent case of *B. G. Towels et al. v. Jesse Campbell et al.*, 204 Ky. 591, 264 S. W. 1107, and reported in 50 A. L. R. 175.

[6] While agreeing with the trial court that the case of *Lawrence v. Gayetty*, supra, and the subsequent cases following the same rule established the law in this state that rescission of a deed to real estate cannot be had on account of the subsequent failure of the grantee to comply with his agreements, we are nevertheless of the opinion that upon the case made, as presented by the transcript, the trial court should have followed all, in-

stead of a part of the holding had in the Lawrence-Gayetty Case, and directed an amendment of the complaint, and then proceeded to award the plaintiffs the relief to which the evidence showed them to be entitled.

The judgment is reversed, and the trial court is hereby directed to allow the plaintiffs to amend their complaint, if so advised, so as to present all the issues which may be properly tendered and tried in this case, to the intent that the plaintiffs may be awarded such relief as may be consonant with equity and justice.

We concur: FINCH, P. J.; HART, J.

87 Cal. App. 272

AZARELLO et al. v. BESSOLO. (Civ. 3365.)

District Court of Appeal, Third District, California. Dec. 3, 1927.

1. Deeds ☞188—Complaint not alleging purchaser's representations were untrue, or intention not to perform, was insufficient for cancellation of deed for fraud.

Complaint for rescission of deed to real property on ground of fraud failing to allege that representations made by purchaser to vendor were untrue, or that purchaser had no intention of performing material promises referred to in complaint, though alleging that vendor relied on representations or promises of purchaser, but not alleging that vendor was otherwise deceived, failed to state cause of action for cancellation for fraud.

2. Pleading ☞237(6)—Complaint to rescind conveyance for failure of consideration held not material variance from testimony showing damages requiring allowance of amendment to conform to proof (Code Civ. Proc. §§ 469, 470).

Complaint alleging transfer by plaintiffs of property to defendant valued at \$14,500, for which defendant was to transfer equities in patents, but that no such transfer was made, set forth action for damages at least in amount of value of equities in patents to have been transferred to plaintiffs, and hence there was no material variance, under Code Civ. Proc. § 469, between testimony showing such damage and complaint, though seeking rescission of conveyance, and court should have directed finding in accordance with evidence or order amendment, under section 470, to conform to proof.

Appeal from Superior Court, Los Angeles County; John L. Fleming, Judge.

Action by Savatore Azarello and others against W. L. Bessolo. To review a judgment of nonsuit, plaintiffs appeal. Reversed.

Willedd Andrews, of Los Angeles, for appellants.

John Perry Wood, of Los Angeles, amicus curiæ.

P. E. Greer, of Los Angeles, for respondent.

PLUMMER, J. Action by plaintiffs for rescission of deed to real estate based upon fraud and failure of consideration. At the conclusion of the plaintiffs' case judgment of nonsuit was entered, and the plaintiffs appeal.

In all essential particulars this is a companion case to that of Masero et al., Plaintiffs and Appellants, v. W. L. Bessolo, Defendant and Respondent, in action Civil No. 3364 (Cal. Sup.) 262 P. 61, this day decided by this court. All the authorities cited in that case are pertinent here, save and except as to those relating to the court granting a nonsuit for reasons not stated in the motion therefor.

The complaint in this action involves 23 acres of land situate in the same vicinity as the 10 acres of real estate involved in action Civil No. 3364, and was to be used by the defendant for the same purposes. In the complaint herein it is set forth, among other things, that the defendant represented to the plaintiffs that, if the plaintiffs would transfer to the defendant said 23 acres of real property, the defendant would transfer to the plaintiffs the equities valued at \$9,000 in 38 patents, including a patent covering the valuable oil tongs manufactured by the defendant, and in addition thereto would pay the plaintiffs the sum of \$14,500. Thereupon, and about the 14th day of June, 1922, the plaintiffs entered into a contract agreeing to convey to the defendant the 23 acres of land. Thereafter and on or about the 15th day of November, 1922, it is alleged that the defendant represented to the plaintiffs, and stated to them, that the land had increased somewhat in value on account of the good prospect for oil therein, and used this language:

"This land has gone up, and there is a good chance for oil there; if you will deed me an undivided one-half interest in the land covered by the option, and keep the equities, I will not pay you the \$14,500, and you can keep your one-half of the land, and you will still have your interest in the oil tongs and all the patents and tools."

Thereupon, and on the 16th day of November, 1922, the plaintiffs executed and delivered to the defendant a deed conveying a one-half interest in and to the real property herein referred to. The complaint then alleges:

"That the defendant has not, since the 16th day of November, 1922, or at any other time, assigned, sold or transferred to the plaintiffs, or either or any of them, any interest whatever in said valuable big rotary tongs, although the said defendant is now manufacturing and selling said big rotary tongs to the oil trade of California."

It is further alleged that the plaintiffs have received no benefit, financial or otherwise, for the real property transferred to the defendant, save and except that the defendant

has transferred to the plaintiffs certain alleged equities in patents obtained by him not covering the oil tongs referred to. The complaint further shows that the defendant had not filed in the office of the Commissioner of Patents of the United States any declaration dividing the equities in said oil tongs, as represented by him, but that the declaration so filed covered other and different tools patented by the defendant. The prayer of the complaint was that the deed conveying the real estate to the defendant be canceled, and that the plaintiffs have such other and further relief as to the court might seem meet and just. The transcript sets forth, in substance, the same testimony from which we have taken excerpts as set forth in action Civil No. 3364, and in addition thereto we here set forth the following (testimony of defendant Bessolo):

"Q. What did you say, Mr. Bessolo? A. I told him that I was willing to take the land at that price that was spoken about, \$14,500, and one equity, and he says, 'No,' he says, 'there will be one equity each, or none at all.' He says 'I will take one equity, and Sal take one equity, and Cira take one equity.'

"Q. What did you say? A. Well, we had quite a long conversation, as Italians generally do, and afterwards we agreed upon it.

"Q. What did you say you would give him an interest in, in reference to your oil tongs and 38 patents? A. There never was 38 patents mentioned.

"Q. What did you say about your patents? A. I told him that we were going to manufacture, in fact, we were at that time already manufacturing the tongs. But regarding patent or any 38 patents, there was never any conversation.

"Q. Did you tell him that you had a patent on a rotary tongs? A. No, sir; they all knew that—I told everybody I was trying to take a patent, although it was disclosed into the equity system patent.

"Q. Didn't you tell him that the oil rotary tongs was included in all the patents you owned, and that he would get an interest in that? A. I told him that every equity holder would participate in all those tools that we were manufacturing.

"Q. Didn't you state and demonstrate at that time to him the rotary oil tongs as a part of them? A. We demonstrated that."

Further on, as to the value of the equities, the witness testified:

"What did he say? A. He said that was all right with him, one equity each, for which I told him that they were worth \$3,000 each."

In answer to a question by the court, of the defendant, as to the profits in the manufacture of oil tongs, the defendant replied that the profits were about \$40,000, and that at no time had the plaintiffs received any part thereof. The testimony of the plaintiffs is substantially to the effect that the defendant represented that the equities which he was conveying to them included equities

in the patent issued covering the rotary oil tongs, and that they were to participate in the profits of the business of manufacturing all of the tools, included in any and all of the patents. As stated, at the conclusion of the plaintiffs' testimony, the court granted the defendant's motion for nonsuit on the two grounds mentioned, and in its opinion granting a nonsuit summarized the testimony shown by the transcript, which we will use as being a correct statement thereof, and as testified to by the defendant, to wit:

"His testimony simply amounts to this, that he (the defendant) told these people that if they would give him a deed to this property, in the first instance, he would make them a partner, each of them a partner, and give them an interest in each of these patents, including the oil tong. * * * Then, later, when it came to the question of cancellation of the agreement (referring to the whole title of the 23 acres of land), he (the defendant) said to them that it appeared to have prospects of being oil land, and in view of that fact, why not release him from his obligation to pay the \$14,500 and keep a half interest in the land, which would entitle them to retain their interest in the patent, and also their interest in the oil, if any was produced."

Zamboni's testimony was as follows:

"Bessolo said, 'I will give you an equity apiece, \$3,000, and then pay you the balance as it becomes due.'"

Campagna said:

"If those are the conditions that I am to receive that royalty and the profits and part of the patent, I will be glad to make the transfer. * * * Relying upon that" (referring to the statements of the defendant, "they" (the plaintiffs) "deeded a half interest in this land.")

The court then further says:

"I am satisfied that these people have an action against Bessolo requiring him to assign to them not only an interest in these profits, but an interest in these patents, and they are entitled to an accounting. As equity holders, they are entitled to an accounting to compel him to account to them for their portion of what has been received out of the profits of the tongs. I do not think there is any doubt at all about that, and if that were before me, that would be the way I would hold under the present condition of the evidence in this case."

The court then, upon authority of *Lawrence v. Gayetty*, 78 Cal. 126, 20 P. 382, 12 Am. St. Rep. 29, granted the defendant's motion for nonsuit.

[1, 2] In addition to the fact that the court did not take into consideration that the plaintiffs were entitled to damages in a sum equal at least to the value of the equities as stated by the defendant and agreed to be transferred by the defendant to the plaintiffs, it is further urged upon this appeal that the evidence makes out a case warranting cancellation upon the grounds of fraud, to

wit, misrepresentation. While the testimony as summarized by the trial court, and which we have set forth very briefly, does show that the plaintiffs are entitled to relief, the complaint in this action, as we read it, is almost silent with reference to the essential allegations necessary to justify a rescission on the grounds of fraud. There is no allegation in the complaint that the representations made by the defendant to the plaintiffs were untrue. There is no allegation in the complaint that the defendant had no intention of performing the material promises referred to in the complaint. There is an allegation in the complaint that the plaintiffs relied upon the representations or promises of the defendant, but there is no allegation that they were in any wise deceived. Other shortcomings of the complaint might be mentioned, but the foregoing are sufficient to show its essential deficiencies. While the complaint was one for rescission, it nevertheless did set forth an action entitling the plaintiffs to relief. The trial court particularly expressed the relief to which the plaintiffs were entitled, as shown by the testimony, and a consideration of the summary of the complaint which we have set forth herein discloses practically every essential allegation to show damages suffered by the plaintiffs in at least the sum of \$9,000, the value of the equities covering the patent to the rotary tongs agreed to be transferred and assigned by the defendant to the plaintiffs. Thus, there was no material variance between the allegations of the complaint and the testimony, even though the plaintiffs were seeking rescission. The allegations of the complaint showed the plaintiffs' damages, and the testimony likewise establishes such damages. Thus, section 469, Code of Civil Procedure, applies, wherein it is stated:

"No variance between the allegation in a pleading and the proof is to be deemed material, unless it has actually misled the adverse party to his prejudice in maintaining his action or defense, upon the merits."

Therefore, the court should have followed section 470, Code of Civil Procedure, which reads:

"Where the variance is not material, as provided in the last section, the court may direct the fact to be found according to the evidence, or may order an immediate amendment, without costs."

The essential averments alleging fraud that should be in the complaint, and which are wanting here, are fully set forth in 12 California Jurisprudence, 806, § 64, and the authorities there cited, and also in the recent case of *B. G. Towels et al. v. Jesse Campbell et al.*, 204 Ky. 591, 264 S. W. 1107, and reported in 50 A. L. R. 175.

Upon the case thus made the court should

have followed the latter portion of the rule laid down in the case of *Lawrence v. Gayetty*, supra, and supported by the case of *Schott v. Schott*, 168 Cal. 342, 143 P. 595, and *James v. James* (Cal. App.) 251 P. 666, and, instead of granting a nonsuit, denied the same, with permission or direction to the plaintiffs to amend their complaint to conform to the proofs.

In view of what has been said in this opinion, and in the opinion deciding the companion case of *Masero v. Bessolo*, it would serve no useful purpose to enter into a consideration of the testimony establishing fraud, as claimed by the appellant, for the simple reason that reversal could not be had upon that ground by reason of the deficiencies of the complaint, and for the further reason that upon a retrial, which must be ordered upon other grounds, the deficiencies in the testimony may be supplied by questions propounded and based upon what we have said should be in the complaint to sustain rescission on account of fraudulent misrepresentations. This being an action in equity, and the case stated showing that the plaintiffs are entitled to relief, either by way of damages or by way of an accounting and judgment for their share in the profits, and that the motion for nonsuit was granted notwithstanding such facts, it is hereby ordered that the judgment be and the same is hereby reversed, and the trial court further directed to permit the plaintiffs to amend their complaint, if so advised, so as to enable the plaintiffs to obtain such relief as the testimony may show them to be entitled.

We concur: FINCH, P. J.; HART, J.

87 Cal. App. 538
LIBBY v. KIPP. (Civ. 3387.)

District Court of Appeal, Third District,
California. Dec. 13, 1927.

1. Attorney and client $\S$ 169—In suit for attorney's fees, trial court's allowance is conclusive, where not so excessive as to shock conscience of appellate court.

In suit for attorney's fees, trial court's judgment for plaintiff is conclusive, where not so plainly excessive as to shock conscience of appellate court, regardless of whether appellate court, if deciding matter in first instance, would have allowed compensation in a materially reduced sum.

2. Evidence $\S$ 523, 571(7)—Expert opinions are admissible as to value of attorney's services, but are not conclusive; question being finally for trial court.

In suit for attorney's fees, expert opinions are admissible as to value of services, but they are not conclusive, and the question is eventually one for the sound judgment of the trial court.

3. Attorney and client ☞169—Appeal from judgment for plaintiff in suit for attorney's fees cannot be converted into trial de novo.

In suit for attorney's fees, appeal from judgment for plaintiff cannot be converted into a trial de novo.

4. Attorney and client ☞141—In suit for attorney's fees for looking after widow's property interests, evidence held not to show trial court's allowance of \$11,000 to be so excessive as to justify reversal.

In suit for attorney's fees for services in looking after widow's property interests, which necessitated consideration of several important legal questions, and involved a saving to her of \$75,000, evidence held not to show that trial court's allowance of \$11,000 was so excessive as to justify reversal on appeal.

Appeal from Superior Court, Los Angeles County; William C. Doran, Judge.

Action for attorney's fees by Frank A. Libby against Ida Belle Kipp. Judgment for plaintiff, and defendant appeals. Affirmed.

Page, Nolan, Rohe & Hurt, of Los Angeles, for appellant.

W. Joseph Ford and Robert A. Jarrott, both of Los Angeles, for respondent.

PLUMMER, J. As the assignee of Frank G. Tyrrell, attorney at law, the plaintiff had judgment for the sum of \$10,545.89 as attorney's fees and costs. From this judgment the defendant appeals.

The record in this case shows: That for some years prior to the 6th day of March, 1923, the defendant, Ida Belle Kipp, had been the wife of Bernhardt A. Kipp. That on the 6th day of March, 1923, Bernhardt A. Kipp died at the city and county of Los Angeles, leaving him surviving, as his widow, the defendant in this action. The record further shows: That Bernhardt A. Kipp and the defendant, Ida Belle Kipp, contracted the relationship of husband and wife at a time when Bernhardt A. Kipp was well advanced in life and had accumulated an estate valued somewhere in the neighborhood of \$500,000. That, just preceding the marriage of the defendant, Ida Belle Kipp, and Bernhardt A. Kipp, a prenuptial agreement was entered into between said persons, by virtue of which the said Ida Belle Kipp relinquished all claim of whatsoever character against the estate or property of the said Bernhardt A. Kipp, including all right to dower and right to inherit, as surviving widow. This agreement was entered into in consideration of the said Ida Belle Kipp receiving from the estate of said deceased, upon his death, the sum of \$25,000. This sum was to be in lieu of any property rights which she might have or otherwise be entitled to as his widow. A will subsequently executed by the said Bernhardt A. Kipp provided for the payment to the defend-

ant of an additional sum of \$3,000 per year. During the time the defendant and the said Bernhardt A. Kipp were living together as husband and wife in the city of Los Angeles, the said Bernhardt A. Kipp had, in taking title to what is called the home place, occupied by said parties, procured the title in the name of himself and the said Ida Belle Kipp, as joint tenants, with the right of survivorship. In addition to this, the said Bernhardt A. Kipp had registered under the Torrens Act, as community property of himself and his wife, about \$40,000 worth of property. So far as our attention has been called to anything in the record, Bernhardt A. Kipp died childless. On the 17th day of February, 1923, Bernhardt A. Kipp and his wife, Ida Belle Kipp, entered into an escrow agreement with William Bauermeister and his wife, whereby it was agreed that the said Bernhardt A. Kipp and his wife would transfer to the said William Bauermeister and his wife certain property situate on Elden street, in the city of Los Angeles, estimated to be worth the sum of \$22,000, and pay the additional sum of \$53,000, in consideration of which the said Bauermeister and his wife agreed to transfer to the said Bernhardt A. Kipp and Ida Belle Kipp, as joint tenants, a certain apartment building in the city of Los Angeles known as the La Rae Apartments, to Bernhardt A. Kipp. The deeds as executed by the respective parties pertaining to the transfer of the properties just above mentioned, together with the escrow agreement, were deposited with the Westlake Branch of the Citizens' Trust & Savings Bank in the city of Los Angeles. The time limited in the escrow agreement for the completion of the transfer of said properties and the payment of the sum above mentioned was 30 days. Thus over one-half of the time limited for the completion of the transfer of the properties above mentioned had expired. The building on Elden street above referred to was a part of the separate property of Bernhardt A. Kipp, and the \$53,000 additional to be paid by the Kipps to the Bauermeisters was to be paid out of the separate property of the said Bernhardt A. Kipp. In order to enable him to make the payment in the sum of \$53,000 to carry out his contract with Bauermeister, the said Bernhardt A. Kipp had directed his brother, Frank Kipp, who lived in Milwaukee, to collect the sum of \$75,000, which was due the said Bernhardt A. Kipp from certain parties owing him that sum in the city of Milwaukee, and to deposit the same in a Milwaukee bank to the credit of the said Bernhardt A. Kipp. It appears, however, that the said Frank Kipp collected the money upon the mortgages, as requested, but deposited the money in a Milwaukee bank in his own name.

After the death of the said Bernhardt A. Kipp on the 6th day of March, 1923, as afore-

said, his widow, the defendant herein, Ida Belle Kipp, consulted attorneys Ralph W. Pontius and Frank G. Tyrrell, having offices in the Washington building in the city of Los Angeles, and retained said attorneys in the matter of looking after her property interests. The exact language of the conversation that took place between the defendant and the said attorneys relative to the retention of their services is not set forth, and there is a conflict in the testimony as to just what services the attorneys were to perform. However, the matter of securing title to the La Rae Apartments, the obtaining of an additional \$53,000 from the estate of Bernhardt A. Kipp, deceased, the matter of perfecting her title to the home place and her interest in the community property appear to have been mentioned. The securing of the title to the apartments and the funds to carry out the escrow agreement and to keep the same alive until it could be completed was the principal subject of consideration. It also appears that the said Bernhardt A. Kipp, by his will, disposed of his property in trust, this trust to be administered principally in the city of Milwaukee, state of Wisconsin. The widow, the defendant, Ida Belle Kipp, was not named as one of the trustees in the will just referred to, nor was she named as an executrix of the estate. Shortly after the death of the said Bernhardt A. Kipp, Frank G. Tyrrell, acting as the attorney of Ida Belle Kipp, filed a petition for special letters of administration upon the estate of the said Bernhardt A. Kipp, deceased, upon the hearing of which petition such letters were granted to the defendant, Ida Belle Kipp, and immediately thereafter a draft was drawn for the sum of \$75,000 upon the money collected by the said Frank A. Kipp, as directed by the said Bernhardt A. Kipp, and at that time supposed to be deposited in bank in the city of Milwaukee, in the name of the said Bernhardt A. Kipp. There being no money in the name of Bernhardt A. Kipp in bank in the city of Milwaukee upon which the draft was drawn, by reason of the fact that the money had not been deposited by the said Frank A. Kipp, as directed, the draft was returned unpaid and no money was immediately available for the payment of the sum of \$53,000 in order to carry out the terms of the agreement with the Bauermeisters. Thereafter, and before the prenuptial agreement had been examined by Mr. Tyrrell, an application was made to the court for a widow's allowance and an allowance of \$1,500 per month ordered by the court. This order was subsequently vacated. The record shows considerable negotiation between Mr. Tyrrell, representing the defendant, Mr. Bauermeister and the attorney representing Mr. Bauermeister relative to keeping alive the escrow agreement, and that in order to secure an extension of time and to permit the same to run until the money could be

obtained to comply with the agreement, a bonus of something over \$3,000 was paid by the defendant to Mr. Bauermeister. That in carrying out the agreement with Bauermeister, and before the money was obtained from the estate, the defendant borrowed something like \$16,000. That in obtaining the loan of said moneys, Mr. Tyrrell rendered some assistance and did secure an advance payment of some \$5,000 on the loan.

It further appears that when Frank A. Kipp came to Los Angeles he was somewhat put out by reason of the action taken by Ida Belle Kipp, and through his attorneys sued out an injunction against Ida Belle Kipp to prevent her from collecting or disposing of any of the moneys of the estate of Bernhardt A. Kipp, deceased, and also proceedings were taken to obtain an inspection of the escrow agreement and the papers pertaining thereto placed in the hands of the bank hereinbefore named. It also appears that, during the course of the administration of the estate, M. Mr. Tyrrell, acting in behalf of the defendant, filed a petition in behalf of Mr. Bauermeister under the provisions of section 1597 of the Code of Civil Procedure, asking for specific performance of the escrow agreement on the part of the trustees of the estate of Bernhardt A. Kipp, deceased, and also a like petition in behalf of the defendant, Ida Belle Kipp. In due course of time these petitions came on for hearing, and at the hearing, at least formal opposition was made by the trustees of the estate of Bernhardt A. Kipp, deceased. The hearing occupied, as stated by appellant, about one hour and a half. So far as the transcript shows, it would appear that the testimony taken upon this hearing related principally to identifying the signatures of the parties to the respective instruments, and the terms of the escrow agreement and the amount of money to be paid by Bernhardt A. Kipp, deceased, to Mr. Bauermeister in order to comply with the terms and provisions of the escrow agreement. At the conclusion of the hearing, the court made an order directing the trustees of the estate to pay over the sum of \$53,380, in pursuance of which the record shows that the trustees of the estate of Bernhardt A. Kipp thereafter did turn over to the escrow holder said sum of money; this being paid on or about the 10th day of October, 1923. It may be here stated that the trustees of the estate of Bernhardt A. Kipp, deceased, after making of the two orders above mentioned, took an appeal to the Supreme Court from these orders, which appeals were dismissed prior to the 10th day of October, 1923. At the time the orders were made and subsequently thereto, it appears, at least from the statements of the attorneys representing the trustees, that all that was desired was that the trustees of the estate of said deceased would be protected from liability on account of such payment,

and that the orders of the court should be so made as to afford protection to the trustees. Upon the settlement of the account of the defendant as special administrator, attorney's fees were allowed in the sum of \$500, and the same were paid, and are not taken into consideration in this action. Proceedings were also taken by Mr. Tyrrell in behalf of the defendant, under the provisions of section 1723 of the Code of Civil Procedure, in order to obtain a decree adjudging termination of the estate and interest of the said Bernhardt A. Kipp in and to the home place heretofore referred to which was held by the said Bernhardt A. Kipp and Ida Belle Kipp as joint tenants with the right of survivorship. Some other proceedings were taken upon a citation directed to the trustees, to show cause why they should not be removed from their trusteeship. This proceeding, however, was dismissed. After these proceedings had been taken and had, it appears from the transcript that the defendant, Ida Belle Kipp, wrote to her attorneys, Pontius and Tyrrell, notifying them that she no longer desired their services. However, no substitution of attorneys was ever made. Mr. Tyrrell, who was the attorney of record in all these proceedings, then made out his bill for services rendered in behalf of the defendant in matters pertaining to the properties which we have mentioned in the sum of \$11,000, giving credit to the defendant for the sum of \$500, paid as aforesaid, leaving due as attorney's fees the sum of \$10,500, and also the further sum of \$45.89 paid out as costs advanced in the course of the proceedings referred to. Payment being declined by the defendant, assignment of the account was made to the plaintiff herein, and this action begun for the collection of the same.

[1] It is contended upon this appeal that the allowance of fees in the sum named by the trial court is exorbitant and is so grossly excessive that this court should interfere and either reverse the judgment or modify the same. It is perhaps difficult to conceive of any record that could be presented to the appellate court which would give less light upon the subject to be determined than a transcript relating to the fees or compensation that should be awarded for professional services, for the simple reason that only a few pages of testimony or a few simple statements contained in the record may be necessary to state the proceedings taken and had so far as the court records are concerned, whereas the time required to ascertain and determine the proceedings that should be taken or the skill required to determine the proper proceedings to be taken are the real elements which enter into the value of the services for which compensation is properly awarded, cannot be placed upon, and never do appear on a typewritten or printed page. It is for this reason that the matter of

awarding compensation for professional services, when that service is rendered by an attorney, is left, to so great a degree, in the judicial discretion of the trial court, so much so that, unless the sum allowed is plainly and palpably exorbitant and such as shocks the conscience of an appellate court, the determination of the trial court will not be disturbed. It is not sufficient that the transcript, as read by an appellate court, discloses a case from which, if the court of appeal were to decide the matter in the first instance it would only allow compensation in a materially reduced sum. There is nothing in the record that shows any prejudice or bias on the part of the trial court, or that the trial court did not conscientiously endeavor to ascertain the compensation that should be justly awarded for the services rendered by the attorneys involved in this action for the defendant Ida Belle Kipp.

While the testimony does not show, as we have stated, that the defendant, Ida Belle Kipp, gave any specific directions to Mr. Tyrrell or to Mr. Pontius, to examine into either the prenuptial agreement or the will of the deceased, creating a trust to be administered in the city of Milwaukee it is nevertheless apparent that an attorney, in order to ascertain just what rights the widow had in the matter, and how to proceed in relation to securing compliance with the escrow agreement which we have herein referred to, and to have the title of the La Rae Apartments vested in the widow, would necessarily desire to acquaint himself fully with every instrument affecting the estate of the deceased in order that he might be in a position to take advantage of any defect therein, to the intent that parties representing opposing interests might be induced to accede to a fair, advantageous, and perhaps a liberal settlement of property upon the widow, in order to avoid a contest such as might be instituted to set aside the prenuptial agreement, especially in view of the fact that it provided for a payment of \$25,000 out of the estate of the deceased after his death, and was not an advance payment of any sum, at a time when neither the deceased nor his estate was under any obligations to the defendant. On the face of it, it would appear that the widow had, in consideration of the sum of \$25,000, to be paid out of the estate Bernhardt A. Kipp, after his death, relinquished all claim to the decedent's estate valued, as shown by the record, at the sum of about one-half million dollars. We may here state the record does disclose that Mr. Pontius drew the will creating the trust for Bernhardt A. Kipp, but the record does not show that either Mr. Pontius or Mr. Tyrrell knew anything about the prenuptial agreement entered into between the deceased and the defendant, Ida Belle Kipp, who, after the death of Bernhardt A. Kipp, became their client. And if the pre-

nuptial agreement contained terms and provisions which were subject to doubt, and in the light of which the will executed by the deceased might be open to litigation, it was the duty of Mr. Tyrrell or Mr. Pontius to investigate the subject thoroughly, even though the widow did not desire to contest either the prenuptial agreement or the will creating the trust. It of course required no great consideration to determine that Mr. Bauermeister had a right to petition, under section 1597 of the Code of Civil Procedure, for an order directing the trustees of the estate of Bernhardt A. Kipp, deceased, to comply with the escrow agreement and pay over to him or to the persons to whom the sum of money was directed to be paid for his benefit by the said Bernhardt A. Kipp to complete the portion of the agreement that was to be carried into execution by said deceased, but there was a serious question as to where the title would be vested to the La Rae Apartments when the deed placed in escrow by Mr. Bauermeister and his wife, purporting to convey the La Rae Apartments to Bernhardt A. Kipp and the defendant, Ida Belle Kipp, as joint tenants, with the right of survivorship, should be delivered. Would that title be vested absolutely in the defendant, or would she take that title, as a tenant, of an undivided one-half interest therein and as holding an undivided one-half interest therein as trustee for those entitled to take under the will of the deceased?

The general rule in relation to escrows is that a deed does not transfer title, or that an instrument does not take effect, until the contingency has occurred which entitles the grantee to a delivery of the instrument. This rule is obviated to some extent by the fiction of law whereby a subsequent delivery is held to relate back. The rule also is that, where a valid escrow agreement has been entered into, the death of one of the parties does not invalidate the agreement, and the other party has a right to insist upon its performance. As the matter is not before us, we express no opinion as to the title that would or could have come to the defendant in this case by the payment of \$53,380 to Mr. Bauermeister by the trustees of the estate of Bernhardt A. Kipp, deceased, if the question of the title that would have been required under the deed delivered after the death of Bernhardt A. Kipp which purported to convey to him and to the defendant, Ida Belle Kipp, a joint estate with the right of survivorship, had been contested. It is sufficient to say that the circumstances which we have detailed required careful, as well as skillful, consideration, procedure, and management in order that the title to the property valued at \$75,000 should be vested in the defendant. The circumstances upon their face show that the results attained actually removed from the separate property of the estate of the

deceased and vested in the defendant property of the value above stated. While the record does not show many appearances in court, and it is not indicated that the time consumed in hearing any of the motions or proceedings presented to, or taken, and had in the courts, occupied any considerable period or even amounted to more than formal hearings, such as the necessary identification of signatures and an exhibit of the various instruments relating to the property involved, there is, however, testimony to the effect that a considerable portion of counsel's time was devoted to the consideration of the rights of the defendant in and to the property mentioned, almost daily for a number of months.

The opinion of the trial court, printed in the appendix to appellant's brief, shows that the trial court was convinced that all the proceedings taken by counsel for the defendant were taken in good faith, and that, while anticipated contests did not materialize, or that not more than a formal contest was made to the proceedings instituted by counsel for the plaintiff to secure title to the property as herein indicted, the circumstances were such as justified counsel in thoroughly preparing for any contingency that might arise. The opinion further indicates that the court was impressed with the necessity of prompt action on the part of counsel for the defendant to prevent loss to her of property valued at the sum of \$75,000. Whatever may have been the position taken by the trustees of the estate of Bernhardt A. Kipp, deceased, it is evident from the record that Bauermeister was in a position to dictate terms by reason of the time limit contained in the escrow agreement, and the record does show that Bauermeister made considerable difficulty and some effort to escape from the terms of said agreement, whether with the intent of securing release therefrom by insisting upon the time limit contained therein, or simply for the purpose of obtaining additional money is immaterial. That this situation had to be handled carefully is patent, and the services of counsel in relation thereto were matters properly to be taken into consideration by the trial court. The record shows that the additional time was secured to the defendant by the payment of some additional bonuses to Bauermeister.

[2-4] The transcript also sets forth the testimony of a number of expert witnesses, all of whom testified as to the value of the services, and placed a higher estimate thereon than was allowed by the trial court. This, however, is not the sole criterion by which to judge of the value of counsel's services. The opinions of experts are admissible, but, after such testimony is admitted, the case goes back to the sound judgment of the trial court, and, unless we can say that that judgment and discretion have been abused and the amount of compensation awarded grossly ex-

cessive or exorbitant, we are not in a position to order a reversal or even a modification of the judgment. In the case at bar, the amount allowed seems rather large, as we gather the extent of the services from the cold record. But, for the reasons hereinbefore stated, we are not in the same position as the trial court in passing judgment, as the transcript is necessarily lacking in many of the elements which must be taken into consideration by the trial court. The mere fact that we may think the trial court erred somewhat in judgment and allowed more than this court would have allowed presents no cause for reversal. An appeal in cases of this kind cannot be converted into a trial de novo. The law upon this subject is so fully set forth in the cases cited by the opinion of this court, written by Mr. Justice Hart, in the matter of the Estate of Iser, 52 Cal. App. 405, 198 P. 1014, that we only need to give the citation in support of what we have just said.

Being of the opinion that the amount of attorney's fees awarded in this case is not so grossly excessive as to justify interference on the part of an appellate court, the judgment of the trial court is hereby affirmed.

We concur: FINCH, P. J.; HART, J.

87 Cal. App. 549

TRACY v. RINGOLE. (Civ. 5760.)

District Court of Appeal, First District, Division 1, California. Dec. 14, 1927.

1. Attorney and client ⚖️143—Attorney may contract for professional services and fix compensation thereby (Code Civ. Proc. § 1021).

Under Code Civ. Proc. § 1021, an attorney may contract for his professional services, and such contract may fix amount of his compensation.

2. Attorney and client ⚖️63—Express contract for attorney's services, fairly made, controls, and construction is same as between others sustaining like fiduciary relations.

Express contract for attorney's professional services, when fairly entered into, will control between parties, and construction of such contracts does not differ from construction of contracts between other persons who sustain like fiduciary relation toward each other.

3. Attorney and client ⚖️176—Attorney's lien on judgment may be created by contract.

A lien on judgment for attorney's compensation may be created by contract of parties.

4. Attorney and client ⚖️189—Under attorney's contingent fee contract giving attorney lien on cause of action and judgment, attorney had lien on money received in settlement by substituted attorney.

Where contract between attorney and client provided for contingent fee for one-third of sum

recovered, and provided that attorney should have lien on cause of action and on any judgment that might be secured for such share and that no substitution of attorneys could be made without attorney's being paid first, except in event of his misconduct, attorney became equitable owner of an undivided one-third of whatever sum might become due by reason of prosecution of action, and had lien on fund in hands of substituted attorney as proceeds of settlement of case.

5. Trusts ⚖️103(4)—Where attorney had contract lien for contingent fee, substituted attorney, employed on same terms, became "constructive trustee" of money received in settlement.

Where original attorney took case on contingent fee basis, and contract with client provided that he should have lien on cause of action and on judgment for such share, and that there should be no substitution of attorneys without paying him, substituted attorney, employed on same terms, took cause of action and money received therefrom in settlement, subject to original attorney's interest therein, and became "constructive trustee" of cause of action and money arising therefrom to extent of his interest.

Appeal from Superior Court, City and County of San Francisco; John J. Van Nostrand, Judge.

Action to enforce a lien for attorney's fees by J. A. Tracy against G. C. Ringole. From a judgment sustaining a demurrer to the complaint, plaintiff appeals. Reversed.

J. A. Tracy and Wm. Steers, both of San Francisco, for appellant.

Samuel D. Hamburg, of San Francisco, for respondent.

TYLER, P. J. Action to enforce a lien for attorney's fees. The complaint alleges, in substance, that one Sperro was seriously injured in an automobile accident, and, being in indigent circumstances, he employed plaintiff upon a contingent fee to collect damages for his injuries. Plaintiff agreed to advance all costs and to render all necessary legal services in consideration of receiving one-third of any amount that might be finally recovered. The agreement, which was in writing, contained a clause giving to plaintiff a lien on the cause of action and on any judgment that might be secured for the sum and share agreed upon, and it was provided that no substitution of attorneys could be had without plaintiff being first paid, except in the event of his misconduct. The complaint then charges that after plaintiff had performed certain services, defendant, an attorney at law, fraudulently, and for the purpose of depriving plaintiff of his fee, induced Sperro to discharge plaintiff as his attorney, without justifiable reason, and caused and procured himself to be appointed and engaged

as the attorney of Sperro, upon the same terms as plaintiff had been employed; that thereafter defendant herein made a settlement of the case with the defendants in the action and their insurance carriers for the sum of \$3,000. It is then claimed that plaintiff has a lien upon one-third of this amount for his fee under his contract with Sperro; that defendant knew of all the facts and circumstances concerning plaintiff's lien, but, notwithstanding such knowledge, converted the amount thereof to his own use in fraud of plaintiff's rights. A demurrer was interposed to the complaint and sustained. This is an appeal from the order.

[1-3] The sole question here presented is whether or not an attorney may, by contract with his client, provide for a lien upon an anticipated judgment for the amount of his contingent fee. As a general rule, the principles of law applicable to claims of attorneys for services, in so far as their right thereto is concerned, do not differ materially from those applicable to other contracts of employment, except, by reason of the confidential relationship, extortionate agreements will not be upheld. It is well settled throughout the United States that an attorney may contract for his professional services, and that such contract may fix the amount of the compensation. Indeed, the right of attorneys to compensation depends, in all cases, on a contract either express or implied. Any express contract therefore, when fairly and honestly entered into, will control as between the parties, and the construction of such contracts does not differ from the construction of contracts between other persons who sustain a like fiduciary relation toward each other. The right of an attorney to contract for a fee has found expression in our Code of Procedure. It is there provided that the measure and mode of compensation of attorneys is left to the agreement, express or implied, of the parties. Code Civ. Proc. § 1021. In most jurisdictions a lien for attorney's fees is expressly provided for by statute or is established by judicial decision. The lien is based on the idea that counsel should not be deprived of their compensation by the unfair conduct of their clients. The lien when provided for is generally described as being of two kinds; one called the general, retaining or possessory lien, the other the special, or charging lien. The special or charging lien of an attorney has been held to be an equitable right to have the fees and costs due to him for services in a suit secured to him out

of the judgment or recovery in the particular action, the attorney to the extent of such services being regarded as an equitable assignee of the judgment. It is based, as in the case of a lien proper, on the natural equity that a party should not be allowed to appropriate the whole of a judgment in his favor without paying for the services of his attorney in obtaining such judgment. The use of the term lien in this connection has been criticized as inaccurate, and the right of the attorney has been said to be merely a claim to the equitable interference of the court. 6 C. J. 767.

In California there is no statute giving a lien to an attorney upon a judgment for services rendered in favor of his client, and they must consequently recover for their services in the ordinary mode. *McGown v. Dalzell*, 72 Cal. App. 197, 236 P. 941. It has been said that the paucity of the California cases on attorney's liens, and particularly the entire absence of authority on retaining liens, is remarkable. 3 Cal. Jur. 683. A lien, however, may be created by contract of the parties. Here the contract did provide for a lien, and it is alleged that defendant had full knowledge of this fact. In such a case it has been held that the agreement for a lien is decisive as to its existence and amount, and it constitutes a valid equitable assignment of the judgment pro tanto and creates a lien upon the specific fund, notwithstanding that the action in which the judgment was obtained was on a cause of action for a tort in itself unassignable. 6 Cyc. 742. See, also, *Goad v. Hart*, 128 Cal. 197, 60 P. 761, 964; *Hoffman v. Vallejo*, 45 Cal. 564.

[4, 5] We are of the opinion, therefore, that by reason of his contract plaintiff became the equitable owner of an undivided one-third of whatever sum might become due by reason of the prosecution of the action, and that a lien was created in favor of plaintiff upon the fund in the hands of defendant; that defendant took such cause of action and the money received therefrom in settlement, subject to plaintiff's interest therein, and thereupon became a constructive trustee of the cause of action and the moneys arising therefrom to the extent of plaintiff's interest. *Hoffman v. Vallejo*, supra; *Goad v. Hart*, supra. This being so, the complaint states a cause of action, and the demurrer to the same was improperly sustained.

The judgment is reversed.

We concur: KNIGHT, J.; CASHIN, J.

87 Cal. App. 313

PEOPLE v. COSTELLO et al. (Cr. 1394.)★

District Court of Appeal, First District, Division 2, California. Dec. 7, 1927.

Hearing Denied by Supreme Court Feb. 2, 1928.

1. Criminal law §736(2)—Conflicting testimony as to whether defendants' confessions were freely and voluntarily made held to make question for trial court.

Where testimony was conflicting as to whether confessions of defendants were given freely and voluntarily, it was function of trial court to determine issues thus raised preliminary to ruling on admissibility of confessions.

2. Criminal law §519(2)—Admitting confessions relative to unsuspected crimes voluntarily repeated to stenographer held not error, under conflicting evidence as to whether they were voluntary in first instance.

Action of court in admitting evidence of confessions obtained from persons accused of robbery, under conflicting evidence as to whether confessions were freely obtained, held not error, where defendants voluntarily returned on following day to have their confessions taken down by stenographer, and where confessions related to other crimes than those of which defendants were suspected.

3. Robbery §24(3)—Failure of complaining witness to positively identify all persons accused held not to prevent conviction, where evidence showed defendants had been acting jointly in commission of similar robberies.

Failure of complaining witness to identify all of persons charged with robbery held not to prevent conviction, where evidence indicated that defendants had been working together in commission of similar robberies, and used same automobile, and were gathered together at time of their arrest preparing to commit another robbery.

4. Criminal law §530—Signed confessions merely referring to Chinese laundry on L. street as scene of robbery were sufficiently definite, under evidence showing oral confessions disclosed street number.

That signed confessions of robbery merely related to place of crime as Chinese laundry on L. street, did not render confessions inadequate to show defendants' connection with crime, where it appeared from testimony that oral confessions originally made identified place of crime by street number.

5. Criminal law §517(1)—Variance between confessions and complaining witness' testimony as to bystanders present at robbery and amount taken held not to prevent use of confessions.

Fact that there was a discrepancy between confessions and testimony of complaining witness as to bystanders present at time of robbery, and as to amount of money taken, held not to require exclusion of confessions, since number of persons present and amount of money taken were immaterial on question whether crime was committed.

6. Criminal law §400(9)—Notes of confessions held properly admitted under reporter's testimony that notes correctly represented defendants' statements, were signed by defendants as interpreted and re-read, and that transcription was accurate.

Where reporter, who took notes of defendants' confessions, made in foreign language, and transcribed them into typewriting, testified that notes were true and correct copies of what was said by defendants, that each signed same as they had been interpreted and re-read to him, and that the typewritten documents were true transcriptions of notes, reporter's notes were admissible in evidence as written confessions, and as such might be read by jury or translated to them by reporter.

7. Criminal law §663—Prosecution was entitled to have confessions in foreign language, properly in evidence, interpreted by having notes read into record, or by filing transcription in evidence.

Where confessions in foreign language were properly before jury as evidence, prosecution was entitled to have them interpreted in language which jury could understand, either by having reporter read his notes into the record, or by filing in evidence a transcription of the notes for the jury's convenience.

8. Criminal law §400(9)—Reporter's notes constitute "best evidence" of confessions.

Reporter's notes of confessions, identified by reporter as correct statement of matters related to him, constitute "best evidence" of confessions.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Best Evidence.]

9. Criminal law §1169(12)—Admission of typewritten translations of reporter's notes of confessions properly in evidence held not prejudicial.

Where reporter's notes of confessions made in foreign language were identified as correct and were properly in evidence, admission of typewritten transcription shown to be true translation of original notes was not prejudicial.

10. Criminal law §695(2)—Where typewritten translations of notes of confessions are otherwise admissible, specific objection must be made that notes detail other crimes.

Where typewritten translations of notes of confessions, made in foreign language, contain confessions relating to other crimes besides that for which defendants are being prosecuted, specific objection must be made to admission of translations on ground that they contain details of other crimes in order to have them excluded on that ground.

Appeal from Superior Court, City and County of San Francisco; J. J. Trabucco, Judge.

Frank Costello, William Avelino, and William Raleigh were convicted of robbery while armed with a deadly weapon, and they ap-

peal. Affirmed as to appellant Frank Costello.

See, also, 262 P. 78.

Milton T. U'Ren, of San Francisco, and H. Edward Manning, of Vallejo, for appellants.

U. S. Webb, Atty. Gen., and Wm. F. Cleary, Deputy Atty. Gen., for the People.

NOURSE, J. The defendant Costello was tried jointly with Avelino and Raleigh before a jury upon an information charging them with robbery. The jury returned separate verdicts finding each of the defendants guilty of robbery in the first degree, the crime having been committed while each of the defendants was armed with a deadly weapon. From the judgments following these verdicts and from the orders denying each of the defendants a new trial they have appealed separately, but by stipulation the three appeals have been presented upon a single typewritten record.

At about 10 o'clock p. m. of June 19, 1926, the three defendants entered the laundry of Yee Lung, located at No. 9 Langton street, San Francisco, upon the pretense that one of them had left clothes with the complaining witness to be laundered. As the witness opened the door, the defendant Costello pointed a revolver at him and he and one of the other defendants took the witness upstairs, made a search of the premises, and took from a trunk belonging to the witness the sum of \$432. They then bound the witness and the three defendants left the premises. On the night of June 25, 1926, a number of police officers entered a rooming house conducted by the mother of defendant Raleigh in search of parties suspected of having been guilty of an attempt to commit murder in the county of San Mateo. The officers there encountered the three defendants, one of whom endeavored to make his escape through a window, while the other two concealed themselves under a bed. The three defendants were handcuffed and questioned by the officers for a period running from about midnight of the night of the arrest until 5 o'clock of the following morning. During the course of the examination one of the officers discovered a lunch basket containing five revolvers, which were shown to the defendants after they had stated that no arms were concealed in the house. About this time the defendant Costello expressed the willingness to make a full confession of the crimes in which he had participated. He was taken into another room and made a full confession to the officers implicating himself and the other two defendants in a series of robberies committed within a period of about 10 days immediately preceding. Costello was then taken back to the other defendants, who were told of the confession made by Costello, and each admitted the truth of the statements made by him. Each defendant was then asked to point out

the revolver which he had used in the several robberies detailed in this confession, and each did so while a newspaper photographer took pictures of them in the act. The defendants were then taken to the hall of justice where they were assembled at about 8 o'clock a. m. of June 26th, in the office of the police commissioners in the presence of some 15 or 20 police officers and newspaper men. Costello was then asked if he desired to make a confession and stated that he would do so if it was satisfactory to his codefendants. They both nodded their assent, and Costello proceeded to give in detail a description of all robberies in which he had participated during a period of some 10 days prior to his arrest. This confession was taken down in shorthand by a reporter, read back to Costello, who thereupon signed the shorthand notes. The same proceeding was had with each of the other defendants, and all three in the presence of this group of officers and newspaper men stated that their confessions were made voluntarily and without any duress or promise of reward. The shorthand reporter thereafter transcribed his notes, and these shorthand notes, together with the typewritten transcriptions, were all offered and received in evidence during the course of the trial.

[1, 2] On this appeal the appellants have raised four grounds which we will consider in the order presented. It is argued that the trial court erred in admitting the confessions of these defendants on the ground that they were not freely and voluntarily given. In support of the argument the testimony of the three appellants and of other roomers in the house where they were arrested is cited to show that before the confessions were given the appellants were handcuffed and kept upon the floor for several hours; that they were beaten and abused by some of the officers and threatened with further punishment if confessions were not made. All this testimony was denied by creditable witnesses, and it was, of course, the function of the trial court to determine the conflict. It stands out unmistakably from the record that the witnesses for the defense were carefully coached to present a picture of cruelty and maltreatment on the part of the officers, but that their stories were so conflicting and improbable that the trial court could not have justly found otherwise than that the confessions were freely and voluntarily given. When the appellants were brought into the presence of the officers on the following morning for the purpose of taking their confessions down in shorthand, there was no pretense that they were threatened or abused or induced to confess their crimes by any promise on the part of the officers. But outside of the question of the conflict between these witnesses as to what occurred preceding the confessions, the outstanding fact is that each of these appel-

lants gave detailed accounts of the various crimes in which they had participated over a period of some 10 days or 2 weeks immediately prior to their arrest, and in so doing brought to the attention of the arresting officers for the first time the details and circumstances of these various crimes. It is also significant that, though each of the appellants was taken into custody on suspicion of having participated in an attempt to commit murder in another county, and that, while each was being questioned as to his participation in that crime, each detailed to the arresting officers his participation in these robberies committed in San Francisco, for none which any one of the appellants had theretofore been suspected.

[3] It is argued that the evidence is insufficient to sustain the convictions of Avelino and Raleigh because the complaining witness failed to positively identify them, and because their confessions did not admit the commission of the crime charged and were not true. It is true that Avelino and Raleigh were not identified by the complaining witness, but it was shown that the three appellants had been working together over a considerable period of time in the commission of similar robberies; that the three had teamed together and used the same automobile and the pistols which were found in the house at the time of their arrest; that they were gathered at this house at the time of their arrest preparing to commit another robbery that night; and that the automobile which had been used in their previous crimes was standing in front of the door, the driver ready to take them to the seat of the crime planned for that night.

[4] It is argued that the confessions do not link either of these two appellants with the particular crime for which they were on trial, because they referred merely to a Chinese laundry on Langton street without giving the street number or the date of the robbery. This is true in so far as it relates to the confessions given in the office of the police commission, but it is not true in reference to the confessions given at the Gough street house at the time of the appellants' arrest. In the examination of one of the officers relative to the confession made by Costello, he was asked: "What did he say about the robbery at No. 9 Langton street in this city and county?" The witness answered: "He said he participated in that robbery." This witness then gave in detail the statement of Costello covering all the circumstances of the robbery of this laundry and of his codefendants' participation in the crime. This was then all repeated to Avelino and Raleigh, who stated at the time that the facts were true as given by Costello. It is apparent that throughout the making of these confessions the parties had in mind the particular robbery committed at No. 9 Langton street upon the complaining

witness in this trial, and that it was for this reason that they did not in each instance designate the time, place, parties present, and amount of money taken. The case is like *People v. Dutro*, 75 Cal. App. 138, 142, 242 P. 84, where a confession which was indefinite in similar respects was held properly admitted.

[5] The argument is also made that these confessions in so far as they relate to Avelino and Raleigh cannot be treated as confessions because they were untrue. The argument is that inasmuch as the complaining witness stated he was alone in the laundry at the time of the robbery and that \$432 was taken from him, whereas one of the appellants stated that two other Chinamen were present at the time of the robbery and that all stated that they took but \$200, we must assume that the appellants were not telling the truth and that their statements cannot therefore be treated as confessions of the crime charged. The number of Chinamen present at the time of the robbery and the amount of money taken had no bearing upon the crime for which the appellants were all tried, and a variance in either of these particulars had no effect upon the use of the admissions made by the appellants. It is significant that Costello alone stated that three Chinamen were present at the time of the crime, and that each of the three differed as to the exact amount of money received, a circumstance which may have occurred through mistake or misinformation.

[6] It is argued that the trial court erred in admitting the shorthand notes and the typewritten transcriptions of these notes. Before these documents were admitted, the reporter who made the notes and transcribed them into typewriting was called to the stand and testified that the notes were true and correct notes of what was said by the appellants, and that each signed the same as they had been interpreted and re-read to him. The same witness also testified that the typewritten documents were true transcriptions of these notes. The reporter's notes were properly admitted in evidence as written confessions of the accused and could have been read by the jury or translated to them by the reporter if the members of the jury were unable to read them. The same situation would arise if the confessions had been written in a foreign language and signed by the accused and then translated into English. The original writings with the signature of the accused would be admissible in evidence as the written confessions of the accused. 16 Cor. Jur. § 1508.

[7-10] When these confessions were before the jury, the prosecution was entitled to have them interpreted into language which the jury could understand, and this might have been done either by having the reporter read his notes into the record or by filing in evi-

dence a transcription of those notes for the convenience of the jury. When the reporter was on the stand he might have been asked to then translate his notes or to read the typewritten transcription, the state having shown that this transcription was a true translation of the original notes, but because of the objection of the appellants, and in order to avoid placing before the jury the details and circumstances of the various other crimes committed by these appellants, the district attorney read from this typewritten translation the facts and circumstances which related to this particular crime alone for which the appellants were all tried. By this process the district attorney, in reading from the typewritten translation, eliminated those portions of the confessions which did not pertain to the offense charged in the information, whereas, if the reporter had been called on to translate his notes, it would have been difficult to avoid giving a complete translation covering all these other crimes. The reporter's notes, which were the best evidence of the confessions, being properly in evidence, the appellants were not prejudiced by the admission of the typewritten translations, unless it be because these contained the details of the other crimes. These, however, could have been eliminated if the appellants had made their objection upon that ground.

Upon the whole case we are satisfied from an examination of the entire record that all the appellants were fairly tried and convicted upon evidence which unmistakably demonstrates their guilt of the crime charged in the information.

Judgment and order affirmed as to appellant Frank Costello.

We concur: KOFORD, P. J.; STURTEVANT, J.

87 Cal. App. 793

The PEOPLE of the State of California, Plaintiff and Respondent, v. Frank COSTELLO, William Avelino, and William Raleigh, Defendants and Appellants. (Cr. 1394.)

District Court of Appeal, First District, Division 2, California. Dec. 7, 1927.

Appeal by defendants from judgments of the Superior Court, City and County of San Francisco, J. J. Trabucco, Judge, of conviction of robbery while armed with a deadly weapon and from orders denying motions for new trial. Affirmed as to defendant Avelino.

Milton T. U'Ren, of San Francisco, and H. Edward Manning, of Vallejo, for appellants.

U. S. Webb, Atty. Gen., and Wm. F. Cleary, Deputy Atty. Gen., for the People.

NOURSE, J. Upon the authority of *People v. Costello* (Cal. App.) 262 P. 75, this day filed, the appeal of the defendant William Avelino

from the judgment and order denying his motion for a new trial is affirmed.

We concur: KOFORD, P. J.; STURTEVANT, J.

87 Cal. App. 794

The PEOPLE of the State of California, Plaintiff and Respondent, v. Frank COSTELLO, William Avelino, and William Raleigh, Defendants and Appellants. (Cr. 1394.)

District Court of Appeal, First District, Division 2, California. Dec. 7, 1927.

Appeal by defendants from judgments of the Superior Court, City and County of San Francisco, J. J. Trabucco, Judge, of conviction of robbery while armed with a deadly weapon and from orders denying motions for new trial. Affirmed as to defendant Raleigh.

Milton T. U'Ren, of San Francisco, and H. Edward Manning, of Vallejo, for appellants.

U. S. Webb, Atty. Gen., and Wm. F. Cleary, Deputy Atty. Gen., for the People.

NOURSE, J. Upon the authority of *People v. Costello* (Cal. App.) 262 P. 75, this day filed, the appeal of the defendant William Raleigh from the judgment and order denying his motion for a new trial is affirmed.

We concur: KOFORD, P. J.; STURTEVANT, J.

87 Cal. App. 246

JONES v. EXPRESS PUB. CO. et al. (Civ. 5981.)

District Court of Appeal, First District, Division 2, California. Dec. 2, 1927.

1. Libel and slander $\S$ 48(2)—One contesting authority to discharge her from public office during time of publication of alleged libelous matter was estopped from denying she was public officer, and doctrine of privileged communications applied (Civ. Code, $\S$ 47).

Where plaintiff, in public investigation before civil service commission, was contesting authority of district attorney to discharge her from office of deputy having charge of investigation of juvenile offenses, when alleged libelous matter was published, she was estopped from denying that she was in fact a public officer so as to relieve her from application of doctrine of privileged communications under Civ. Code, $\S$ 47, and communication was privileged.

2. Libel and slander $\S$ 86(4)—Plaintiff declaring construction of alleged libelous language by use of innuendo is bound by interpretation, except where language has obvious meaning independent of explanation.

Having formally declared her construction of alleged libelous language by use of specific innuendo, plaintiff was bound by her interpretation, except where language had clear and obvious meaning independent of any explanation.

3. Libel and slander $\S$ 10(6)—Charge that employee in district attorney's office threatened to sell her affidavit regarding intimate relations with district attorney, held not actionable, where affidavit itself showed unchastity.

Action for libel would not lie, based upon charge that plaintiff threatened to sell her own affidavit regarding her intimate relations with district attorney to his enemies, which affidavit in fact declared truth respecting plaintiff's own character.

4. Libel and slander $\S$ 10(6)—Public employee could not complain of publication of facts regarding her character, which she subsequently admitted to be true in public investigation respecting her fitness for office.

Plaintiff could not be heard to complain of publication of facts regarding her character, which in public investigation respecting her fitness for office she admitted to be true, even though this confession was made subsequent to first publication, since she must be deemed to have anticipated result of public confession amounting to acknowledgment of unchastity.

5. Libel and slander $\S$ 10(6)—Newspaper acting without malice is not liable for damages for publishing communication concerning fitness for public office, admitted to be true (Civ. Code, $\S$ 47).

Newspaper cannot be held liable for damages under Civ. Code, $\S$ 47, for publication of communication, without malice, concerning fitness of one for public office, which statement is voluntarily admitted by accused to be true.

6. Libel and slander $\S$ 93—One relying upon doctrine of privileged communications must adequately plead facts (Civ. Code, $\S$ 47).

One who relies upon doctrine of privileged communications, under Civ. Code, $\S$ 47, as special defense, must adequately plead facts.

7. Libel and slander $\S$ 101(1)—Where pleadings admit or plaintiff's evidence establishes affirmative defense in libel action, defendant need not prove such defense.

Burden is upon defendant to prove any affirmative defense upon which he relies in libel action, including defense of truth of charge or that communication is privileged, but, when pleadings admit or evidence on part of plaintiff affirmatively establishes such facts, defendant is relieved of this burden.

8. Libel and slander $\S$ 123(8)—When essential facts are undisputed, privilege is question of law for court (Civ. Code, $\S$ 47).

When essential facts in libel action are not disputed, question as to whether communication is privileged under Civ. Code, $\S$ 47, is solely question of law for determination of judge.

9. Libel and slander $\S$ 101(4)—When facts clearly constitute privileged communication, although language employed under other circumstances might be slanderous per se, privilege creates presumption of no malice (Civ. Code, $\S$ 47).

When facts clearly constitute a privileged communication under Civ. Code, $\S$ 47, even though language employed under other circumstances might be slanderous per se, privilege

creates presumption that communication is used innocently and without malice.

10. Libel and slander $\S$ 51(1)—Statute requiring reasonable ground for supposing motive for privileged communication to be innocent applies to newspaper publications (Civ. Code, $\S$ 47).

A newspaper stands in same class as an individual, so far as application of principle of privileged communication under Civ. Code, $\S$ 47, is concerned.

11. Libel and slander $\S$ 48(2)—Newspaper publication as to fitness for public office of public employee who was stranger to publishers held privileged; "privileged communication" (Civ. Code, $\S$ 47, subd. 3).

Where plaintiff was an entire stranger to publishers of newspaper, which published article regarding plaintiff's fitness for office of investigating juvenile offenses, mere presumption of malice would be refuted under Civ. Code, $\S$ 47, subd. 3, defining "privileged communication" as one without malice to person interested therein by one who is also interested, since public was vitally interested in knowing character of such an officer.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Privileged Communication (In Libel and Slander).]

12. Libel and slander $\S$ 41—Communication may be privileged, even though communication is false (Civ. Code, $\S$ 47).

Communication may be privileged, under Civ. Code, $\S$ 47, even though communication is false, and, when communication is clearly privileged, question of truth or falsity of charge is not necessarily involved.

13. Libel and slander $\S$ 54—Truth of published communication is defense to charge of libel (Civ. Code, $\S$ 47).

Truth of published communication is complete defense to charge of libel in itself, and claim of privileged communication under Civ. Code, $\S$ 47, is defense entirely independent of question of truth of charge.

14. Libel and slander $\S$ 50—Criticism of faults and misconduct of public officers impairing their fitness for office, by citizens or newspapers in good faith, is not libelous (Civ. Code, $\S$ 47).

It is not only the privilege but the duty of every citizen and every newspaper in community to fairly and impartially criticize faults and misconduct of public officers, which faults impair their fitness or usefulness for office which they seek or hold, and, so long as this is done in good faith and without malice, it is not libelous under Civ. Code, $\S$ 47, relating to privileged communications.

15. Appeal and error $\S$ 1056(1)—Excluding evidence in libel action which was mere aggravation of former charge of unchastity held not prejudicial error.

In libel action against newspaper company, where newspaper had published articles concerning plaintiff's intimate relations with district attorney, sustaining objection to question, "It is stated in this article of May 13, 1922,

that, according to attachés of the district attorney's office who investigated the case, Miss Jones made charges of intimacy against four other prominent men of Los Angeles, one of them a city official, one of them a state official, the third a doctor, and the fourth a lawyer; I will now ask you whether or not you made such a statement to any person?" where statement was mere aggravation of former charge of unchastity, *held* not prejudicial error.

16. Appeal and error ☞1026—Error not prejudicing substantial rights of appellant will not suffice to reverse judgment.

Error which does not prejudice substantial rights of appellant will not suffice to reverse judgment.

17. Witnesses ☞393(4)—Where gist of libelous publications was imputed lack of chastity on plaintiff's part, use of deposition admitting unchastity and circumstances characterizing publications as privileged on cross-examination held proper.

In libel action, where gist of alleged libelous publications was imputed lack of chastity on part of plaintiff and she claimed that defendants had falsely charged her with unchastity, her deposition, taken in public proceedings before civil service commission, acting in quasi judicial capacity, containing her sworn statements amounting to admissions of her unchastity, together with circumstances characterizing publications as privileged, *held* properly used on cross-examination.

18. Appeal and error ☞927(2)—After nonsuit, every presumption favors the judgment.

After a nonsuit is granted, every presumption is in favor of the judgment.

19. Appeal and error ☞757(3), 901—Appellant seeking to reverse judgment has burden of showing that it was improperly granted, and full and fair record of evidence applicable to points relied on should be printed in briefs.

When one seeks on appeal to reverse judgment, burden is on appellant to show that it was improperly granted, and full and fair record of evidence applicable to points relied on by appellant should be printed in briefs.

20. Appeal and error ☞757(3)—Appellate court is not required to search typewritten record for error.

Appellate court is not required to assume vexatious burden of searching typewritten record for error.

21. Appeal and error ☞757(3)—Where appellant does not pretend to present fair summary of evidence applicable to points relied on, court will assume that record supports judgment (Code Civ. Proc. § 953c).

Where there is no pretense on part of appellant to conform to Code Civ. Proc. § 953c, to present fair summary of evidence applicable to points relied on, appellate court will assume that record amply supports judgment.

Appeal from Superior Court, Los Angeles County; John M. York, Judge.

Action of libel by Ida Wright Jones against the Express Publishing Company and others.

From a judgment of nonsuit, plaintiff appeals. Affirmed.

Halverson & Price, of Los Angeles, for appellant.

Anderson & Anderson, of Los Angeles, for respondents Express Pub. Co., Kellogg, and Dickson.

THOMPSON, Justice pro tem. This is an appeal from a judgment of nonsuit rendered at the close of plaintiff's case, in an action for libel. The plaintiff claims that the nonsuit was erroneously granted, since she had proved a prima facie case by showing that the published language which charged her with unchastity was libelous per se, and that, under such circumstances, the law presumes malice and casts the burden on the defendants to show an absence of actual malice. Respondents assert that the evidence shows that the alleged libelous language was privileged, and that the charge therein contained was true.

The defendants were jointly charged with libel in the publication of alleged false and malicious statements concerning the character of plaintiff, which were made in the Los Angeles Evening Express on May 13 and June 2, 1922. Separate answers were filed, one by the defendant Woolwine, and the other by the remaining defendants jointly. At the close of plaintiff's case, a nonsuit was granted as to all defendants. Pending the appeal, the defendant Woolwine died, and the action survives only as to the remaining defendants. The Express Publishing Company, F. W. Kellogg, and Edward A. Dickson were publishers of the Los Angeles Evening Express, a daily newspaper of general circulation, having a subscription list of some 50,000 readers in and about the city of Los Angeles. At the time of the publication of the alleged libelous matter, the defendant Woolwine was district attorney of Los Angeles county, and plaintiff was his deputy, having charge of the investigation of juvenile offenses. The district attorney sought to discharge her by letter, but she refused to acknowledge his authority to do so without confirmation by the Los Angeles county civil service commission, to which she appealed for vindication. During a public investigation of the affair by this commission, plaintiff voluntarily made admissions of her guilt of the material portions of the alleged libelous publications. The publishers of the newspaper were entire strangers to the plaintiff, and no express malice was shown.

The record in this case discloses a state of affairs with relation to the personal association of the defendant Woolwine and the plaintiff, which, if true, would have justified the dismissal of both as unfit to hold their respective offices. Dissension arose between

them. May 2, 1922, Mr. Woolwine sent the following letter to plaintiff:

"You are hereby discharged from the position you now hold in the district attorney's office, that of juvenile investigator, for the good of the service. It is my usual custom to allow employees who have forfeited a right to hold their position in the district attorney's office to resign, but, after a consideration of all the circumstances, I do not deem that you are entitled to this courtesy.

"Yours very truly,

"Thomas Lee Woolwine,
"District Attorney."

On the same date he addressed a communication to the civil service commission, pursuant to the requirements of section 34, subd. 13, of the charter of Los Angeles, which read as follows:

"This is to advise you that I have discharged Ida Wright Jones, an employee of the district attorney's office. Her dismissal was embodied in a letter of date May 2, 1922, a copy of which I inclose.

"In accordance with the provisions of subdivision 13 of section 34 of the Charter, I give my reason for such action as follows:

"It was communicated to me by one of the employees of the district attorney's office that Miss Jones had stated to him that she was going to make an affidavit to the effect that she had been intimate with me, and that she was going to sell this affidavit to my political enemies for the sum of \$10,000 and then leave the state. Upon verifying the fact that she made such a statement and that she had planned to take such action, I immediately discharged her.

"Very respectfully,

"Thomas Lee Woolwine,
"District Attorney."

Subsequent to the delivery of these letters, the plaintiff demanded and secured a public hearing before the civil service commission, and on May 17, 1922, her deposition was taken in shorthand at great length, and with minute details she voluntarily confessed to a continuing course of sexual intimacies with the district attorney, extending over a period of several years, and resulting in a miscarriage on one occasion, and the performance of an illegal operation upon her at another time. She also admitted that she had consulted with her attorney and that she had made an affidavit concerning this illicit relationship, which affidavit she alleged was solely for her own protection, and denied that it was made for the purpose of selling it to his enemies.

[1] This conflict between the district attorney and the plaintiff led to several conferences. It was a common topic of conversation about the courthouse and in political circles, and was known to the reporters of the public press. An investigation of the truth of these stories was made by the reporters of the Los Angeles Evening Express.

Several interviews occurred between the reporters and the defendant Woolwine, and a request was made of him to furnish a true statement of the facts, in response to which he provided the newspaper reporters with copies of the two letters above quoted, together with a written statement concerning the affair. Plaintiff immediately learned of the district attorney's letter to the civil service commission, and of its contents. She did not deny the charge of unchastity. Indeed, she subsequently admitted the truth of this charge. There was good reason for the reporters to believe that the charge of unchastity was true. It was therefore in perfect good faith that these two letters, together with excerpts from the district attorney's written statement, with explanatory headlines, was, on May 13, 1922, published in the Los Angeles Evening Express. The material portion of this newspaper article was true. The plaintiff subsequently confessed her unchastity. While, in a public investigation before the civil service commission, she was contesting the authority of the district attorney to discharge her, she will be estopped from denying that she was in fact a public officer so as to relieve her from the application of the doctrine of privileged communications. The occasion rendered the communication privileged under the circumstances.

It is unnecessary to quote the entire newspaper article. The gist of this publication was found in the first paragraph, as follows:

"A plot to ruin him through charges of immorality was made today by district attorney Thomas Lee Woolwine in a letter to the county civil service commission announcing he had discharged Ida Wright Jones, an investigator in his office. The district attorney alleged that Miss Jones had tried to sell to his political enemies for \$10,000 a false affidavit in which she claimed to have had intimate relations with him."

The complaint contained two causes of action. The first count was based upon the newspaper publication of May 13th. The innuendo of this language was alleged to be that—

"Defendants meant thereby, and that it was so understood by those who read that article, that the plaintiff had made a false affidavit and had tried to sell said false affidavit to the political enemies of the defendant Thomas Lee Woolwine for \$10,000, and further that the plaintiff had falsely and dishonestly entered into a plot to ruin said defendant, Woolwine."

The second cause of action consisted of a charge of libel in the publication of the newspaper article of June 2, 1922, composed chiefly of quotations from the district attorney's statements, in which he severely criticized the civil service commission, and the individual members thereof, for their manner of investigation and their disposition of his

attempt to dismiss the plaintiff from his employ, together with a reiteration of his claim that plaintiff had threatened to sell her affidavit to the enemies of the district attorney, in which affidavit she claimed to have had intimate relations with him. This article also commented upon the evidence adduced at the investigation of the civil service commission, and quoted from chairman Burger as follows:

"We have taken a lengthy statement from Miss Jones in the presence of witnesses, in which she gives dates and places of misconduct and the names of witnesses. We have established that an illegal operation was performed in January, 1921. * * * The question of the discharge of Miss Jones has paled into insignificance. * * * Her own communication shows that she is no fit person to be in the employ of the county. * * * With such charges involving a public officer, this matter has gone beyond the province of the civil service commission, and should be taken to the grand jury."

The innuendo of the language of this second cause of action was alleged to be that—

"Defendants meant thereby, and that it was so understood by those who read said article, that the plaintiff was an unchaste, immoral, and evil woman, and that the plaintiff was at said time a prostitute."

It is evident from the innuendo employed with respect to both causes of action that the gravamen of the entire complaint is a charge that the defendants had falsely accused the plaintiff of unchastity.

[2] Having formally declared her construction of the alleged libelous language by the use of specific innuendo, the plaintiff will be bound by her interpretation, except where the language has a clear and obvious meaning independent of any explanation. *Gatley on Libel and Slander*, p. 474; *Newell on Libel and Slander* (4th Ed.) 599, §§ 546, 547; 16 Cal. Jur. 88, § 57. The last citation quoted approvingly from *Mitchell v. Sharon* (C. C.) 51 F. 424, which said:

"When the plaintiff, by innuendo, puts a meaning on the language uttered, he is bound by it, although the interpretation he chooses may be such as to destroy his right of action."

[3, 4] In the instant case, while much of the language employed is clear and requires no explanation, the purport of the entire publications is a challenge to the chastity of plaintiff, and a denial of her fitness for the office which she held. It is true that in the first cause of action plaintiff does complain of an alleged charge that she had planned to sell to the enemies of the district attorney a false affidavit, but the alleged falsity of this affidavit referred only to her lack of chastity. Certainly, if the affidavit were otherwise true, and the plaintiff admitted

her lack of chastity, then the affidavit was not false, and an action for libel would not lie, based upon a charge that she threatened to sell her own affidavit which in fact declared the truth respecting her own character. The only other specific charge complained of in the innuendo was that the defendants accused plaintiff of falsely and dishonestly entering into a plot to ruin the defendant Woolwine. The nature of this alleged plot is not revealed. Neither the pleadings nor the evidence disclose any facts upon which the charge of such a plot was founded. With respect to her chastity, the deposition of plaintiff before the civil service commission leaves no room for doubt. She freely admits the truth of this charge and condemns herself. By this confession she acknowledges her own unfitness for the office which she held, and she may therefore not be heard to complain of the publication of facts regarding her character, which, in a public investigation respecting her fitness for office, she admitted to be true, even though this confession was made subsequent to the first publication. In retaliation for the district attorney's effort to discharge her from his service, she confessed her shame for the evident purpose of punishing him. Harmful as this may have been to her reputation, she must be deemed to have anticipated the result of a public confession amounting to an acknowledgment of unchastity. In *Kenyon v. Hartford A. & I. Co.* (Cal. App.) 260 P. 952, it is said:

"The general rule of law is that whoever does an illegal or wrongful act is answerable for all the consequences that ensue in the ordinary and natural course of events, though those consequences be immediately brought about by intervening agents, provided such agents were set in motion by the primary wrongdoer, or provided those acts, causing the damage, were the necessary or legal and natural consequence of the * * * act. The publication was such a natural, usual, and ordinary consequence" of the act (of publicly admitting her lack of chastity in an investigation of her fitness for her office), and its publicity "must be deemed to have been contemplated."

See *Filer v. Smith*, 96 Mich. 347, 55 N. W. 1002, 35 Am. St. Rep. 603; *Burke v. Watts*, 188 Cal. 118, 127, 204 P. 578; *Ray Wong v. Earl C. Anthony, Inc.*, 199 Cal. 15, 18, 247 P. 894.

[5] "Libel is a false and unprivileged publication. * * *" Civ. Code, § 45. The communication in the instant case was neither false nor unprivileged. Certainly a newspaper cannot be held liable for damages for the publication of a communication without malice, concerning the fitness of one for a public office, which statement is voluntarily admitted by the accused to be true. But the appellant denies the application of the principle respecting privileged communications, for the reason that she was no longer a public officer, having been previously dismissed by

her employer. While it is true that the letter of dismissal had been sent to her the same day on which a copy was delivered to the reporters, she refused to acknowledge the authority of the district attorney to discharge her without the confirmation of the civil service commission. At the very time of the publications complained of she was engaged in resisting her employer's efforts to dismiss her. The question of the truth of these charges and of her fitness for the position which she held was then an issue before the commission, and not yet determined. Under such circumstances, for the purpose of the application of the principles respecting privileged communications, she must be deemed to come within the classification of public officers.

Privileged communications are defined in section 47 of the Civil Code as follows:

"A privileged publication is one made * * * (3) in a communication, without malice, to a person interested therein, by one who is also interested, or by one who stands in such relation to the person interested as to afford a reasonable ground for supposing the motive for the communication innocent, or who is requested by the person interested to give the information. * * *

The appellant contends that, since the language of the challenged publications was libelous per se, they were not privileged, but upon the contrary, were presumed by law to be malicious, and that the burden of proving an absence of actual malice rested upon the defendants. In support of this assertion, the case of *Stevens v. Storke*, 191 Cal. 329, 216 P. 371, is cited. That case was an action for libel against the editor of the *Daily News of Santa Barbara*, on the part of a private citizen. No question of the fitness of a public officer was there involved. So also the entire group of authorities cited in appellant's brief in support of the principle that a newspaper report which imputes to a person grave offenses or discloses conduct which will expose one to contempt and disgrace, is libelous per se, have reference to false charges against private individuals, and not against public officers. Quite a different rule prevails with respect to fair criticism of the necessary qualifications of a public officer.

[6, 7] The doctrine of privileged communications rests essentially upon public policy. Under proper circumstances the interest and necessities of society become paramount to the welfare or reputation of a private individual, and the occasion and circumstances may for the public good absolve one from punishment for such communications even though they be false. *Newell on Libel*, 340, § 341. It is the settled law of this state that one who relies upon the doctrine of privileged communications as a special defense, must adequately plead the facts. *Stevens v. Snow*, 191 Cal. 58, 64, 214 P. 968. This was done

in the instant case. It is true that, where the facts do not constitute a privileged communication, and the language is libelous per se, the law implies malice, and the burden is then upon the defense to prove a lack of actual malice. *Stevens v. Storke*, supra. The burden is also upon the defendant to prove any affirmative defense upon which he relies, including the defense of the truth of the charge, or that the communication is privileged. But when the pleadings admit, or the evidence on the part of the plaintiff affirmatively establishes, such facts, manifestly the defendant is thereby relieved of this burden. In *Gatley on Libel and Slander*, at page 280, it is said:

"When a defense of qualified privilege is set up, it is for the defense to allege and prove all such facts and circumstances as are necessary to bring the words complained of within the privilege, unless such facts are admitted before or at the trial of the action."

[8, 9] When essential facts are not disputed, the question as to whether the communication is privileged, is solely a question of law for the determination of the judge. *Newell on Libel*, 382, §§ 345-347; *Gatley on Libel*, 280-284, 650; *Dauphiny v. Buhne*, 153 Cal. 757, 96 P. 880, 126 Am. St. Rep. 136. "It is exclusively for the judge to determine whether the occasion on which the defamatory statement was made, was such as to render the communication a privileged one. * * * If, taken in connection with admitted facts, the words complained of are such as must have been honestly and in good faith used by the defendant, the judge may withdraw the case from the jury." *Newell on Libel*, 383, § 345. And when the facts clearly constitute a privileged communication, even though the language employed under other circumstances might be slanderous per se, the very privilege creates a presumption that the communication is used innocently and without malice. *Newell on Libel*, 381, § 342; *Jones on Evidence* (3d Ed.) 34, § 29.

[10] A newspaper stands in the same class as an individual so far as the application of the principle of privileged communications is concerned. In the case of *Snively v. Record Pub. Co.*, 185 Cal. 565, 198 P. 1, it is said:

"A newspaper stands in such relation to the people of the community in which it is published and circulated that, with regard to publications therein concerning local public officers, it comes within the scope of that part of subdivision 3 [Civ. Code, § 47] requiring a reasonable ground for supposing the motive of the communication innocent, if the matter published has the other characteristics of a privileged communication."

The appellant, however, contends that, where the language is libelous per se, even though it is applied to a public officer, innocent as the motives may be, malice is implied, and it will not be privileged. In support of this assertion, appellant relies upon

the cases of *Jarman v. Rea*, 137 Cal. 350, 70 P. 216, and *Dauphiny v. Buhne*, supra. Both of these cases, however, have been overruled by the *Snively Case*, supra, so far as they seek to limit the application of the doctrine of privileged communications. The opinion in the *Snively Case* is authority to the effect that proof of circumstances which characterize a communication as privileged under the provisions of the Civil Code, § 47, completely refutes the presumption of malice, even when the language is libelous per se. The statute provides that the very relationship existing between the publisher of the alleged libelous matter and the interested parties may afford reasonable grounds for supposing the motive for the communication to be innocent, and therefore privileged.

[11-13] In the instant case the proof seems conclusive of the absence of malice on the part of these respondents. The appellant was an entire stranger to the publishers of the newspaper. It was their business to disseminate news. The question of the fitness of a county officer was involved. Good moral character is peculiarly essential to an officer whose duties require her to supervise juveniles in the plastic years of their lives. The public was vitally interested in knowing the character of such an officer. No possible reason for malice on the part of these respondents was shown. Under such circumstances the mere presumption of malice will be refuted. Moreover, when a communication is clearly privileged, the question of the truth or falsity of the charge is not necessarily involved. It may be privileged even though the communication is false. The truth of a published communication is a complete defense to a charge of libel in itself. The claim of privileged communications under the statute is a defense entirely independent of the question of the truth of the charge.

[14] It is not only the privilege but the duty of every citizen and every newspaper in the community to fairly and impartially criticize the faults and misconduct of public officers, which faults impair their fitness or usefulness for the office which they seek or hold. So long as this is done in good faith and without malice, it is not libelous. In this regard the opinion in the *Snively Case*, supra, says:

"Since the conduct of public officers * * * is a matter in which every citizen of the community in which they serve is interested, the publication, * * * if otherwise privileged, must be considered as one made to persons interested. * * * There are some decisions which hold that a communication concerning a public officer which is not made to those having the power of removal or of appointment, but is made to the public generally, is not privileged. We are of the opinion, however, that this rule should not be followed. * * * Communications made in good faith and without malice to the public generally respecting the conduct of

such officer come within the spirit and purpose of the statute regarding privileged communications. They tend to promote knowledge concerning such officers and give citizens a basis for their petitions [for election or removal]."

So, also, in *Gatley on Libel*, at page 224, it is said:

"It is of the highest importance that none but persons of good character should be elected to public office. If a citizen honestly believes that a candidate for public office has committed an offense (or is unworthy or unfit for public service) * * * he is under a moral duty to society to communicate the facts as he believes them to exist, * * * and, if he does so without malice, his communication will be privileged."

This principle manifestly applies not only to candidates for office but to incumbents as well. Nor is the rule different with respect to appointive officers. Better service may be expected from public officers who are conscious of the watchful eyes of their constituents.

[15] The appellant charges error on the part of the trial court in sustaining an objection to the following question:

"It is stated in this article of May 13, 1922, that according to attachés of the district attorney's office who investigated the case, Miss Jones made charges of intimacy against four other prominent men of Los Angeles, one of them a city official, one of them a state official, the third a doctor and the fourth a lawyer. I will now ask you whether or not you made such a statement to any person?"

Respondents' objection to this question was sustained on the ground that appellant was bound by her construction of the language as indicated by her innuendo. This statement was a mere aggravation of the former charge of unchastity. If it were true, it would merely mean that she was more common and promiscuous in her sexual indulgences than she had admitted. When one is accused of unchastity and admits the charge a court will not indulge in critical distinctions to determine just what degree of profligacy the accused has attained. This ruling was therefore not prejudicial error.

[16, 17] The appellant also complains of the unwarranted extent to which respondents were permitted to range in cross-examination of her witnesses. But scant evidence is printed in her briefs, and the court's attention is not called to any fact thus elicited which appears to have been prejudicial to her cause. Error which does not prejudice the substantial rights of the appellant will not suffice to reverse the judgment. 2 Cal. Jur. 1004, § 595. The gist of the alleged libelous publications was imputed lack of chastity on the part of appellant. She claimed that the respondents had falsely charged her with unchastity. Her deposition, taken in a public proceeding before the civil service commis-

sion, acting in a quasi judicial capacity, contained her sworn statements amounting to admissions of her own unchastity, together with circumstances which characterize the publications as privileged. The use of this deposition on cross-examination was therefore competent and proper.

[18-21] This appeal was perfected under the provisions of section 953c, Code of Civil Procedure. Very little evidence was printed in appellant's briefs. Substantially all that appears in her opening brief is a bare record of the publication of the alleged libelous language. Because this language charged unchastity, and was libelous per se, it was assumed that it implied malice, and that proof of its publication constituted a prima facie case. But the original transcript of evidence, containing 425 pages, discloses satisfactory proof of the truth of the alleged libelous language, and of circumstances which rendered it privileged. After a nonsuit is granted, every presumption is in favor of the judgment. 2 Cal. Jur. 884, §§ 519, 520. When one seeks on appeal to reverse a judgment, the burden is upon the appellant to show that it was improperly granted, and a full and fair record of the evidence applicable to the points relied upon by appellant should be printed in the briefs. "It is not a compliance with the procedure governing appeals under the so-called alternative method, for an appellant to print in his opening brief, or in the supplement thereto, only the testimony in the case favorable to his contentions. All the evidence, material to the point made on the appeal, should be presented in order that the court may consider its weight and sufficiency, and any conflict presented therein. * * *" Eddy v. Stowe, 43 Cal. App. 789, 792, 185 P. 1024, 1025. The appellate court is not required to assume the vexatious burden of searching the typewritten record for error. 2 Cal. Jur., 645; Scott v. Hollywood Park Co., 176 Cal. 680, 169 P. 379; McLaren v. Hards, 39 Cal. App. 104, 178 P. 332. In the instant case a judgment of nonsuit was granted on the theory that the plaintiff's case showed that the alleged libelous matter was both true and privileged. Where there is no pretense on the part of appellant to conform to section 953c, Code of Civil Procedure, to print a fair summary of the evidence applicable to the points relied upon, this court will assume that the record amply supports the judgment. The burden placed upon the appellate courts, with the multitude of appeals which are now pending, is too onerous to permit a search of voluminous records to ascertain whether the judgment is supported by substantial evidence.

The judgment is therefore affirmed.

We concur: KOFORD, P. J.; STURTEVANT, J.

(262 P.)

inal agreement as an exhibit thereto *held* not abuse of discretion.

2. Pleading ⚡236(5)—Allowance of amendments to conform to proof is discretionary and no abuse is shown unless substantially different issues are produced.

Allowance of amendments to conform to proof rests in discretion of court, and no abuse of discretion is shown, unless by permitting amendment new and substantially different issues are produced in case or rights of adverse party are prejudiced.

3. Brokers ⚡86(5)—Owner's acceptance of purchaser and execution of contract of sale is conclusive, in broker's action for commission, that purchaser was able, willing, and ready.

Court's finding, in action to recover commission on sale of real property, that purchaser procured by plaintiff was ready, able, and willing to carry out contract, *held* supported by record; execution of contract of sale by defendant being conclusive proof that he was satisfied as to qualification of purchaser and his ability to carry out terms of contract.

4. Appeal and error ⚡1010(1)—Court's finding, in action for commission, that broker did not induce purchaser to enter into sale by fraudulent representations, supported by record, was final.

In action to recover commission on sale of real property, court's finding that purchaser had not been induced to enter into sale by false and fraudulent representations of plaintiff, having ample support in record, was final.

5. Statutes ⚡205—Statute, including all provisions, must be considered as whole to determine legislative intention.

A statute, including all its provisions, must be read and considered as a whole, in order that true legislative intention may be determined.

6. Statutes ⚡190—Statute relating to corporation's license to sell real estate, being free from ambiguity, needs no interpretation (Broker's Act, §§ 2, 8, 9, 10).

Broker's Act, §§ 2, 8, 9, 10 (Deering's Gen. Laws 1923, Act 112), relating to license of corporation to sell real estate, being free from ambiguity or uncertainty, needs no interpretation.

7. Brokers ⚡42—President of licensed corporation may conduct business of real estate broker either as such president or as individual (Broker's Act, §§ 2, 8, 9, 10).

As respects right to commissions, under Broker's Act, §§ 2, 8, 9, 10 (Deering's Gen. Laws 1923, Act 112), president of licensed corporation is authorized by corporate license to conduct business of real estate broker either as such president or as an individual.

Department One.

Appeal from Superior Court, Los Angeles County; F. M. Jamison, Judge.

Action by T. J. McNamara against J. W. Steckman to recover commission on sale of

202 Cal. 569

McNAMARA v. STECKMAN. (L. A. 8936.)★

Supreme Court of California. Dec. 9, 1927.

Hearing Denied in Bank Jan. 5, 1928.

1. Pleading ⚡237(6)—Where broker inadvertently attached proposed modified agreement of sale to complaint instead of original agreement, on which he based claim for commission, court properly permitted amendment to conform to proof.

In action to recover commission on sale of real property, where plaintiff through inadvertence attached as an exhibit to his amended complaint proposed modified agreement of sale of land, instead of original agreement, on which he was basing claim for commission, permitting amendment to conform to proof with orig-

real property. From a judgment for plaintiff, defendant appeals. Affirmed.

Hearing denied in bank; Langdon, J., voting for a hearing.

Tanner, Odell & Taft, of Los Angeles, for appellant.

Fogel & Beman, of Los Angeles, for respondent.

PRESTON, J. This is an appeal from judgment in favor of plaintiff in an action to recover an alleged commission of \$3,000 earned by him in the sale of certain real estate owned by defendant. The trial court found in substance that defendant, by written agreement of January 8, 1924, employed plaintiff, a duly licensed real estate broker, to sell his said property for \$78,000, payable upon the terms stipulated in said agreement, plaintiff to receive for his services a commission of 5 per cent. of the purchase price, and the agreement to continue until terminated by 15 days' notice to plaintiff; that plaintiff waived the right to collect any sum greater than \$3,000 as such commission; that on February 2, 1924, prior to any revocation of said agency agreement, plaintiff procured a purchaser ready, able, and willing to purchase said property at the price and according to the terms agreed upon; that on said day defendant, his wife, and said purchaser entered into a written agreement of sale and purchase of said property (being Exhibit B to plaintiff's complaint to conform to proof) at a price of \$78,000, \$8,000 thereof payable upon execution of the agreement and the balance in stipulated installments; that said purchaser was at all times ready, willing, and able to carry out said agreement, and did make the first \$8,000 payment therein provided to defendant; that on February 13, 1924, defendant and said purchaser, by written mutual release, canceled said contract of February 2, 1924, the \$8,000 initial payment being returned to purchaser; that no part of said 5 per cent. commission was paid to plaintiff, wherefore the court gave judgment in his favor for \$3,000, interest and costs.

[1, 2] It appears that shortly after the agreement of sale of February 2, 1924, between defendant and the purchaser was executed, the purchaser returned and attempted to secure defendant's consent to several slight modifications. The principal amendment related to having notes secured by trust deed subject to a mortgage of \$40,000 instead of \$35,000. Defendant refused to accede to the proposed changes. The document as amended was never executed by the parties, and later, on February 13, 1924, they signed said mutual release. Up to the date of execution of this release, however, the original contract of sale was in full force and effect. Through inadvertence, plaintiff attached as an exhibit to his amended complaint the

proposed modified agreement of sale instead of the original agreement. Therefore the court permitted him to file a complaint to conform to proof with the original agreement as an exhibit thereto. Appellant claims to have been prejudiced by such action, but we hold that no abuse of discretion is shown and that the permitting of the amendment was plainly justified and clearly correct. It is elementary that the allowance of amendments to conform to proof rests in the discretion of the court. The utmost liberality is allowed in this respect, and no abuse of discretion is shown unless by permitting the amendment new and substantially different issues are introduced in the case or the rights of the adverse party prejudiced. 21 Cal. Jur. pp. 209, 210, § 143, and many cases there cited.

[3, 4] Appellant's contention that the broker did not find a purchaser ready, able, and willing to buy the property at the price and terms mentioned in his contract of employment is likewise unfounded. It is true that said employment contract specified that the broker should secure a \$21,000 cash payment, but it also contained the following saving clause:

"* * * Terms can be arranged satisfactorily or at any other price or terms that said owner may accept."

And the owner did in fact accept other price or terms, to wit, those set forth in the agreement of sale. His unqualified acceptance thereof could have been expressed no more plainly than it was by his signature to that document. Furthermore the execution by the owner of said contract of sale is conclusive proof that he was satisfied as to the qualifications of the purchaser and his ability to carry out the terms of the contract. In addition to the above, the record abundantly supports the finding of the court to the effect that the purchaser was ready, able, and willing to carry out the contract. Defendant endeavored to prove that said purchaser had been induced to enter into the sale by false and fraudulent representations of plaintiff, especially to the effect that plaintiff would aid in carrying the financial burden of the deferred payments. However, the court specifically found against defendant on these allegations, and such conclusion likewise has ample support in the record and is final. The principles of law governing the several questions raised by this issue are set forth fully in the case of Wood & Tatum Co. v. Basler, 37 Cal. App. 381, 383, 385, 173 P. 1109, 1110, which involved a more or less similar situation, and from that case we quote with approval the following:

"The consideration results from the services performed in securing purchasers for the land upon terms that were agreeable to and ratified by appellant. It is a matter of no consequence that in the beginning somewhat different terms were contemplated. * * * As to the extent

of the services required of an agent to entitle him to his commission, the rule is well settled, and no elaboration is called for. We find in the record ample evidence to show that the parties were able, willing, and ready to complete the purchase, and the failure of the consummation of the sale was due to the neglect of appellant to perfect his title. And it may be added that appellant is estopped from objecting to the qualifications of the proposed purchasers for the reason that the evidence brings the case clearly within the principle announced in 4 R. C. L. p. 309, as follows: 'Once the customer procured by the broker is accepted by the employer, the latter is thereafter estopped from denying the purchaser's ability or willingness to complete the contract, inasmuch as he is not bound to accept the offer of such person without a reasonable opportunity to inquire and satisfy himself in relation to it. Consequently his acceptance should estop him from denying anything against this claim except fraud on the part of the broker in inducing the acceptance.' See, also, *Carrington v. Smithers*, 26 Cal. App. 460, 147 P. 225. As we have seen, plaintiff notified defendant of the sale of the property, and informed him who were the purchasers. These parties were all known to the defendant. * * * With knowledge of these things, defendant accepted the deposit of \$600, approved of the sale in writing, and promised to pay the said commission of \$5,000. He thereby accepted said purchasers upon his own responsibility, and could not thereafter dispute their capacity and disposition to make the purchase."

See, also, to the same effect, *Sobaje v. Schubert*, 37 Cal. App. 709, 174 P. 364.

The real issue to be determined upon this appeal, however, concerns the sufficiency of the evidence to support the finding that plaintiff was a duly licensed real estate broker. He testified that individually he held no license, but that he was president of T. J. McNamara, Inc., a corporation, and produced the license of said corporation to engage in the real estate business for the year 1924, the second paragraph of which reads as follows:

"The president of said corporation is also by this license entitled to engage in the real estate business for the term last hereinabove mentioned, such real estate business being said business engaged in during the term of this license, by the corporation aforesaid. * * *"

He likewise produced a card certifying as follows:

"* * * This statement is to certify that T. J. McNamara is the president of T. J. McNamara, Inc., * * * which was issued corporation license * * * in accordance with the provisions of chapter 605, Statutes of 1919. * * * [Signed] State Real Estate Department, Edwin T. Keiser, Commissioner."

Appellant contends that the sale should have been negotiated and this action brought in the name of T. J. McNamara, Inc., that, inasmuch as plaintiff as an individual held no real estate license, if he had any right at all as a broker to negotiate the sale or to

pursue the action, it was a right as president of the corporation only; hence his execution of the contract with defendant and his institution of this action as an individual, without reference to his office as president, was unauthorized and unlicensed, and he cannot recover.

Section 2 of the Broker's Act (Deering's Gen. Laws, 1923, p. 26) defines a real estate broker, within the meaning of the act, as "a person, copartnership or corporation who, for a compensation, sells, or offers for sale. * * * real estate. * * *"

Section 8 provides:

"No real estate license shall give authority to do any act mentioned in section two of this act to any person, copartnership or corporation other than those to whom said license is issued; provided, however, that when a license is issued to a corporation the officers thereof, *other than the president*, shall be required to obtain a license. * * *"

Section 9 provides that, if the applicant is a corporation the real estate commissioner may require such proof as he may deem advisable as to the honesty, truthfulness, and good reputation of the officers thereof.

Section 10, providing for license fees, reads in part:

"* * * If the licensee be a corporation, the license issued to it *shall entitle the president thereof to engage in the business of real estate broker* within the meaning of this act. * * *"

[5, 6] There is no uncertainty or ambiguity in this clause, and it cannot be interpreted to mean other than what the wording clearly imports, to wit, that a license to a corporation is also a license authorizing the president thereof to act as a real estate broker. This meaning is made even more plain when the provision is read in connection with the various other provisions of the statute, particularly section 8, requiring all officers other than the president to obtain a license. The specific wording of the license itself as above set forth is likewise significant. It is a cardinal rule of construction that a statute, including all its provisions, must be read and considered as a whole in order that the true legislative intention may be determined (23 Cal. Jur. § 134, p. 760), and it is also the rule that a statute free from ambiguity or uncertainty, as is this statute, needs no interpretation (*Davis v. Hart*, 123 Cal. 387, 55 P. 1060).

If the intent and purpose of the act were merely to authorize the corporation alone to act as broker, what possible meaning or value could be attached to the clause reading, "* * * shall entitle the president thereof to engage in the business of real estate broker * * *"? Would not the various references to his authority be merely surplusage? And how could or would a licensed corporation act except through its officers?

We therefore have no hesitancy in concluding that under said statute a license to a corporation also authorizes its president to engage in the business of a real estate broker.

[7] But the further question arises as to whether such authorization extends to acts performed by him as a broker in his individual capacity in transactions unconnected with the corporate business. We are directed to no citation of law other than the statute itself, and there are no cases in this state bearing directly on the point. The purport of decisions from other jurisdictions would appear to harmonize with the holding that the license also extends to acts performed by the broker in his individual capacity. In the case of *Friedland v. Isenstein*, 191 Ill. App. 109, 115, it was held that, when a broker's license is issued to a partnership, and one of the partners succeeds to the business of the partnership upon dissolution of the firm and continues business *individually* at the same location, he is to be considered a licensed broker. Quoting with approval from *City of St. Charles v. Hackman*, 133 Mo. 634, 34 S. W. 878, the court in that case said:

"Looking at the purpose of the tax and the terms of this ordinance it would seem that a license to two persons to carry on a certain business for a year at a certain place should naturally be interpreted to include the right of one of them to so carry on that business. A license to a firm of two would ordinarily be understood to be a license to one of the firm, on the general principle that the greater includes the less."

Would any advantage be gained by requiring a president of a licensed corporation to secure a second permit if he desired to negotiate a sale as an individual? "The single primary purpose of the [Brokers'] Act [as defined in the case of *Riley v. Chambers*, 181 Cal. 589, 593, 185 P. 855, 856 (8 A. L. R. 418)], is to require of real estate brokers and salesmen that they be 'honest, truthful and of good reputation.' All of its provisions, including the requirement of a license, are but incidental to this single purpose and designed to accomplish it." *Riley v. Chambers*, supra. Now, this single, primary purpose of the act is accomplished both as to the corporation and its president, whether he acts for the company or individually, through compliance by the real estate commissioner with the requirement of section 9 that he secure such proof as he deems advisable as to the honesty, truthfulness, and good reputation of the officers of an applicant corporation. It would certainly be illogical to have the commissioner institute two inquiries into the qualifications of the officer and then issue two permits to him, one as president and one as an individual. If the commissioner is satisfied as to his honesty, integrity and truthfulness as an officer, he cannot question

his possession of like qualities as an individual. We hold that under said statute the president of a licensed corporation is authorized by the corporate license to conduct the business of a real estate broker either as such president or as an individual.

We are not concerned in this case with the question as to whether plaintiff should turn over to the corporation the amount of the commission received by him, for that is a distinct and separate matter to be adjusted between his corporation and himself.

Judgment affirmed.

We concur: CURTIS, J.; SEAWELL, J.

202 Cal. 586

CONTINENTAL NAT. BANK OF LOS ANGELES v. REPUBLIC CASUALTY CO. et al. (L. A. 8853.)

Supreme Court of California. Dec. 12, 1927.

1. Schools and school districts $\S$ 81(2)—Contractor's bond to school district, given in sum and in manner required, held "statutory bond," precluding recovery by assignee of unperfected materialmen's claims (Public Works Act).

Bond given by contractor to school district for construction of school buildings in proportion to amount of contract required by Public Works Act (St. 1919, p. 487), given and accepted at time and in manner required by statute, held "statutory bond," under which no recovery could be had for certain assigned claims of materialmen and laborers which had not been perfected prior to assignment.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Statutory Bond.]

2. Schools and school districts $\S$ 81(2)—Omission of required provisions, included by implication, held not to prevent treatment of contractor's bond to school district as statutory bond (Public Works Act).

Fact that bond of contractor, given school district on construction of school buildings, omitted certain obligations required by Public Works Act (St. 1919, p. 487), held not to prevent bond being statutory bond, where omitted details might be included in obligations assumed by liberal construction of language used.

Department 2.

Appeal from Superior Court, Los Angeles County; Charles A. Burnell, Judge.

Action by the Continental National Bank of Los Angeles against the Republic Casualty Company and another. Judgment for defendants, and plaintiff appeals. Affirmed.

Paul Barksdale D'Orr and A. L. Abrahams, both of Los Angeles, for appellant.

Fredericks & Hanna, of Los Angeles, for respondents.

RICHARDS, J. This is an appeal from a judgment of the superior court of the county

of Los Angeles in favor of the defendants in an action instituted by the plaintiff as assignee of certain claimants to recover upon a bond upon which the defendant the Republic Casualty Company was a surety, and which bond its principal, the National Construction Company, a corporation, caused to be executed in connection with certain contracts entered into between said construction company and the board of trustees of Santa Ana school district for the construction of two certain public school buildings in said district. After the execution of said bond and after the work of construction upon said buildings had proceeded for some time, the plaintiff loaned to the contractor upon several occasions certain sums of money aggregating \$11,600 for the purpose of assisting him in the performance of his contract. Thereafter the plaintiff further agreed to finance said contract, provided the contractor would turn over to it the warrants issued and to be issued to him by the school district as the work upon said buildings went on. The plaintiff also became the assignee of the claims of various materialmen and laborers who had furnished material or performed work upon the erection of one of said buildings, and the indebtedness thus accruing to it, not having been paid by the contractor or by said district, the said plaintiff commenced this action upon said contractor's bond for the recovery of the several amounts alleged to be due to it upon said claims. The trial court rendered judgment for the defendants, and in so doing made its findings of fact upon the hearing of said action, and with such findings of fact the appellant herein does not disagree, and for that reason has presented its appeal upon the judgment roll alone. The appellant, however, bases its appeal upon the alleged erroneous conclusion of law which the trial court deduced from said findings of fact; the appellant's chief and only substantial contention being that the conclusion of law of the trial court to the effect that "the bond set forth in plaintiff's complaint and recovery upon which is sought in this action against the surety, defendant the Republic Casualty Company, is the statutory bond required by the Act approved May 10, 1919, and known as the 'Public Works Act.'" The appellant herein, in order to perfectly clarify the question presented upon this appeal, concedes that, if the foregoing conclusion of the trial court "is sound, * * * then the judgment must be affirmed; but, if not, the judgment should be reversed and a new judgment ordered in favor of the plaintiff and against the defendant the Republic Casualty Company." The reason why the said bond, if it is held to be the statutory bond referred to in the trial court's aforesaid conclusion of law, is ineffectual as binding upon the surety, is to be found in the findings of fact with which the appellant agrees and wherein it ap-

pears that at the time of the transfer of the claims to it upon which its action as the assignee thereof is predicated, the assignors thereof had not so far perfected their said claims as to entitle them to make assignments of the same, or as to entitle the plaintiff as the assignee thereof to recover upon said bond as a statutory bond. It is, however, the contention of the appellant that said bond, though not a statutory bond, is a common-law bond and should have been held by the trial court in its conclusions of law to be such, in which event the plaintiff would have been entitled to a recovery upon its said assigned claims.

[1] We are of the opinion that the trial court was correct in holding the bond in question to be the statutory bond required by the provisions of the statute to which its conclusion of law refers. The findings of fact of the trial court show that said bond and the contract to which it relates were delivered together as parts of one and the same transaction; that the bond in question was such a bond as was referred to and required by the specifications under which the contract was awarded; that the bond is in the proportion of the amount of the contract which the statute requires; that the bond was given to and accepted by the school board at the time and in the manner required by the statute; that the law requires said school board to exact from the contractor such a bond, and that in the exaction thereof said school board performed its mandatory duty under said law; that the school board accepted said bond as being the bond required by statute, and thereafter did certain acts which it was expressly forbidden to do until such bond had been filed; that said bond, in the formalities of its execution and in its essential and material provisions embraces the requirements of the statute as to what must be included in such statutory bond. From the foregoing undisputed facts the conclusion is irresistible that it was the intention of all of the parties to the transaction in the course of which such bond was given that it should be, and be considered as, the statutory bond which the law in question required.

[2] It is, however, the contention of the appellant that said bond is not to be treated as a statutory bond, for the reason that it omits from its requirements certain of the obligations which the statutory bond was required to embrace and assure. We are of the opinion that this contention is without substantial merit for two main reasons; the first of which is that, while the bond does not enter into the detail of its assumed obligations in certain particulars required by the statute, its language, when liberally construed, is broad enough to include these details, and the second reason is that supplied by certain recent decisions of this court and the District Court of Appeal which to our minds furnish sufficiently identical requisites in bonds of

this character to render such decisions decisive of the instant case. We are unable to distinguish between this case and the case of *Stone v. Shackelford*, 64 Cal. App. 750, 222 P. 846, wherein a bond given in pursuance of the Public Works Act (St. 1919, p. 487), under which the bond in question here was given, and, being literally identical as to its binding clauses with the bond herein, was held to be a statutory bond. Neither are we able to discover a basic distinction between the bond here under review and that considered and held to be a statutory bond in the case of *Miles v. Baley*, 170 Cal. 151, 149 P. 45. The cases of *Pacific Wood & Coal Co. v. Oswald*, 179 Cal. 712, 178 P. 854, and *Sherman v. American Surety Co. of New York*, 178 Cal. 286, 173 P. 161, are also instructive and controlling in reaching the conclusion that the bond in question here is in substantial compliance, as to the very matters which form the basis of the appellant's criticism, with the terms of the statute which prescribes the form and substance of such bond. We are therefore of the opinion that the trial court was entirely correct in its conclusion of law holding the bond here under review to be a statutory bond, and hence was also correct in its judgment denying the plaintiff any relief in its action thereon.

The judgment is affirmed.

We concur: SHENK, J.; LANGDON, J.

202 Cal. 675

MOX, Inc., v. WOODS et al. (L. A. 8861.)

Supreme Court of California. Dec. 17, 1927.

1. Conspiracy ⇨18—Complaint for damages from conspiracy to defraud by land scheme held to state cause of action as against general demurrer.

Complaint for damages resulting from conspiracy to defraud by means of land scheme, alleging that all defendants conspired to create fictitious value for desert land, and to buy building material and supplies and construct a few improvements thereon as part of scheme, and to subdivide tract, sell it for large aggregate sum, receive proceeds, and escape liabilities, and that plaintiff was deceived and furnished corporation, which was alter ego of one conspirator, hardware and building material used in scheme and was not paid, held to state cause of action as against a general demurrer.

2. Conspiracy ⇨1—Elements of "action for conspiracy" are formation and operation of conspiracy and damage from acts in furtherance thereof; cause of action being damage suffered.

Elements of action for damages from civil conspiracy are formation and operation of conspiracy and damage resulting to plaintiff from act or acts done in furtherance of common design; cause of action being the damage suffered.

3. Conspiracy ⇨14—All conspirators are liable for act of one done in furtherance of conspiracy during its continuance.

All conspirators are liable for act of any one of them, which is done in furtherance of conspiracy during its continuance, and hence conspirator may be held liable, though he in fact committed no overt act.

Department 1.

Appeal from Superior Court, Los Angeles County; Frank C. Collier, Judge.

Action for damages for conspiracy, brought by Mox, Incorporated, against Frank E. Woods and others. From a judgment dismissing the action as to certain defendants, plaintiff appeals. Reversed.

Pritchard & Daniels, of Los Angeles, for appellant.

W. E. Lady, of Los Angeles, for respondents.

PRESTON, J. This is an appeal by plaintiff corporation from judgment dismissing from the action certain defendants, following order sustaining general demurrers separately interposed by them, plaintiff having declined to amend. The defendants who had judgment are Frank E. Woods and Nancy E. Woods, husband and wife, and Bank of America, a corporation.

The complaint attempts, and we think successfully, to plead damages as the result of a civil conspiracy, to wit, a conspiracy to inflict damages by wrongful acts. We are not concerned with the question of the ability of the plaintiff to prove the allegations of the complaint, and this would be true even though we could foresee insuperable difficulties in making such proof. We are merely to pass upon the sufficiency of the complaint as a pleading.

[1, 2] The conspiracy charged and the damages alleged may be set forth briefly as follows: Defendants Woods and wife were the owners in 1923 of some 1,540 acres of desert lands in San Bernardino county of a market value not to exceed \$17,000. Intending to create a false and fictitious value therefor and to thereby cheat and defraud the public in the sale and disposition of these lands in small tracts, a scheme or joint venture of all defendants was planned, whereby they were to receive all the proceeds from such venture and yet not be responsible for any of the losses or liabilities that would surely occur on the eventual dissipation of the real estate bubble. Accordingly, the properties were named as the Lenwood Estates. Defendant William Barnard, a man known to all the other defendants to be insolvent, was selected as the manager of said Lenwood Estates, although he was to and did operate under the name of Arizona-California Land Company, a corporation, said company being his alter

ego. A secret trust agreement was entered into among the defendants by which the lands were to be deeded to defendant Bank of America as trustee, and defendants Woods and wife, former owners of the property, were to be free from liability of any kind in connection with the scheme. Said lands were to be subdivided and prices were fixed for the sale of the various small tracts, which said prices would in the aggregate amount to some \$200,000 or more for the entire tract. The whole scheme was from its inception one to cheat and defraud, as it was never the intention of defendants to do more than create a fictitious value for said properties, and then at the most appropriate time abandon the scheme, divide the receipts, and at the same time escape liability for the losses and outlays. As a part of said plan it was the intention of defendants to make a false showing as to their intended development of said tract, and to that end it was their intention to buy building material and supplies and construct a few improvements on a part of said property, to aid in creating a false belief in the public as to said plans and intentions to develop said tract. The scheme of defendants was successfully carried through. The public was cheated out of thousands of dollars, and the creditors and investors of the scheme were left to suffer without redress. Plaintiff was one of said sufferers, having furnished to said Arizona-California Land Company hardware and building material which was used and employed as a part of said scheme. Plaintiff was deceived into believing that the goods were being furnished to a concern which included the owners of the tract and that the owners would be responsible for the goods so furnished. Defendant bank represented to said plaintiff that said owners would be responsible therefor should they be sold and delivered to said concern. The purchase price of said goods was never paid, and plaintiff suffered damages as the result of said conspiracy in the amount set forth in said complaint.

There is no escape from the conclusion that the complaint states a cause of action. The elements of an action for civil conspiracy are the formation and operation of the conspiracy and damage resulting to plaintiff from an act or acts done in furtherance of the common design. The cause of action is the damage suffered. "It is a general and well-settled principle of law that, where two or more per-

sons are sued for a civil wrong, it is the civil wrong resulting in damage, and not the conspiracy, which constitutes the cause of action. *Herron v. Hughes*, 25 Cal. 555; *Davitt v. Bakers' Union*, 124 Cal. 99, 56 P. 775; *Dowdell v. Carpy*, 129 Cal. 168, 61 P. 948; *Menner v. Slater*, 148 Cal. 284, 83 P. 35. In such an action, the major significance of the conspiracy lies in the fact that it renders each participant in the wrongful act responsible as a joint tort-feasor for all damages ensuing from the wrong, irrespective of whether or not he was a direct actor and regardless of the degree of his activity. *Cohen v. Fisher*, 135 App. Div. 238, 120 N. Y. S. 546; *White v. White*, 132 Wis. 121, 111 N. W. 1116; *Miller v. John*, 208 Ill. 173, 70 N. E. 27. A plaintiff is entitled to a joint recovery of damages against such defendants as he can show have united or co-operated in inflicting a wrong upon him. *Herron v. Hughes*, supra; *More v. Finger*, 128 Cal. 318, 60 P. 933; *Nevin v. Gary*, 12 Cal. App. 1, 106 P. 422." *Revert v. Hesse*, 184 Cal. 295, 301, 193 P. 943, 946.

See, also, *Bowman v. Wohlke*, 166 Cal. 121, 135 P. 37, Ann. Cas. 1915B, 1011; 5 Cal. Jur. p. 528, §§ 29-31.

[3] The advantage gained in charging a conspiracy is that the act of one during the conspiracy is the act of all if done in furtherance thereof, and thus defendants may be held liable who in fact committed no overt act whatsoever and gained no benefit therefrom. *Revert v. Hesse*, supra.

The attorney for respondents has not dignified the cause by the filing of any brief therein and we have had before us only the unanswered arguments and citations of appellant. On the hearing, the attorney for respondents was invited to appear. He not only declined to attend the hearing of the cause, but also declined to file a brief. "His blessed assurance" that all is well has caused us to halt and re-examine the principles controlling this investigation, but, after a careful consideration of the whole cause, we are constrained to assert that, as against a general demurrer, the complaint over and again states a cause of action against the said defendants.

The judgment entered in favor of defendants Frank E. Woods, Nancy E. Woods, and Bank of America, a corporation, is therefore reversed.

We concur: CURTIS, J.; SEAWELL, J.

202 Cal. 665

SCHELLENBACH v. LAGASSE et al.
(L. A. 8843.)

Supreme Court of California. Dec. 16, 1927.

1. Specific performance ⇨28(3)—Contract providing extension of time, not specifying who could grant extension, held too uncertain for specific performance.

Provision of contract for sale of land that "time is the essence of this contract but the time for any act required to be done may be extended not longer than thirty days," which did not specify what person or persons had authority to grant extension, was too indefinite and uncertain to form the basis of an action in specific performance.

2. Vendor and purchaser ⇨78—Contract with time of the essence held terminated within time limited for performance, where provision for extension was unenforceable.

Where contract for sale of land provided that acts be done within 30 days and that "time is the essence of this contract but the time for any act required to be done may be extended not more than thirty days," without specifying who could grant extension, held, that provision granting extension of time in addition to the 30 days was too indefinite and uncertain and vendor at the end of 30-day period had right to consider contract at end, in absence of valid extension of time for performance.

Department 2.

Appeal from Superior Court, Los Angeles County; William C. Doran, Judge.

Action by Amelia J. Schellenbach against Simeon Lagasse and others to quiet title to certain land. Judgment for plaintiff, and defendants appeal. Affirmed.

D. A. Knapp, of San Francisco, for appellants.

Dockweiler, Dockweiler & Finch, of Los Angeles, for respondent.

SHENK, J. Plaintiff brought this action to quiet her title to certain land in Los Angeles county. The complaint is in the usual form. In their second amended answer the defendants set up as their interest in said land a contract of purchase dated October 25, 1924, wherein the plaintiff agreed to sell and the defendant Simeon Lagasse agreed to buy said land for \$7,750 and assume a mortgage of \$6,000 on the property. The sum of \$350 was to be paid and was paid upon the execution of the contract, and the remaining cash payment of \$7,400 was payable within 30 days from the date of the contract. It was then alleged that "said contract stipulated that either party should have 30 days to prepare for and to consummate said contract, said period to be extended thirty days at the option of either party." Other allegations with reference to the state of the title are then set forth, but it is deemed unnecessary to recite them for the reason that they

do not have any controlling bearing on the disposition of this appeal. By the second amended cross-complaint the defendants realleged in substance the matters set forth in their second amended answer, and in addition thereto alleged facts intended to entitle them to a specific performance of said contract. It was therein averred that on the 14th day of November, 1924, the defendants discovered that a tenant was in possession of said property under a leasehold running for a term of years, and thereupon notified the plaintiff to cause the immediate removal of said tenant, and that plaintiff failed, refused, and neglected to do so; that thereupon the defendant Simeon Lagasse notified the plaintiff "that he would exercise his option of extending said term for consummation of said contract to and until the 25th day of December, 1924, and would at his own expense in the meantime secure the removal of said tenant." The complaint was filed on December 4, 1924, which was before the expiration of the 30-day period thus attempted by the defendant Simeon Lagasse to extend the time of payment. The cause was called for trial and the plaintiff made proof of her title. A discussion ensued between court and counsel, during which the contract of purchase and sale was received in evidence. The court then inquired of counsel for defendants what he intended to prove, and he stated in effect that the defendants were standing on a clause in the contract, as follows:

"Sixth. Time is the essence of this contract but the time for any act required to be done may be extended not longer than thirty days by (c) — (d) —. By — Real Estate Agent."

After further discussion the plaintiff's counsel interposed an objection to the defendants' further participation in the case on the ground that the second amended answer and the second amended cross-complaint, in conjunction with the admitted facts and the statement of defendants' counsel as to what he intended to prove, did not state facts sufficient to constitute a defense or a cause of action. The objection was sustained. No application was made by the defendants to amend and judgment was ordered for the plaintiff from which judgment the defendants appeal.

[1, 2] The controversy turns upon the right of the defendants to a 30-day extension of time under the contract or to a reasonable extension of time under the circumstances involved. The trial court took the view that clause "Sixth" of the contract, above quoted, was too indefinite and uncertain to form the basis of an action in specific performance. In this the court, we think, was correct. The contract was on a standard form containing appended instructions as to what should be inserted in the blank spaces. These instruc-

tions were not followed, and it is impossible to tell from the incomplete provision for the extension of time what person or persons have authority to grant the extension. The defendants insist that the power to extend the time was vested in either party at his option. But the contract does not so provide. No attempt was made to reform the instrument, and the allegation of the second amended answer and cross-complaint, to the effect that either party could at his option extend the time for 30 days beyond the 30-day period provided in the contract for the consummation of the deal, must fail in the light of the provisions of the contract itself. The same conclusion must also be announced concerning the claim of the defendants that they would have a reasonable time after the 25th day of November, 1924, in which to perform. When the contract period of 30 days elapsed, the plaintiff had the right to consider the contract at an end in the absence of some valid extension of time for performance. As the incomplete provision of the contract did not have that effect and no right to an extension of time was otherwise shown, the trial court was right in ordering judgment for the plaintiff.

The judgment is affirmed.

We concur: RICHARDS, J.; LANGDON, J.

202 Cal. 647

SCHUSTER v. WILLIAMS. (L. A. 8890.)

Supreme Court of California. Dec. 15, 1927.

Pleading §349—Where answer denied indebtedness, admission in counterclaim did not authorize judgment on pleadings.

In action for money due, where defendant had, in her answer, denied that she was indebted to plaintiff in any sum whatever, any admission of indebtedness she may have made in her counterclaim did not impair denials of her answer, and plaintiff's motion for judgment on pleadings was properly denied.

Department 1.

Appeal from Superior Court, Los Angeles County; John L. Hudner, Judge.

Action for money due by Elsbeth Schuster against Emma A. Williams. From a judgment for defendant, plaintiff appeals. Affirmed.

L. V. Beaulieu, of Los Angeles, for appellant.

Lawler & Degnan, of Los Angeles, for respondent.

CURTIS, J. There is no merit in this appeal. Appellant claims that the court erred in denying her motion for judgment on the pleadings. This motion was based upon the ground that the answer admitted the indebtedness set forth in the complaint, and to recover which the action was instituted by plaintiff. The answer denies in apt language the allegations of the complaint. It is contended, however, by appellant that respondent in a counterclaim admitted that she was indebted to appellant in the sum demanded by the appellant. On account of what is undoubtedly a typographical error in said counterclaim it may be susceptible, of such a construction. This, however, cannot avail the appellant. As defendant had in her answer denied that she was indebted to plaintiff in any sum whatever, any admissions she may have made in her counterclaim did not impair these denials of her answer. The motion for judgment on the pleadings was therefore properly denied. *Cass v. Rochester*, 174 Cal. 358, 163 P. 212; *Botto v. Vandament*, 67 Cal. 332, 7 P. 753.

edness set forth in the complaint, and to recover which the action was instituted by plaintiff. The answer denies in apt language the allegations of the complaint. It is contended, however, by appellant that respondent in a counterclaim admitted that she was indebted to appellant in the sum demanded by the appellant. On account of what is undoubtedly a typographical error in said counterclaim it may be susceptible, of such a construction. This, however, cannot avail the appellant. As defendant had in her answer denied that she was indebted to plaintiff in any sum whatever, any admissions she may have made in her counterclaim did not impair these denials of her answer. The motion for judgment on the pleadings was therefore properly denied. *Cass v. Rochester*, 174 Cal. 358, 163 P. 212; *Botto v. Vandament*, 67 Cal. 332, 7 P. 753.

Judgment affirmed.

We concur: PRESTON, J.; SEAWELL, J.

202 Cal. 672

IN RE VAUGHAN'S ESTATE. VAUGHAN v. KELLY et al. DANIELS v. SAME.
(L. A. 10121, 10122.)

Supreme Court of California. Dec. 17, 1927.

Appeal and error §151(2)—Legatees of specific bequests, not being aggrieved by judgment entered on stipulation in will contest, had no right of appeal; "parties aggrieved."

Where interests of legatees of specific bequests under will were not affected by settlement of will contest by stipulation of contestant and general legatees consenting to judgment and decree denying contest, and distributing property to widow in lieu of will, but otherwise providing that distribution of property be in accordance with will, they were not "parties aggrieved by the judgment" and had no right of appeal.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Aggrieved Party.]

In Bank.

In the matter of the estate of Leonard Ovid Vaughan, deceased. After admission of will to probate, Grace B. Vaughan filed petition against David N. Kelly and others for revocation of will. Consent decree was entered, denying petition for revocation, and directing distribution, and Howard Smith Vaughan and Edna Vaughan Daniels separately appeal. On motion to dismiss appeals. Appeals dismissed.

Feemster & Cleary, of Visalia, for appellants.

Scarborough, Forgy & Reinhaus, A. W. Rutan, Head, Rutan & Scovel, Clyde Bishop, and Chas. D. Swanner, all of Santa Ana, for respondents.

WASTE, C. J. Leonard Ovid Vaughan died testate, leaving an estate which was subsequently inventoried in an amount in excess of \$230,000. By the terms of the will practically the entire estate, all of which was declared by the testator to be his separate property, was divided among the decedent's children, grandchildren, and other relatives. He bequeathed to his wife, Grace B. Vaughan, "one thousand dollars and no more." After the admission of the will to probate, the surviving wife instituted a contest, and filed a petition for revocation of the will upon various grounds, and citation was issued. David N. Kelly, the executor of the will, Gertrude F. Wagner, a daughter, and various minors by their guardian ad litem, A. W. Rutan, filed an answer, putting in issue the allegations of the contestant. The citation was served on Edna Vaughan Daniels, a daughter of the decedent, and on Howard Smith Vaughan, a son, among others, but they did not appear. Other than noted, there were no appearances, pleadings, or opposition to the contest.

When the matter came on for hearing, the contestant, the parties who had answered, and Charles E. Wagner, as trustee for the grandchildren, appeared and stipulated for the entry of a judgment and decree. The stipulation was approved by the court, and on April 12, 1927, a decree was entered by the terms of which it was ordered (1) that the contest of the surviving wife of the decedent was denied; (2) that there be distributed to her, in lieu of the provision in the will, certain designated and described real property; (3) that there be distributed to Gertrude F. Wagner certain real property, with a provision for the execution by her of a promissory note in favor of the trustee for the grandchildren; and (4) "that in all other particulars, distribution be had in accordance with the last will and testament of said deceased." No notice of the entry of the decree was given to any of the parties named in or served with the citation.

On the 6th day of May, following, Edna Vaughan Daniels and Howard Smith Vaughan severally filed notices of intention to move for a new trial of the proceeding to revoke the probate of the will. The motions, each of which was noticed to be made on statutory grounds and upon the minutes of the court, came on regularly for hearing and were duly argued. The court took the matter under advisement, but no decision or order disposing of the motions was made. Within 60 days

after its entry Edna Vaughan Daniels and Howard Smith Vaughan each filed in the court below a notice of appeal to this court from the judgment and decree entered by stipulation on April 12. All the parties who appeared and stipulated to the judgment and decree below have united here, as respondents, in motions to dismiss these appeals, upon the ground that no transcript of the record has been prepared or filed within time, and on the further ground that the appeals are not taken by parties to the proceedings in which the judgment was made, and that the appellants are not parties aggrieved by the order and decree entered.

We deem it sufficient to consider only the last ground of the motions to dismiss, that the persons attempting to appeal are not parties aggrieved by the judgment. No interests of the appellants were injuriously or at all affected by the settlement of the contest. No personal rights or property interests of either of them are so affected by a judgment relating only to the interests of other parties to the proceeding to revoke the probate of the will as to render them aggrieved parties. They, as participants in the distribution of the estate to be finally made, are in exactly the same position as they were before the rendition of the judgment. The only interest either of them had was a specific bequest of the sum of \$1,000. Neither was entitled to share in any other property or in the residue of the estate. No contest was, or can now be, instituted by the appellants, and their interests are still fixed and limited by the provisions of the will as admitted to probate. All claims and demands against the estate, except expenses of administration, compensation of the executor and his attorneys, and state inheritance taxes amounting to less than \$1,000, have been paid, and the executor has in his possession real and personal property valued in excess of \$130,000. The only bequests to be paid are legacies totaling \$6,000, of which \$1,000 is a legacy to the appellant Edna Vaughan Daniels, and \$1,000 a legacy to the appellant Howard Smith Vaughan.

It therefore follows that the purported appeals have not been taken by parties aggrieved by the judgment, and they should be and each of them is ordered dismissed.

We concur: RICHARDS, J.; SHENK, J.; SEAWELL, J.; LANGDON, J.; PRESTON, J.; CURTIS, J.

202 Cal. 792

In the Matter of the Estate of Leonard Ovid VAUGHAN, Deceased. Edna Vaughan DANIELS, Appellant, v. David N. KELLY, etc., Respondent. (L. A. 10120.)

Supreme Court of California. Dec. 17, 1927.

In Bank.

Motion to dismiss appeal from an order of the Superior Court of Orange County, E. J. Marks, Judge, confirming sale of real property. Granted; appeal dismissed.

Feemster & Cleary, of Visalia, for appellant. Scarborough, Forgy & Reinhaus, of Santa Ana, for respondent.

WASTE, C. J. This is one of three motions to dismiss appeal. During the administration of the estate of Leonard Ovid Vaughan, deceased, the court below made an order confirming the sale of real property made by the executor. Edna Vaughan Daniels, a daughter of the deceased, and one of the persons entitled to a specific bequest of \$1,000 under the provisions of the will of the decedent, appealed. Motion is now made to dismiss the appeal on the ground that the appellant is not a party aggrieved.

The moving parties and the appellant concede that, if it be held by this court, in disposing of the other motions to dismiss, that Edna Vaughan Daniels is not a party aggrieved by the judgment and decree denying the petition to revoke the probate of the will entered April 12, 1927, this appeal should be dismissed. The court has so decided. Estate of Vaughan, L. A. Nos. 10121 and 10122 (Cal. Sup.) 262 P. 305.

The appeal is dismissed.

We concur: RICHARDS, J.; SHENK, J.; SEAWELL, J.; LANGDON, J.; PRESTON, J.; CURTIS, J.

202 Cal. 764

IN RE STRAWN'S ESTATE.

STRAWN v. STRAWN.

(L. A. No. 9663.)

Supreme Court of California. Dec. 24, 1927.

Costs $\$260(1)$ —Where appeal from approval of trustee's account was frivolous, trustee may have money judgment and costs in addition to affirmance.

Where appeal by adjudged missing person from order approving trustee's account was adjudged frivolous, appellant, though properly notified, having failed to appear at hearing at which order was entered, trustee held entitled to judgment against appellant for \$100 and costs of appeal in addition to affirmance of order appealed from.

Department 2.

Appeal from Superior Court, Los Angeles County; Sidney N. Reeve, Judge.

In the matter of the estate of George W. Strawn, a missing person. From an order settling the account of Lou A. Strawn, trustee, George W. Strawn appeals. Affirmed with directions.

R. O. Noleman, of Los Angeles, for appellant.

J. R. Wilder, of Los Angeles, for respondent.

RICHARDS, J. This is an appeal from an order of the superior court of the county of Los Angeles, made and entered under the provisions of section 1822 of the Code of Civil Procedure, which relate to the appointment of a trustee for the estate of a missing person in order that the property of such person may be given proper care and attention. The appellant disappeared while living in the county of Los Angeles some time in the year 1923; his whereabouts being unknown. He therefore came within the proper description of a missing person; whereupon one Lou A. Strawn, alleging herself to be his wife, applied to said court under the provisions of the foregoing section of the Code for the appointment of herself as trustee of the estate of George W. Strawn, an alleged missing person. After such notice as the provisions of the Code directed and the court ordered a hearing was had, whereupon said Lou A. Strawn was appointed trustee of the estate of said missing person. Three years later George W. Strawn reappeared and presented in said court and matter an affidavit setting forth that said Lou A. Strawn as such trustee had upon her appointment taken over certain personal property of the affiant of the approximate value of \$400 and also assumed control over a certain described plot of real estate, and asked that a citation issue against the said Lou A. Strawn as such trustee to show cause why she had not made an account or report to the court, and that, upon making such account and report, she deliver to affiant said personal property, and that her trusteeship should be terminated. The court issued such citation, whereupon the trustee responded by rendering a detailed account of her trusteeship, which showed that there was due to said trustee, in excess of the sum received by her, the sum of \$1,414, which said account she prayed might be approved and the amount due thereon declared a lien upon the property of the affiant. Thereupon George W. Strawn filed his objections and exceptions to said account, in the course of which he alleged that the said trustee and he were not husband and wife, and that the former was not, therefore, entitled to charge the items in her said account expended for her support against his estate. Upon the filing of said exceptions, the court set the matter of said account and the

exceptions thereto down for hearing upon a particular day, and directed the proper notices thereof to be given, and thereafter and on the day fixed for the hearing thereon proceeded to hear the same. The appellant herein, though properly notified, did not appear at said hearing, but nevertheless the court proceeded to hear the evidence offered on behalf of said trustee thereon, and, after so doing, made and entered its order settling the final account of the trustee as being in all respects approved, allowed and settled as rendered. The court also in its said order expressly overruled the exceptions filed to said account. It is from the order of the trial court thus made that this appeal is taken; the only record on appeal being the clerk's transcript. It is evident from an examination of this record that this is an utterly frivolous appeal. The only possible contention which the appellant presents as having any semblance of reason is that the court in its order settling the final account of the trustee fastens a lien upon his real estate to the extent of the sum found to be due the trustee; but an inspection of the order of the trial court made in settling said account shows that no such action was taken, and that the entire scope of the court's order amounted to nothing more than a mere approval of said account. It follows that the only point made by the appellant upon this appeal is entirely unjustified by the state of the record before us.

This appeal being thus shown to be frivolous and evidently taken for the purpose of delaying and harassing the respondent, it is hereby ordered that the judgment is affirmed, with directions to the trial court to enter a judgment in favor of respondent and against appellant for the sum of \$100 and costs of appeal.

We concur: SHENK, J.; LANGDON, J.

202 Cal. 758

THIELE et ux. v. SECURITY TRUST & SAVINGS BANK, GUARANTEE BRANCH. (L. A. 8930.)

Supreme Court of California. Dec. 24, 1927.

1. Pleading $\S$ 127(2)—Denial, when construed with complaint, held to admit defendant claimed under deed from plaintiffs to T. and that deed was valid conveyance.

In action to quiet title, where plaintiff alleged defendant claimed an interest in property based partly on forged instrument purporting to have been acknowledged by plaintiffs in favor of T., defendant's denial that his claim was based on such instrument and that deed from plaintiffs to T. was false, forged, or fraudulent, but not denying that it claimed under a deed from plaintiffs to T., held, when construed with allegations of plaintiff's complaint, to be in ef-

fect an admission that it claimed under a deed from plaintiffs to T., and that such deed was a valid conveyance from plaintiffs.

2. Quieting title $\S$ 44(1)—Where defendant claimed title through plaintiffs, plaintiffs need not prove title in their grantor.

In action to quiet title, where defendants, in claiming under a deed which plaintiffs alleged was a forgery, claimed title through plaintiffs, it was unnecessary for plaintiffs to prove title in their grantor.

Department 1.

Appeal from Superior Court, Los Angeles County; L. H. Valentine, Judge.

Action by Louis Thiele and wife against the Security Trust & Savings Bank, Guarantee Branch, executor of the estate of George W. Hazeltine, deceased. From a judgment for plaintiff, defendant appeals. Affirmed.

Schweitzer & Hutton, of Los Angeles (H. F. Clary and B. R. Ware, both of Los Angeles, of counsel), for appellant.

Rosecrans & Emme, of Los Angeles, for respondents.

CURTIS, J. [1, 2] Action to quiet title. The complaint is in the form usually employed in an action of that nature. In a second count, however, the plaintiffs alleged that defendant claims an interest in said real property under a deed purporting to have been executed by plaintiffs to one Hester Thompson, but that plaintiffs never executed said deed, and that said deed was false, fraudulent, and forged. Defendant by answer denied plaintiffs' ownership, admitted that defendant claims an interest in said real property, denied that it claimed under any forged deed, and further alleged that it became the owner of said real property by virtue of a sheriff's deed issued in an action in the superior court of the county of Los Angeles, brought by said defendant against Hester Thompson for the foreclosure of a mortgage given by her to said defendant. Upon the trial, the plaintiffs introduced a deed to the said real property from Strawberry Park Land Company in favor of said plaintiffs. They further testified that they never executed any deed to said real property in favor of Hester Thompson or any other person, and that the purported deed from them to Hester Thompson was a forgery. The court made findings in favor of plaintiffs and entered judgment quieting their title to said real property.

The defendant has appealed, and the only point made for a reversal of the judgment is that the evidence fails to support the finding of the court that plaintiffs are the owners of said property. It is contended by appellant that, in an action to quiet title, the plaintiff must recover upon the strength of his own title and not on the weakness of the de-

fendant's, and that in this action, admitting that there was evidence to support the finding that the deed to Hester Thompson was a forgery, and therefore defendant had no title to said real property, still there was an utter lack of any evidence to show plaintiffs to be the owners of said property. In plaintiffs' complaint they alleged that defendant claimed an interest in said property based in part upon a forged instrument purporting to have been executed by plaintiffs in favor of Hester Thompson. Defendant denied that its claim was based upon a forged instrument executed by plaintiffs in favor of Hester Thompson, and denied that the deed from plaintiffs to Hester Thompson was false, forged, or fraudulent. There was no denial that defendant claimed under a deed from plaintiffs to Hester Thompson. Defendant's denial taken in connection with the allegations of plaintiff's complaint, was in effect an admission that it claimed under a deed from plaintiffs to Hester Thompson, and that said deed was a valid conveyance from plaintiffs. If, therefore, defendant claimed under said deed it must claim title to the property through the plaintiffs. This being the case, it was not necessary for the plaintiffs to prove title in their grantor. It is well settled, in an action to quiet title, that plaintiff need not prove title in his grantor when both parties claim title under a common source. *Phillips v. Menotti*, 167 Cal. 328, 139 P. 796; *McGorray v. Robinson*, 135 Cal. 312, 67 P. 279. The rule applies with much greater force when the defendant claims title through the plaintiffs.

Judgment affirmed.

We concur: PRESTON, J; SEAWELL, J.

202 Cal. 638

HARTFORD ACCIDENT & INDEMNITY CO. v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al. (L. A. 10002.)

Supreme Court of California. Dec. 19, 1927.

1. Master and servant §375(1)—Injuries to newspaper carrier delivering milk for milk wagon driver with whom he rode in delivering papers held "in course of employment."

Where newspaper carrier arranged to assist in delivering milk in return for being carried in milk truck on newspaper route, which arrangement was to his employer's benefit and was reasonable under the circumstances, and means of transportation had been left to carrier, injury occurring while carrier was temporarily off newspaper route delivering milk held to arise out of and "in course of employment" for newspaper, as well as in course of employment by creamery.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Course of Employment.]

2. Master and servant §375(1)—To be entitled to compensation for injuries, newspaper carrier need not necessarily be in act of delivering newspaper.

It is not essential to support compensation award for injuries sustained by newspaper carrier that injuries were received while carrier was in the act of delivering a newspaper.

3. Master and servant §417(7)—Industrial Commission's award, supported by inferences fairly drawn, is conclusive.

Where findings of Industrial Commission are supported by inferences, which may be fairly drawn from the evidence, even though the evidence be susceptible of opposing inferences, appellate court will not disturb award.

In Bank.

Proceeding under the Workmen's Compensation Act by George Abram, by his guardian ad litem, Henry D. Abram, opposed by the Hartford Accident & Indemnity Company, insurance carrier. The Industrial Accident Commission awarded compensation, and the insurance carrier applies for certiorari to review the order of award. Award affirmed.

Superseding opinion in District Court of Appeal, Second District, Division 1, 256 P. 873.

George L. Greer, of Los Angeles, for petitioner.

Frank J. Creede, of San Francisco, for respondent State Compensation Fund

G. C. Faulkner, of San Francisco, for other respondents.

SHENK, J. By this proceeding the petitioner seeks to annul an award made by the Industrial Accident Commission to George Abram in so far as said award applies to the owner of a daily newspaper, of which the petitioner is the insurance carrier. The relationship of employer and employee between the newspaper proprietor and Abram is admitted, but it is contended that at the time of the injury for which compensation was awarded the employee was not acting within the scope of his employment.

The facts, in brief, are as follows: George Abram, a minor, was employed by the newspaper proprietor to deliver its newspapers to certain subscribers, a list of whom was furnished to him. The method of accomplishing the delivery, the means of transportation, and the particular route to be followed were left to the arrangement and discretion of Abram. He was, however, required to commence deliveries about 4:30 o'clock in the morning and to make deliveries to the subscribers as soon thereafter as possible. The driver of a milk truck, operated by a creamery company, traversed in a general way the same territory in the delivery of milk and cream as that covered by the newspaper route. The milk driver passed near young Abram's home about 4:30 in the morning. Abram made an ar-

rangement with the driver of the milk truck to carry him and his newspapers over this general route. At times it was necessary to leave the milk route in order to deliver the papers, and at times it was also necessary to leave the newspaper route to make deliveries of milk. Along some portions of the route deliveries of both milk and newspapers were made at the same residence. In return for the transportation received by Abram he assisted the driver of the milk truck in the delivery of milk and cream. He received no other reward for his services so long as there were newspapers undelivered. On school days he left the driver when delivery of his newspapers was completed, which was usually about 7 o'clock, and returned home to have his breakfast and go to school. On Saturdays and Sundays, however, after his papers were delivered, instead of leaving the driver, he continued on with him and assisted him to the end of the milk route. For this service the driver paid him 75 cents in cash and furnished him with breakfast.

On the morning of Saturday, May 15, 1926, Abram started out with his newspapers and with the milk driver as usual. At about the hour of 7 o'clock, and before his newspaper deliveries had been completed, he was reaching for a bottle of milk when his foot slipped and he fell under one of the wheels of the truck and suffered the injury for which compensation was awarded. The accident occurred on Portia street, which was on the milk route, but not on the newspaper route. The next and final paper to be delivered by Abram that day was to be left at a house on Quintero street, about two blocks away from the scene of the accident. Abram testified that he intended to make that delivery when the milk truck should proceed on Sutherland street, which was a block nearer to the Quintero address than the place where the accident occurred, and that if the accident had not happened he would have arrived at the last place of newspaper delivery in about five or ten minutes.

[1, 2] The commission found that at the time of the injury Abram was "being conveyed in said delivery wagon in the joint course of both employments." The ratio of liability of the respective employers was then computed and the award made accordingly. We think the commission was justified in its findings and conclusions as to both employers. As to the creamery company, the award was not questioned. As to the newspaper proprietor, the record shows that no restrictions were placed on Abram as to the method or means of transportation he might secure; that the method or means actually employed redounded to the benefit of the newspaper employer in that earlier deliveries were thereby brought about, and that the means thus employed were reasonable under all the circumstances shown. "An employee is in the 'course of his employ-

ment' when he does those reasonable things which his contract with his employment expressly or impliedly permits him to do." *State Compensation Ins. Fund v. Ind. Acc. Com.*, 194 Cal. 28, 33, 227 P. 168, 169.

Petitioner contends that the activities of Abram at the time of the injury did not have anything to do with his employment to deliver newspapers; that the injury cannot be traced to any risk reasonably incident to that employment; that the act was for his own personal benefit; and that, therefore, the commission exceeded its jurisdiction because, it is claimed, the injury did not arise out of and in the course of his employment with the newspaper proprietor. It is further urged that Abram had deviated from his employment to deliver newspapers, and that the deviation had not been completed at the time of the injury. With these contentions we cannot agree. It is not essential to the support of an award of compensation that the injured person must actually have been "manipulating the tools of his calling"—in this case actually in the act of delivering a newspaper. *Judson Mfg. Co. v. Industrial Acc. Com.*, 181 Cal. 300, 302, 184 P. 1. It would have been entirely proper for Abram, under the evidence, to have employed the truck driver for a cash consideration to haul him and his newspapers over the newspaper route. The fact that the consideration was personal service in assisting the driver to deliver the milk cannot affect the principle applicable to the case. And this assistance was not complete unless it was afforded to the milk driver at points other than those where newspapers were to be delivered as well as those where both milk and newspapers were to be delivered. The newspaper route may well be, as it undoubtedly was by the commission, considered as a unit. There was no deviation from the employment so long as the newspaper deliveries were not completed. Also, the service Abram was performing at the time of the injury was in furtherance of the contract made for the benefit of his newspaper employer and was incidental thereto. A case very similar to the present one and involving dual employment in the delivery of milk and newspapers was presented to the court in *Press Publishing Co. v. Industrial Acc. Com.*, 190 Cal. 114, 210 P. 820, and the award imposing joint liability on the employers was affirmed.

[3] It is, of course, well settled that this court will not annul an award of the commission where there is substantial evidence to support the commission's finding and order. *Southern Pacific Co. v. Industrial Accident Commission*, 177 Cal. 378, 170 P. 822; *Western Ind. Co. v. Ind. Acc. Com.*, 182 Cal. 709, 190 P. 27; *Dearborn v. Ind. Acc. Com.*, 187 Cal. 594, 203 P. 112; *Pruitt v. Ind. Acc. Com.*, 189 Cal. 459, 209 P. 31; *Market St. Ry. Co. v. Ind. Acc. Com.*, 193 Cal. 178, 224 P. 95. And if the findings are supported by inferences

which may fairly be drawn from the evidence even though the evidence be susceptible of opposing inferences, the reviewing court will not disturb the award. *Western Pac. R. R. Co. v. Ind. Acc. Com.*, 193 Cal. 413, 224 P. 754, and cases cited at p. 417 (224 P. 755). Such we find the state of the record in this case to be.

It is deemed unnecessary to review the cases relied upon by petitioner, as we discover nothing therein which is opposed in principle to the determination here made on the record presented.

The award is affirmed.

We concur: WASTE, C. J.; RICHARDS, J.; SEAWELL, J.; CURTIS, J.; PRESTON, J.; LANGDON, J.

202 Cal. 668

DIMOCK et ux. v. MILLER. (L. A. 8422.)

Supreme Court of California. Dec. 17, 1927.

1. Appeal and error ⇨1002—On review, court must, where testimony was conflicting, accept that which supports verdict.

Upon review, the court must, where the testimony was conflicting upon the question of negligence, accept that which supports the verdict.

2. Physicians and surgeons ⇨18(8)—Evidence held to show that alleged negligence of dentist in extraction of teeth was proximate cause of infection in plaintiff's arm.

In action against dentist for malpractice in extracting teeth, evidence held to show that alleged negligence of defendant in giving a hypodermic injection following extraction of teeth, in failing to sterilize the hypodermic needle and using impure water in the morphine solution, was the proximate cause of resulting infection throughout plaintiff's arm.

3. Physicians and surgeons ⇨18(5)—In action against dentist for malpractice, pleading held to cover allegations that water and utensils used were unsterilized.

In an action against a dentist for malpractice in use of hypodermic injection, given after extraction of teeth, allegations in the plaintiffs' pleading that the solution injected was prepared from water which was "highly septic and contaminated with germs or bacteria" held sufficiently broad to permit testimony that the defendant used an unsterilized glass, unsterilized spoon, and unsterilized water.

In Bank.

Appeal from Superior Court, San Bernardino County; Jesse Olney, Judge.

Action by George M. Dimock and wife against Goodman A. Miller. Judgment for plaintiffs, and defendant appeals. Affirmed. Superseding opinion in District Court of Appeal. 256 P. 236.

Swing & Wilson, of San Bernardino, for appellant.

Earle M. Daniels and Julius V. Patrosso, both of Los Angeles, Grant Holcomb, of San Bernardino, and C. C. Mishler, of Los Angeles, for respondents.

LANGDON, J. Plaintiffs sued as husband and wife to recover damages alleged to have been caused by the negligent treatment of the wife by the defendant, who was a practicing dentist. The cause was tried before a jury, which rendered a general verdict in the sum of \$6,000, and, from the judgment following the verdict, the defendant has appealed.

The charge of negligence is based upon the claim that, in giving to his patient a hypodermic injection following the extraction of two of her teeth, the defendant failed to sterilize the hypodermic needle and used impure water in the morphine solution.

The facts of the case are that Mrs. Dimock had been suffering for a number of years from imperfect teeth, and that on January 23, 1923, defendant, at her request, performed an operation, extracting two teeth which were imbedded and one of which was badly infected. On the evening of the same day, defendant called at the home of his patient and cleansed the cavities, thereafter administering a hypodermic injection to ease the pain from which she was suffering. This was repeated on the following morning and again on the following afternoon. The manner of administering this hypodermic injection on the afternoon of January 24th is the basis of plaintiff's charge of negligence. It is claimed that the defendant used an ordinary bulb syringe to cleanse the cavities from which the teeth had been extracted, previously having mixed in a glass a solution of warm water and salt; that after he had used the syringe in cleansing one of the cavities he immersed the syringe in the water again and cleansed the other cavity, and thereafter called for a spoon, with which he dipped a small portion of the water from the glass, using this to dissolve the morphine tablet. The hypodermic needle was then filled with this solution and injected into the right forearm of the patient.

A small red blot soon appeared at the point of injection, and this continued to increase in size until it was found that the patient was suffering from infection throughout the arm, and incisions were made and drains inserted for the purpose of eliminating the toxins.

[1] There is conflict in the testimony as to whether or not defendant inserted the syringe in the glass after having used it in the infected cavities of Mrs. Dimock's mouth, but we must accept the testimony which supports the verdict, and the record contains testimony from which the jury was justified in finding that the defendant had been negligent.

[2] The main contention of appellant is

that, even though negligence is shown against the defendant, nevertheless there is no evidence to establish this asserted negligence as the proximate cause of the injury. It is true that several of the expert witnesses, while admitting the improper preparation of the hypodermic, if prepared in the manner heretofore stated, were unable to state whether the infection was caused by this act or by some other cause, such as being carried in the blood from the infected cavities of the teeth. However, we find the testimony of Dr. Savage appearing in the record as follows:

"That is all I can say. I would assume that hypodermic having been used with the result almost immediate, that the infection was due to the hypodermic injection."

Upon cross-examination, he testified that the infection in the mouth might operate as a predisposing cause of infection if the tissue was subject to any unusual trauma or injury. Dr. Sellew was asked to state his opinion of the cause of the infection in the arm, and stated:

"The introduction of infection into the skin at that point would be the most logical reason. It would be far-fetched to seek for any other source of infection"—and other similar statements.

Dr. Garcelon, testifying for defendant, admitted that it was not possible to determine, absolutely, the source of the infection in a case like the instant one, but that it was "purely and simply a question of weighing probabilities."

The record also contains testimony by plaintiff's nurse that, after plaintiff developed this infection, the defendant said to the nurse, "I wonder if Mrs. Dimock will ever forgive me for wrecking her arm;" and that on another occasion he said, "That looks like bad technic."

If the rule of law is as contended for by defendant and appellant, and it is necessary to demonstrate conclusively and beyond the possibility of a doubt that the negligence resulted in the injury, it would never be possible to recover in a case of negligence in the practice of a profession which is not an exact science.

[3] Appellant also contends that the plaintiff did not plead as negligence the use of an unsterilized glass containing unsterilized water and the use of an unsterilized spoon, and that these matters were asserted by plaintiff's witnesses to be contributing factors in the infection. It would seem that the pleading was broad enough to cover the matter, for it is alleged that the solution injected was prepared from water which was "highly septic and contaminated with germs or bacteria."

We find no merit in the objections urged by appellant to some of the instructions given to the jury. One of the instructions of which

complaint is made is, in effect, substantially the same as an instruction given in *Scally v. Garratt & Co.*, 11 Cal. App. 138, 104 P. 325, which was there held not to be error, and is different in language and effect from the instruction criticized in *Saylor v. Taylor*, 42 Cal. App. 474, 183 P. 843. We are cited to no authority for the objections made to the other instructions, and, if such objections have any merit, in theory, nevertheless the matters complained of could not have been prejudicial to appellant under the facts of this case.

There is no other question raised which merits discussion, and the judgment appealed from is affirmed.

We concur: WASTE, C. J.; SHENK, J.; RICHARDS, J.; SEAWELL, J.; PRESTON, J.; CURTIS, J.

202 Cal. 679

SAY v. BARBER et al. (L. A. 8867.)

Supreme Court of California. Dec. 17, 1927.

1. Appeal and error ⇨193(1)—Defendant, failing to object to sufficiency of complaint in court below, cannot object for first time, on appeal.

Defendant, who made no objection to sufficiency of complaint at any time in court below, but treated complaint as stating good cause of action, cannot, for first time on appeal, complain of insufficiency of complaint to state sufficient facts to constitute cause of action.

2. Pleading ⇨36(3)—Contention of lack of evidence that defendants were associated in business held without merit, in view of admission in answer.

In action for damages as result of operation of plastic surgery performed on plaintiff's face, contention that defendant conducting beauty parlor was not associated with defendant specializing in plastic surgery, and hence latter was not bound by representations made by former, is without merit, in view of admission in answer that defendants were engaged in business of beauty culture and plastic surgery.

3. Physicians and surgeons ⇨14(4)—Surgeon undertakes only to use skill and learning of average member of his profession in good standing.

A surgeon does not guarantee a good result; his undertaking being to use the skill and learning of average member of his profession in good standing, and to exercise reasonable care, and to exert his best judgment in an effort to bring about a good result.

Department 1.

Appeal from Superior Court, Los Angeles County; A. B. McKenzie, Judge.

Action by Bertha Say against Bessie L. Barber and another. Judgment for plaintiff, and defendants appeal. Affirmed.

John F. Imel, of Los Angeles, and Neal E. Dow, of Long Beach, for appellants.

Arthur C. Webb, of Los Angeles, for respondent.

CURTIS, J. [1] Plaintiff recovered a judgment against defendants as damages sustained by plaintiff as a result of an operation alleged to have been negligently performed on plaintiff's face by the defendant Dr. Foster M. Hull. Defendants ask a reversal of the judgment on the ground that the complaint fails to state sufficient facts to constitute a cause of action for malpractice, and that the evidence is insufficient to support the findings. In support of the first ground defendants claim that the complaint states no specific facts showing the negligence complained of or that contributed to the injury of plaintiff. It is alleged in the complaint that defendants performed the operation, and in doing so "neglected to use proper care and skill in the performance of said operation, and performed said operation in a careless and negligent manner, and as a proximate consequence and cause thereof the plaintiff" sustained the damage complained thereof. No objection was made to the complaint at or prior to the trial, or at any time in the court below. On the other hand, it was treated by all parties as stating a good cause of action against the defendants for negligence. Such an objection comes too late if made for the first time on appeal. *McDougald v. Hulet*, 132 Cal. 154, 160, 64 P. 278; *Parke & Lacy Co. v. Inter Nos Oil & Development Co.*, 147 Cal. 490, 493, 82 P. 51. However, a complaint in many of its essential features like the one in the present action was approved by this court in the recent case of *Hall v. Steele*, 193 Cal. 602, 605, 226 P. 854.

[2, 3] The second ground upon which defendants rest their claim for a reversal of the judgment is that the findings are not supported by the evidence. It is first contended that Dr. Hull was not bound by certain statements and representations made by the defendant Barber, in the absence of any evidence that the two defendants, one of whom was conducting a beauty parlor and the other a physician specializing in plastic surgery, were associated together in carrying on a joint business. There is no merit in this contention, in view of the admissions in their answer that "defendants are engaged in the business of beauty culture and plastic surgery," and "hold themselves out as being capable of performing this operation with skill." The further claim is made that the evidence does not sustain the finding that the defendants were guilty of negligence in the performance of the operation resulting in the disfigurement of plaintiff's face. A surgeon does not guarantee a good result. His undertaking is to use the skill and learning of the average

member of his profession in good standing, to exercise reasonable care, and to exert his best judgment in an effort to bring about a good result. *Louden v. Scott*, 58 Mont. 645, 194 P. 488, 12 A. L. R. 1491, 1492. The trial court found that the acts of the defendants in performing the operation upon plaintiff did not measure up to this standard. This conclusion finds support in the testimony of the plaintiff and her sister, and that of Dr. Brown, a witness for the plaintiff. The finding, therefore, of negligence on the part of the defendants, is justified by the evidence.

The judgment is affirmed.

We concur: PRESTON, J.; SEAWELL, J.

202 Cal. 714

HAWORTH v. SOUTHERN COUNTIES GAS CO. (CITY OF LOS ANGELES, Intervener). (L. A. 8955.)★

Supreme Court of California. Dec. 20, 1927.

Rehearing Denied Jan. 19, 1928.

Trial $\Leftrightarrow$ 295 (1)—Slightly erroneous instruction held not reversible error, in view of charge as a whole.

A judgment will not be reversed by the reviewing court because of slight error in an instruction, where, in view of the instructions as a whole and the facts of the case, the jury could not have been misled thereby.

Department 2.

Appeal from Superior Court, Los Angeles County; Harold Louderback, Judge.

Action by W. D. Haworth against the Southern Counties Gas Company, in which the City of Los Angeles filed a complaint in intervention. Judgment for plaintiff, and defendant appeals. Affirmed.

George L. Greer and Le Roy M. Edwards, both of Los Angeles, for appellant.

Clement L. Shinn and Walter J. Little, both of Los Angeles, for respondent.

RICHARDS, J. This appeal is from a judgment in favor of the plaintiff in an action for damages arising out of a gas explosion occurring at San Pedro harbor, whereby the plaintiff was injured, which he alleges occurred through the negligence of the appellant, Southern Counties Gas Company. The facts of the case as shown by the evidence, which is not in substantial conflict, are briefly as follows: The appellant, at the time of the explosion in question, and for some time prior thereto, maintained and operated a gas-distributing system in the vicinity of Wilmington and San Pedro, which extended along the water front in that region, and one of the projections of which, in the form of a gas main or pipe, was located along and under the premises where the explosion occurred through which the plaintiff received

his injuries. The city of Los Angeles has for some time been engaged in filling in the lands behind the rubble wall in the vicinity of which said pipe line was laid, and in the course of such work had been previously and was at the time of said explosion engaged in operating a locomotive crane, which was used in excavating the sand and soil from the bottom of the channel adjacent thereto and depositing the same on the landward side of said wall. The negligence with which the appellant was charged was that its said pipe underlying the point at which said work was being prosecuted was laid without any sufficient foundation or support under it and was at the joints thereof insufficiently welded, although the appellant knew or should have known that heavy machinery and heavy loads would necessarily be placed upon the surface of the ground under which said gas main was laid, in the course of the operations of said city, which operations were under way at the time said gas pipe was laid. The plaintiff was an employee of said city, engaged in the operation of said locomotive crane, which was stationed immediately above the spot where the gas explosion occurred, which, according to the plaintiff's averments, was due to the insufficient welding and support of its aforesaid pipe. The defendant, in its answer to plaintiff's complaint, denied any negligence upon its part which would constitute a proximate cause of the plaintiff's injuries. After the filing of said answer, the city of Los Angeles, by leave of the court first had and obtained, filed a complaint in intervention, wherein it also alleged that the defendant, Southern Counties Gas Company, was negligent in the respect already averred by the plaintiff, and that as a result thereof the plaintiff, as its employee, suffered the injuries complained of, and that as a result of such injury the said intervenor had been obliged to expend on account of said injuries to its employee and of its obligation to him under the Workmen's Compensation Act a large sum of money for compensation, and also for hospital fees, nurses, physicians, medical supplies, and medicine, aggregating the sum of \$4,775.94, for which it sought a recovery from said defendant. The jury returned a verdict in favor of the plaintiff for the sum of \$21,500, which apparently was intended to cover the outlays of the intervenor; and, from the judgment entered upon said verdict, the defendant has prosecuted this appeal.

The main contention upon which the appellant relies upon this appeal is that the evidence is insufficient to sustain the verdict or the judgment entered thereon. We do not deem it necessary to enter upon an elaborate review of the extensive record embracing the evidence educed upon the trial of this cause, since from a careful examination thereof we

are satisfied that the evidence was abundantly sufficient to sustain such verdict and judgment.

As to the appellant's further contention that the court was in error in giving certain instructions to the jury, we find that the only instruction which the appellant quotes as subject to its criticism is one which reads as follows:

"The law requires of a gas company that it shall use reasonable and proper care, under all circumstances, in selecting its pipe, in laying its pipe, in taking care of it afterward, looking after it, and this question of reasonable and proper care has reference of course, to the kind of instrumentality that it was dealing with and to the possible or probable consequences of neglect on its part. But the principle by which its conduct is to be regulated is one of reasonable and proper care under the circumstances."

This instruction we find by reference to the original record is but one of a large body of instructions which seem to cover every phase of the issues to be tried and determined by the jury, and, while said instruction standing alone might be subject in some degree to the appellant's criticism of it because of the use therein of the phrase, "*possible* or *probable* consequences of neglect on its part," the jury could not have been misled thereby, in view of the facts of the case and of the entire body of instructions which was given to it. The case should not, therefore, be reversed on that ground.

Finding no other error in the record, the judgment is affirmed.

We concur: SHENK, J.; LANGDON, J.

202 Cal. 581

GOTTSTEIN v. ADAMS et al. (L. A. 8850.)★

Supreme Court of California. Dec. 12, 1927.

Hearing in Bank Denied Jan. 9, 1928.

1. Taxation ⚡178—Statutory mode for collection of tax on possessory interest in land exempt from taxation is measure of state's and officials' power (Pol. Code, §§ 3617, 3820-3822, 3824, 3825).

Mode provided in Pol. Code, §§ 3617, 3820-3822, 3824, 3825, for collection and assessment of tax on one in possession of public land, which is itself exempt from taxation pursuant to convention by terms of which California was admitted into Union (Act Cong. Sept. 9, 1850, c. 50, § 3, 9 Stat. 452), is measure of state's and its officials' power in collecting such tax, assuming they have such power.

2. Taxation ⚡734(6)—Tax deed pursuant to proceeding to sell public lands to which possessor had not title held void (Pol. Code, §§ 3617, 3820-3822, 3824, 3825).

Where state's officials in taxing possessory right of one who had entered public land, but who had no title thereto, did not proceed pur-

suant to Pol. Code, §§ 3617, 3820-3822, 3824, 3825, but proceeded to sell land under other provisions of Political Code relating to sale of lands for delinquent tax, tax deed of purchaser was void.

Department 2.

Appeal from Superior Court, San Diego County; S. M. Marsh, Judge.

Action by John Gottstein against W. R. Adams and others. From a judgment for plaintiff defendant Reuben N. Erickson appeals. Reversed, with instructions.

James W. Glassford and H. L. Welch, both of El Centro, for appellant.

Herbert C. Kelly, of San Diego, for respondent.

RICHARDS, J. [1] This is an appeal from a judgment in favor of the plaintiff and against the defendant Reuben N. Erickson, in an action to quiet title. The plaintiff based his right of recovery in said action upon a tax deed issued to him in consequence of a tax sale of the premises in question had on the 27th day of June, 1924, wherein the tax collector offered said premises for sale to the highest bidder for the amount of a tax assessed in the year 1918, and which became delinquent and were sold to the state in the month of June, 1919. It was the contention of the defendant upon the trial, and is his contention upon this appeal, that said tax deed was and is void for two reasons: First, for the reason that the procedure provided by the statute for the levy of the assessment and for the sale of whatever interest the appellant had in said premises for and on account of the defendant's delinquency in the payment of the tax levied thereon pursuant to said assessment was not followed; and the second reason is that the lands and premises at the time of the levy of the assessment and of the proceedings had thereon leading up to such tax sale was United States government land, which was in the course of being acquired by the defendant as a homestead and was not subject to state taxation, and hence that the assessment of whatever interest the defendant had therein prior to the issuance of the final certificate and all subsequent proceedings for the collection of a tax thereon imposed by the state, including the issuance of said deed, were void. The facts presented to the court upon this appeal are uncontradicted and consist of documentary evidence and such additional facts thereto as are embraced in the stipulation of the parties. From the record as thus made up it appears that in November, 1915, the defendant Erickson made a homestead entry under the United States land laws providing therefor upon the east $\frac{1}{2}$ of the east $\frac{1}{2}$ of tract 147, township 13 south, range 14 east S. B. M., in Imperial county, Cal. He completed his probationary period of residence and complied with other requirements of the

homestead laws, and in May, 1921, became entitled to make his final proof and received his final certificate upon his said homestead entry. In October, 1924, he received his patent for the land. In the meantime, and in the year 1918, the county assessor of Imperial county undertook to assess the "possessory right" of said defendant Erickson in said land at the sum of \$3,200 and his improvements thereon at \$400. This assessment was transferred from the assessment list to the assessment book and a total tax computed thereon at the sum of \$127.80. When the defendant later in that year failed to pay said tax, it was transferred by said official to the delinquent list, and at the time of such transfer the descriptive words "possessory right" as they appeared upon the assessment book were dropped, and the delinquent tax appeared upon the delinquent list as a tax against the land. In June, 1919, the tax collector, following the procedure provided in the Political Code for the sale of delinquent taxes upon real estate, sold the said land and the improvements thereon to the state, and five years thereafter, in June, 1924, the said tax thereon remaining unpaid, the tax collector, still following said procedure, advertised the land for sale to the highest bidder and sold the same to the plaintiff herein for the total amount of the delinquency, with penalties and costs for an amount aggregating \$442, and later and in due course issued a deed therefor to the plaintiff herein. Under the convention by the terms of which California was admitted into the Union, as these appear in the act of admission (U. S. Stats. at Large, vol. 9, p. 452) it was provided that:

"Sec. 3. And be it further enacted, that the said state of California is admitted into the Union upon the express condition that the people of said state, through their Legislature or otherwise, shall never interfere with the primary disposal of the public lands within its limits, and shall pass no law and do no act whereby the title of the United States to, and right to dispose of, the same shall be impaired or questioned; and that they shall never lay any tax or assessment of any description whatsoever upon the public domain of the United States."

Under the terms of this convention it has been universally held that the state possessed no power to levy or collect a tax against the lands of the United States while the title thereto remained in the federal government, and while a homesteader was attempting to acquire such title under the homestead laws, but whose right thereto was so far incomplete and inchoate that no certificate had been issued to him prior to the attempted imposition of said tax. *Irwin v. Wright*, 258 U. S. 219, 42 S. Ct. 293, 66 L. Ed. 573. Notwithstanding this state of the law, assessors and tax collectors in the state of California have in past years undertaken to levy and collect a tax upon the possessory right of homesteaders upon public land, purporting to act in so

doing under the provisions of section 3617 of the Political Code. The subsequent sections of said Code, however, provide the procedure to be followed by assessors and tax collectors in the matter of the assessment and collection of taxes imposed or attempted to be imposed upon the possessory interest of claimants or occupants or land which is in itself exempt from taxation. Section 3820 of the Political Code provides as follows:

"The assessor must collect the taxes on all property, when, in his opinion, said taxes are not a lien upon real property sufficient to secure the payment of the taxes. The taxes on all assessments of possession of, claim to, or right to the possession of land and the taxes on taxable improvements located upon land exempt from taxation, shall be immediately due and payable upon assessment and shall be collected by the assessor as provided in this chapter."

Section 3821 of said Code further provides:

"In the case provided for in the preceding section, at the time of making the assessment, or at any time before the first Monday of August following the assessment, the assessor may collect the taxes by seizure and sale of any personal property owned by the person against whom the tax is assessed, or if no personal property can be found, then the assessor may collect the taxes by seizure and sale of the right to the possession of, claim to, or right to the possession of land."

Section 3824 provides that when after the collection of said tax the tax rate is fixed, and it is then discovered that a sum in excess of said rate has been collected, the said excess collected and paid to the county treasurer shall be repaid to the person from whom such collection has been made; and section 3825 provides that, if the sum so collected is less than the tax thus so made:

"The deficiency must be collected by the tax collector either by a sale of the property on which the same is a lien, if any, in the same manner as other taxes on real and personal property are collected, or by seizure and sale of any personal property owned by the person against whom the tax is assessed, in the same manner provided in sections 3821 and 3822 for the seizure and sale by the assessor."

It is apparent from a reading of these sections of the Political Code that the only method by which an assessment of the possessory interest of one in possession of land which is exempt from taxation may be made is that provided therein. In other words, the mode as therein provided for the collection of an assessment and tax upon the possessory interest of one in possession of land which is itself exempt from taxation is the measure of the power of the state and its officials in the matter of the levy and collection of such tax, assuming for the sake of the argument that they have power to levy and collect the same.

[2] It is clear from the uncontradicted record herein that the method provided by the foregoing sections of the Political Code was not followed in the instant case, but that, instead of so doing, the assessor and tax collector of Imperial county undertook to treat the assessment and tax above referred to as a charge upon the land itself, and proceeded to declare such tax delinquent and to sell said land therefor to the state in 1919 and to the plaintiff herein in 1924, under the other provisions of the Political Code which relate to the sale of lands for a delinquent tax imposed thereon. They had no such power, and it therefore necessarily follows that the sale of the land and premises herein by this latter method was invalid, and hence that the deed of the plaintiff issued to him pursuant thereto was and is wholly void. Having thus determined, it becomes unnecessary to consider the further reasons urged by the appellant, for the invalidity of the proceedings upon which said deed is predicated from their inception, and we therefore do not determine that question, nor do we deem it necessary to consider the other points made by the appellant upon this appeal.

The judgment is reversed with instructions to the trial court to make and enter its findings and judgment in favor of the defendant and appellant Reuben N. Erickson or his successor in interest, if the fact shall so appear.

We concur: SHENK, J.; LANGDON, J.

202 Cal. 577

LANE v. BING et al. (L. A. 8773.)

Supreme Court of California. Dec. 12, 1927.

Master and servant $\Rightarrow$ 301(1)—Employer held not liable for negligence of employee using automobile on voluntary engagement to drive her instructor to station after working hours.

In action for injuries resulting from automobile collision, employer held not liable because of negligence of bookkeeper, who was driving employer's automobile when bookkeeper was voluntarily taking accountant to station after working hours, although accountant was paid by employer to instruct bookkeeper.

Department 2.

Appeal from Superior Court, Los Angeles County; Walton J. Wood, Judge.

Action for damages for personal injuries by Nellie A. Lane against Gerald Bing, J. F. West, and others. Judgment for defendant J. F. West, and plaintiff appeals. Affirmed. See, also, 262 P. 318.

Underwood, Burke & Cree, of Long Beach, for appellant.

Edward Everett, of Los Angeles, for respondent Bing.

Joe Crider, Jr., of Los Angeles, for respondent West.

RICHARDS, J. This is an appeal from a judgment of nonsuit, made and entered in favor of the defendant J. F. West after the court had granted the said defendant's motion for a nonsuit at the close of the plaintiff's case, in an action for damages brought by the plaintiff against said defendant West and certain other defendants for the recovery of damages alleged to have been sustained as the result of an automobile collision between two automobiles upon the streets of Long Beach upon the evening of May 3, 1924; one of said automobiles at the time of the collision being driven by the defendant Mrs. Dessie Stapp, a stepdaughter of the defendant West, who was not present at the time of the collision.

The motion for nonsuit was based upon two grounds: First, that the plaintiff's evidence was insufficient to show that the defendant West was the owner of the automobile which his stepdaughter was driving at the time of the collision; second, that the evidence was insufficient to establish any liability on the part of the defendant West for the injuries sustained arising out of said collision by showing that the said automobile was being used by said defendant's stepdaughter within the scope of any agency or employment of his stepdaughter by defendant West, or in the course of his business.

The only evidence which the plaintiff produced at the trial for the purpose of fixing responsibility upon the defendant West was that of said defendant himself, and which

was elicited from him in the course of presenting the plaintiff's case through his examination as a witness under the provisions of section 2055 of the Code of Civil Procedure. For the purposes of this decision, it may be conceded that there was sufficient evidence thus elicited to justify a jury in determining that the automobile involved in the accident and driven by Mrs. Dessie Stapp was the property of the defendant West, although the title thereto seems to have stood in the name of his stepdaughter at the time of the accident complained of. If this be conceded, it follows that the only remaining question in the case is as to whether the plaintiff elicited from defendant West upon his examination sufficient evidence to justify the trial court in permitting the case to go to the jury upon the theory that the defendant's stepdaughter, at the time of the collision, was so far the agent of said defendant, or engaged in doing any business for him, as to render said defendant liable for the injuries caused by said collision.

Upon this branch of the case the undisputed evidence shows that prior to and at the time of the accident the defendant West was engaged in conducting a transfer business under the name and style of West Transfer Company, the office of said business being at his home; that his stepdaughter, Mrs. Dessie Stapp, was employed by him and in the course of said business as his bookkeeper, the hours of her employment being between 7 o'clock in the morning until 4 o'clock in the afternoon; that, in order to increase her efficiency as a bookkeeper, the defendant West had arranged for another and more expert accountant to come to his home occasionally in order to teach and assist his stepdaughter in keeping his books. This service, while paid for by him, was rendered to her after the hours of her employment; the said accountant coming from his home some distance away and arriving by train or bus at a point several blocks from defendant West's residence, the defendant being under no compulsion to provide said accountant with the means of getting to or returning from the place of giving such instruction. Upon the evening in question, the said accountant arrived at the home of defendant West after the hours of duty of his stepdaughter were over and found that the latter was dressed to go to a party and hence that his services upon that evening would not be required. The stepdaughter, however, upon her own initiative and without any direction from West offered to drive said accountant back to the station from which he would go by train or bus to his home, and presently undertook to do so, using the said automobile. She delivered the accountant at his station and was going on to her destination when the collision occurred, as the result of which the plaintiff's injuries arose.

The only other evidence in the case upon which the plaintiff could predicate a claim of liability on the part of the defendant West for her injuries arising out of said collision was the fact that, after the accident, the defendant West had gone with his stepdaughter to the hospital to which the plaintiff had been taken, and had there expressed his sympathy for the plaintiff, and had assured her that the insurance company would reimburse her for the expenses incurred in consequence of her said injuries.

The foregoing was the state of the evidence at the time the plaintiff closed her case and defendants' motion for nonsuit was made and granted. It would seem to be clear that upon this state of the evidence the order of the trial court in granting such motion for nonsuit was properly made, since the undisputed evidence thus elicited showed that the defendant's stepdaughter, in undertaking to drive the said accountant to the train or bus on his way to his home, was performing a volunteered function entirely outside the scope of her employment, and for the consequences of which the defendant West was in nowise responsible. The case of *Brown v. Chevrolet Motor Co., of California*, 39 Cal. App. 738, 179 P. 697, would seem to be entirely in point as to the similarity of its facts and also as to the comment which this court made upon it in denying a petition for a hearing herein. Construing in its most favorable light the evidence elicited by the plaintiff from the defendant West, it amounts to no more than a showing that the stepdaughter of said defendant, in using the automobile, whether her own or the property of said defendant, to drive said accountant to the train or bus station on her way to her destination at the party or dance which she was to attend, was simply doing a favor to the accountant after her regular hours of employment, and which was in no way so connected therewith as to render the defendant West responsible for anything which might happen in the course of her voluntary engagement. The latest decision of this court touching this subject is that of *Kish v. California State Automobile Ass'n*, 190 Cal. 246, 212 P. 27, the following language of which aptly covers the present case:

"But to recover against an employer upon the theory of respondent superior, it is necessary for the plaintiff to establish the two distinct facts of (1) the status of master and servant, and (2) that the act was done within the scope of the servant's employment. The latter is as important and vital to plaintiff's cause of action as the former. If the same testimony which proved the relationship of master and servant proved that at the time of the act for which it is claimed the master was liable, the servant was not acting within the scope of and in the course of his employment, the prima facie case made by plaintiff is rebutted by the

very proof offered to prove the first fact. It is not necessary, therefore, for the defendant to negate the master's liability, inasmuch as the plaintiff has done so herself. The proof at that stage lacks an essential element to support plaintiff's cause of action, and an order granting a nonsuit is therefore proper."

The order granting said defendant's motion for nonsuit herein was proper, and the judgment based thereon is therefore affirmed.

We concur: SHENK, J.; LANGDON, J.

202 Cal. 590

LANE v. BING et al. (L. A. 8909.)

Supreme Court of California. Dec. 12, 1927.

Parent and child §13(1)—Parents, as matter of law, held not liable for minor son's operation of automobile; no agency or signing license application being shown.

In action for injuries resulting from automobile collision, parents, as matter of law, held not liable for negligence of minor son who was driving their automobile, in absence of showing of agency or that son was to parents' knowledge an incompetent driver, or that either of them had signed application for issuance of operator's license to son.

Department 2.

Appeal from Superior Court, Los Angeles County; Walton J. Wood, Judge.

Action for damages for personal injuries by Nellie A. Lane against Dana G. Bing, Anna H. Bing, and others. Judgment for plaintiff, and defendants named appeal. Reversed.

See, also, 262 P. 317.

Edward Everett, of Los Angeles, for appellants.

Underwood, Burke & Cree, of Long Beach, for respondent.

RICHARDS, J. This is an appeal by the defendants Dana G. Bing and Anna H. Bing from a judgment rendered against them and each of them and also against their minor son, Gerald Bing, in plaintiff's favor, in an action instituted by the latter to recover damages for personal injuries alleged to have been sustained as the result of a collision between two automobiles, one of which was being driven by said minor son of the appellants herein, neither of whom was present at the time of the collision.

The chief error of which the appellants complain is that committed by the trial court in denying their motion for a nonsuit at the close of the plaintiff's case, which motion was made upon the ground that there was no sufficient evidence in the case tending to show that their said minor son, in the operation and use of said automobile at and immediately prior to the time of said collision, was

acting as the agent of them or either of them, or that at the time of the collision he was engaged in doing any act for the consequences of which they were as a matter of law responsible.

The evidence in the case upon which said motion was predicated was briefly as follows: The automobile in question was the community property of the parents of said Gerald Bing, but was registered in the name of the father, Dana G. Bing. Gerald Bing was, at the time of said accident, between 16 and 17 years of age. He had driven the automobile of his parents previously upon occasions, although he had no general permission so to do; his use and operation of the automobile being that of driving his father to and from his office frequently. No license to operate automobiles had ever been issued to him, nor had any application for such right ever been made. On the evening in question, and during the absence of his parents from their home, Gerald Bing undertook to drive his sister and several of her boy and girl friends to a party, and, having done so, to convey another boy friend of himself to a theater which they were to attend. It was while thus engaged that the collision between the automobile of the Bings and an automobile of their codefendant West occurred, as a result of which the plaintiff, who was standing on the sidewalk and in no way connected as a passenger or otherwise with either of the automobiles, received her injuries.

At the close of the plaintiff's case, wherein the foregoing facts had been shown, a motion for nonsuit was made on behalf of said defendants, appellants herein, Dana G. and Anna H. Bing, upon the ground hereinbefore stated, which motion the trial court denied, and thereafter proceeded to give to the jury certain instructions of which the appellants herein also complain. Upon the submission of the cause to the jury, a verdict in the sum of \$5,000 damages was rendered against the appellants herein and also against their minor son, Gerald Bing. It is the contention of the appellants that their motion for nonsuit should have been granted. The only brief on file herein is the opening brief of the appellants; the respondent having filed no answer thereto, but on the trial having stipulated that the cause might be submitted upon the appellants' brief on file.

There would seem to be no escape from the conclusion that the trial court was in error in denying the appellants' motion for nonsuit in the light of the decision of this court upon an almost identical state of facts in the recent case of *Perry v. Simeone*, 197 Cal. 132, 239 P. 1056, and also of the conclusion arrived at by this court in the case of *Idemoto v. Scheidecker*, 193 Cal. 653, 226 P. 922, in each of which cases the situation of the appellants as to their liability for the act of their minor

child is practically identical with the situation of the appellants in the instant case. In the absence of any showing that the appellants herein, or either of them, had signed an application to the state motor vehicle department for the issuance of an operator's license to their minor son, and in the absence of any showing that their minor son was either in fact or to their knowledge a careless or incompetent driver, and in the absence of any evidence that he was engaged in any business or affair on behalf of his parents at the time the plaintiff suffered the injuries complained of, it would seem to be clear that upon the foregoing authorities the appellants herein could not be held responsible for the plaintiff's said injuries, and it follows necessarily that the trial court was in error in its denial of the appellants' motion for a nonsuit at the close of the plaintiff's case. This conclusion renders it unnecessary for us to consider the alleged errors of the trial court in its instructions to the jury.

The judgment is reversed.

We concur: SHENK, J.; LANGDON, J.

202 Cal. 648

HARRIS v. CASSELLS et al. (L. A. 8832.)

Supreme Court of California. Dec. 15, 1927.

Trusts $\S$ 81(4)—Plaintiff, whose deceased son had purchased property in his name with money furnished by plaintiff, could have trust declared (Civ. Code, $\S$ 853).

Where plaintiff's deceased son had purchased property for home for himself and other members of plaintiff's family with plaintiff's money and had taken title in his own name, plaintiff was entitled to have trust declared and her title to property quieted under Civ. Code, $\S$ 853, providing that when transfer of real property is made to one and consideration therefor is paid by another, trust is presumed to result in favor of person by whom payment is made.

Department 2.

Appeal from Superior Court, Los Angeles County; Elliot Craig, Judge.

Action to declare trust in real property and to quiet title by Louisa F. Harris against Ella L. Cassells, individually and as administratrix with the will annexed of the estate of William H. Dillard, deceased. From a judgment for plaintiff, defendants appeal. Affirmed.

E. C. Jennings, of Los Angeles, for appellants.

Kemp, Partridge & Kemp, of Los Angeles, for respondent.

SHENK, J. This is an appeal from a judgment in favor of the plaintiff in an action to have it declared that certain real

property, title to which stands in the name of decedent, was held by him in trust for plaintiff and to have her title thereto quieted.

The sole ground of appeal is that the complaint fails to state a cause of action. In addition to other allegations not necessary to be mentioned, the complaint alleges that the decedent was the son of the plaintiff; that in July, 1923, she sold property belonging to her in the state of Kansas and handed over the proceeds to the decedent for the purpose of purchasing a home for himself and other members of her family; that decedent purchased the property in question taking title in his own name; that the son invested no money of his own in the property; and that he held the title thereto in trust for plaintiff. Appropriate prayer for relief followed.

We think the complaint states a cause of action to enforce a trust declared by section 853 of the Civil Code, which provides that when a transfer of real property is made to one and the consideration therefor is paid by another, a trust is presumed to result in favor of the person by whom the payment is made. On the record presented here, we find no merit in the appeal.

The judgment is affirmed.

We concur: RICHARDS, J; LANGDON, J.

202 Cal. 706

TROUT v. SIEGEL et al. (L. A. 8858.)

Supreme Court of California. Dec. 20, 1927.

1. Mechanics' liens $\S$ 5—Mechanics' lien statutes are to be liberally construed (St. 1911, p. 1319, $\S$ 14).

Under St. 1911, p. 1319, $\S$ 14, statutes giving to mechanics and others liens upon real property for work done or materials furnished in the construction of buildings or other structures are to be liberally construed.

2. Mechanics' liens $\S$ 134—Notice of claim of lien definite enough to enable owner to ascertain extent and nature of lienor's claim held sufficient (Code Civ. Proc. $\S$ 1187).

Notice of claim of mechanic's lien, expressly stating contract price, amount paid thereon, and amount due, and that contract was for erection of building on a lot described in notice, sufficiently complied with Code Civ. Proc. $\S$ 1187, since it enabled owner and all persons claiming under him to ascertain extent and nature of lienor's claim.

Department 1.

Appeal from Superior Court, Orange County; F. O. Drumm, Judge.

Action by George E. Trout against Joe Siegel and others and the State Mutual Building & Loan Association to foreclose a mechanic's

lien. From a judgment in favor of the association against the plaintiff, plaintiff appeals. Reversed.

Leonard Evans, of Anaheim, for appellant.
Ames & McFadden, of Anaheim, for respondents.

CURTIS, J. Action brought to foreclose a mechanic's lien. The plaintiff and defendant Joe Siegel entered into a contract whereby plaintiff was to construct a frame dwelling house and garage upon a certain lot owned by defendant Siegel, situated in the city of Orange, and for which said defendant agreed to pay plaintiff the sum of \$2,850, \$1,000 of which sum was paid. Work under this contract was commenced on May 16, 1923, and the contract was completed about July 28, 1923, and on August 6, 1923, plaintiff filed for record his claim of lien against said real property. In the meantime, however, the defendant Siegel had borrowed of the defendant the State Mutual Building & Loan Association the sum of \$2,800, evidenced by a promissory note in said amount, which note was secured by a trust deed to said real property, executed by defendant Siegel and wife in favor of the Title Insurance & Trust Company of Los Angeles, as trustee. This trust deed was delivered and recorded five days after plaintiff commenced work under his contract to construct said house. The interest on said promissory note not having been paid when due, the trustee advertised and sold said real property according to the terms of said trust deed to satisfy the indebtedness evidenced by said promissory note, and at said sale the defendant the State Mutual Building & Loan Association became the purchaser of said real property and thereby became the owner of the legal title to the same. At the trial of said action, the court sustained an objection to the introduction of said claim of lien upon the ground that by its terms it failed to meet the requirements of section 1187 of the Code of Civil Procedure, which provides that claims of lien shall contain, among other things, "a general statement of the kind of work done or materials furnished by him, or both." Judgment was rendered in favor of defendant State Mutual Building & Loan Association and against plaintiff. From this judgment the plaintiff has appealed, and the sole point involved in this appeal is the sufficiency of the statement in said claim of lien "of the kind of work done or materials furnished" by plaintiff under his said contract. Plaintiff's claim of lien was as follows:

"Notice of Contractor's Claim of Lien.

"Notice is hereby given that on or about the 16th day of May, 1923, George E. Trout entered into a contract with Joe Siegel, for the construction and erection of a certain building on the premises, situated in the city of Ana-

heim, county of Orange, state of California, described as follows, to wit: Lot 3 of the Scenic tract according to a map thereof recorded in the office of the county recorder of Orange county, Cal.

"That the name of the owner or reputed owner of said premises is Joe Siegel, and the name of the contractor who engaged with the said Joe Siegel to erect said building is George E. Trout, the undersigned.

"That no notice of completion of said building has been filed as required by law.

"That the said contractor agreed to erect the building above indicated, and to furnish the materials to be used in the building and construction thereof, excepting the paint and painting, upon the terms, at the times given, and upon the conditions as follows, to wit: Full contract price to be paid to the said contractor when the building was completed and all bills against the same shown to have been paid by the undersigned, which building was to have been completed 45 days from and after the commencement of work, but after the date of said contract the same was amended so as to provide for greater dimensions and to include the building of a garage on said premises by the undersigned.

"That said contract has been fully performed on the part of said George E. Trout that all of said materials furnished were actually used in the construction of said building that said building was finished on the 28th day of July, 1923.

"That the amount of contract price for said building furnished as aforesaid is \$3,050 in current lawful money of the United States, specified in the contract, but, after the execution of said contract, it was understood and agreed between the said owner and said contractor that the same should be reduced \$200, and the said contractor released from the obligation of painting said building, which undertaking the said owner took upon himself on account of said reduction in contract price, that the sum of \$1,000 has been paid on account of said contract price, and that the sum of \$1,850 is still due and owing thereon to said contractor, George E. Trout, after deducting all just credits and offsets.

"Wherefore the said George E. Trout claims a lien upon the above described premises for the amount of said contract price still unpaid.
"Geo. E. Trout."

It will be observed that this notice of lien states that the contract is "for the construction and erection of a certain building on the premises," describing them, that the contractor (plaintiff) agreed to erect said building and "to furnish the materials to be used in the building and construction thereof, excepting the paint and painting," and that said contract has been fully performed, and "all of said materials furnished were actually used in the construction of said building that said building was finished on the 28th day of July, 1923."

[1, 2] The statutes of this state giving to mechanics and others liens upon real property for work done or materials furnished in the construction of buildings or other structures are to be liberally construed. Section 14, c. 681. Stats. 1911, p. 1319; Continental

Building & Loan Ass'n v. Hutton, 144 Cal. 609, 78 P. 21; Corbett v. Chambers, 109 Cal. 184, 41 P. 875. The court, in Corbett v. Chambers, supra, states the rule as follows:

"The statute is a remedial statute, adopted in obedience to the requirements of the Constitution, * * * and is to be liberally construed in furtherance of the purposes for which it was authorized. The persons for whose benefit the statute is enacted are not presumed to be versed in the niceties of pleading, and the notices, which under its provisions they are authorized to give, have regard to substance rather than form."

In the case of Wagner v. Hansen, 103 Cal. 104, 107, 37 P. 195, this court said, speaking of a notice of claim of lien:

"The purpose of the record and statement must be to inform the owner, in case of a contractor and laborers rendering service under such contract, as to the extent and nature of a lienor's claim, to facilitate investigation as to its merits."

Was the notice of claim of lien as recorded by plaintiff sufficient to satisfy the purpose of the statute as defined by this court in the decision just quoted? There is no question that the owner and all persons claiming under him could ascertain from this notice the extent and nature of plaintiff's claim. The notice expressly states the contract price, the amount paid thereon, and the amount due. It further states that the contract was for the erection of a building upon the lot described therein. In this connection we might refer to the findings of the court in this action that the contract was for the construction of "a certain building, to wit, a dwelling house including an outbuilding for a garage," that "plaintiff has fully performed each and every of the terms of said contract," and that all of said lands above described are necessary for the convenient use and occupation of said building. From these findings we may conclude that the building, including the garage, was the only structure upon said lot. This being the case, the owner would have no difficulty, from the description of the building in the notice of lien and from an inspection of the premises upon which it was constructed, in investigating the merits of lienholder's claim. In this particular case he would have been in no better position had the notice of lien set out a minute description of the kind and character of the building, with full detail as to the materials used and the labor performed in its erection. There may be cases where a description more complete and comprehensive than that contained in the notice of lien in the present action may be required in order to properly protect the rights of the owner and those claiming under him. But, under the facts as found by the court in the action before us, we are satisfied that no possible injury could result or did result to the owner or the respondent herein by the gener-

al statement of the work done and materials furnished, contained in appellant's notice of lien.

The court erred to the serious prejudice of appellant in sustaining respondent's objection to the introduction of said claim of lien.

The judgment is therefore reversed.

We concur: PRESTON, J.; SEAWELL, J.

202 Cal. 748

GRIDLEY v. TILSON. (L. A. 8856.) *

Supreme Court of California. Dec. 23, 1927.

Rehearing Denied Jan. 19, 1928.

1. Evidence ⇨434(11)—Maker of notes for stock could not rely on agent's statement, contrary to written notice of limitation of agent's authority (Civ. Code, § 1625).

Under Civ. Code, § 1625, maker of notes given for stock may not defend against collection of notes on ground of false representations of agent selling stock contrary to limitations on his authority in written contract of sale, regardless of claim that defendant did not have glasses with him and could not read subscription contract, without showing agent's fraud prevented reading contract or otherwise tricked him into signing notes.

2. Evidence ⇨434(8)—Fraud in Inducement of written contract may be shown by parol testimony, regardless of statute (Civ. Code, § 1625).

Although Civ. Code, § 1625, provides that written contract supersedes all negotiations and stipulations concerning matter between parties, fraud in inducement of contract may be shown by parol testimony.

3. Evidence ⇨434(8)—Principal is bound only by representations in written contract, provisions of which notify prospective purchaser that agent's authority goes no further (Civ. Code, § 1625).

Although fraud in inducement of contract may be shown by parol testimony, regardless of Civ. Code, § 1625, principal is bound only by representations embodied in written contract, whose provisions notify prospective purchaser that agent's authority goes no further.

4. Licenses ⇨39—Evidence held not to support finding that copy of permit to sell stock, printed on back of agreement, was not exhibited and delivered to purchaser.

In action on notes given for stock, evidence that copy of permit to sell corporation's stock was printed on back of subscription contract held to render finding erroneous that true copy of permit was not exhibited and delivered to purchaser of stock.

5. Licenses ⇨39—Recovery may not be had on notes given for stock, sold under permit to sell it for cash.

Where permit by state corporation commissioner to sell stock was to sell it for cash, recovery cannot be had by corporation's trustee in bankruptcy against maker on notes given therefor.

Department 2.

Appeal from Superior Court, Riverside County; William H. Ellis, Judge.

Action by the Manker Shoe Company against W. N. Tilson on notes. On the adjudication of bankruptcy of plaintiff, E. C. Gridley, trustee in bankruptcy, was substituted as plaintiff. From a judgment for defendant, the substituted plaintiff appeals. Affirmed.

N. C. Peters, of San Bernardino, and Miguel Estudillo, of Riverside, for appellant.

Walter S. Clayson, of Corona, and H. K. Lockwood, of Cedar Rapids, Iowa, for respondent.

SHENK, J. [1] This is an appeal from a judgment for defendant in an action brought by the Manker Shoe Company, plaintiff's bankrupt, on three promissory notes of the defendant, dated September 19, 1922; the principal sums aggregating \$5,000. Defendant's answer admitted the execution and delivery of the notes, but, as affirmative defenses, alleged that the notes were given for 5,000 shares of the Manker Shoe Company in reliance on certain false and fraudulent statements and representations made by agents of the Manker Shoe Company, and alleged that the contract for the sale of said stock was void, in that it was executed contrary to the provisions of the permit issued by the commissioner of corporations. He prayed that the plaintiff take nothing. In a cross-complaint defendant also alleged "that plaintiff * * * agreed to cancel said notes and return them to defendant, but has failed and neglected to do so." He also alleged that, "at the time said statements and representations were made, and at all times since said date, the stock of the Manker Shoe Company has been worthless, and without any value whatever; that no stock in said company was ever issued to defendant; that defendant has never received any consideration whatever for said promissory notes." While the action was pending, Manker Shoe Company was adjudicated a bankrupt, and E. C. Gridley, trustee in bankruptcy, was substituted as party plaintiff. At the trial testimony as to the false statements and representations made to defendant by agents of the Manker Shoe Company was admitted over the objection of plaintiff. Plaintiff offered, and there was admitted in evidence, the contract signed by the defendant, dated September 19, 1922, wherein he subscribed for 5,000 shares of the stock of Manker Shoe Company at \$1 each. This subscription contract among other things, provided:

"It is understood and agreed by me that this agreement contains the entire contract between myself and the Manker Shoe Company, Inc. I have read the copy of the permit which is printed on the back of this application. It is understood that no representative has any pow-

er to change, modify, or make any other terms or representations whatsoever than those herein stated, and that the representative is acting as special agent, and all representations not herein set out are by me deemed waived. It is hereby specially agreed that no stock is to be issued until the full amount of this subscription and notes given therefor are paid in full in cash."

There was printed on the back of the subscription contract a copy of the permit issued by the state corporation commissioner, pursuant to which the stock of the Manker Shoe Company was to be sold for cash at \$1 per share. The permit included the following condition:

"(b) That a true copy of this permit be exhibited and delivered to each prospective subscriber for, or purchaser of, said securities before his subscription therefor shall be taken or any sale thereof made to him."

The permit also provided that the company was authorized to sell and issue its shares at par for cash. One of the alleged and proved false representations was that the Manker Shoe Company had obtained a permit to sell the stock at \$1.50 a share, and that the stock subsequently would be sold for that price. Defendant testified that a few weeks after he signed the contract and gave the notes he went to Mr. Manker, president of the Manker Shoe Company, and told him the circumstances, and repeated the statement which the agent had made that the company had been granted a permit to sell the stock for \$1.50 a share; that Mr. Manker stated that there was not a word of truth in it, and the agent had no right to make such a statement, and that he would see that Mr. Tilson's notes were returned to him. Mr. Manker then wrote and delivered to defendant the following on the letterhead of the Manker Shoe Company:

"In view of the fact that the notes aggregating five thousand dollars which you gave to Overgaard et al. in favor of the Manker Shoe Company were obtained by evident misrepresentation and in view of the fact that you came to us before any commission was paid and before the notes were returned to us by the salesman and told us of such misrepresentation, I shall see that these notes are returned to you as soon as I can get the salesmen to relinquish their right in the notes and the State Corporation Commission to O. K. same. Trusting this will be satisfactory I am, Very truly yours, Manker Shoe Company, Inc., C. Manker, Pres."

The trial court found all of the issues in favor of defendant, and rendered judgment accordingly:

[2, 3] It is contended by the plaintiff that the quoted provision of the subscription contract limited the authority of the agents to make only the representations set out in the contract; that the defendant had notice of the limitation; and that evidence of any other representations made by the agents should

not have been received. This contention must be sustained. While the Civil Code, § 1625, provides that a written contract supersedes all negotiations and stipulations concerning the matter between the parties, it has always been the law that fraud in the inducement of a contract may be shown. A well-settled exception, however, is the case where the party seeking to rely on fraudulent representations of an agent had notice of the limitation on the agent's authority to make representations. Therefore a principal is bound only by the representations embodied in the written contract, where a provision in the contract notified the prospective purchaser that the agent's authority went no further. *Fidelity & Casualty Co. of New York v. Fresno Flume & Irrigation Co.*, 161 Cal. 466, 119 P. 646, 37 L. R. A. (N. S.) 322; *Pease v. Fitzgerald*, 31 Cal. App. 727, 161 P. 506; *Tockstein v. Pacific Kiesel Kar Branch*, 33 Cal. App. 262, 164 P. 906; *Munn v. Earl C. Anthony, Inc.*, 36 Cal. App. 312, 171 P. 1082; *Schuster v. North American Hotel Co.*, 106 Neb. 672, 184 N. W. 136, 186 N. W. 87; *Northern Assur. Co. v. Grand View Building Ass'n*, 183 U. S. 308, 22 S. Ct. 133, 46 L. Ed. 213. In the case of *Pease v. Fitzgerald*, supra, the rule was applied under circumstances almost identical with the circumstances in the present case. Defendant, however, attempts to escape the effect of the settled rule of these cases by testifying that he did not have his glasses with him at the time he signed the subscription contract and gave the notes, and therefore he did not read the contract nor the provision referred to. But this cannot afford him an excuse, in the absence of a showing that he was prevented by the agent from reading the limiting clause, or was otherwise tricked into signing the document without reading it. He made no request to have the contract read to him. In addition, it was in evidence that he had previously signed similar contracts with the same company in subscribing for 3,000 shares of its stock.

[4] The plaintiff contends that the finding of the court that a true copy of the permit was not exhibited and delivered to defendant is without support in the evidence. There was no issue in the pleadings on this point, and, as a copy of the permit was printed on the back of the subscription contract, the finding of the court appears to be unsupported.

[5] The respondent contends that the agreement for the purchase and sale of the stock was contrary to the authority granted by the permit of the commissioner of corporations and was therefore void under the statute. The provision of the permit relied upon is that which authorized the Manker Shoe Company to sell and issue the stock "at par, for cash, lawful money of the United States." It is accordingly insisted that, as promissory notes were issued to represent the purchase price of the stock, this condition of the permit was

violated. The defendant relies on the case of *Domenigoni v. Imperial Live Stock & Mortgage Co.*, 189 Cal. 467, 209 P. 36. We find no reasonable ground for distinguishing that case in principle from the case at bar. An inspection of the record in that case discloses that the defendant company was authorized by the permit of the commissioner of corporations "to sell and issue" its capital stock "upon subscription agreements providing for payment of 25 per cent. of the subscription price in cash and the execution of promissory notes bearing interest at 6 per cent. by the subscriber for the balance." The defendant company sold to the plaintiff 2,000 shares of its stock, and took therefor three promissory notes aggregating 75 per cent. of the purchase price, and a fourth promissory note for the remaining 25 per cent. The plaintiff in that action sued to compel the surrender and cancellation of said notes on the ground that the sale was contrary to the permit, and therefore void as in violation of the law of the state. This court declared the transaction void, and, although the relief sought by plaintiff was denied for the reason that the parties to the contract appeared to be in pari delicto, the effect of the litigation was to render the promissory notes worthless in the hands of the defendant company. The plaintiff herein contends that that case is not in point, for the reason, so it is claimed, "that the permit in that case was nothing like the one in the case at bar." It is also insisted that the permit here involved does not prevent what is termed an executory contract of sale. It is pointed out that the subscription agreement in the present case provides that:

"It is hereby specially agreed that no stock is to be issued until the full amount of this subscription and notes given therefor are paid in full in cash."

But we find in the *Domenigoni* Case an almost identical provision in the subscription contract, as follows:

"It is hereby expressly agreed that no stock is to be issued until the amount of this subscription and note given therefor are paid in full, in cash."

We think the facts in the present case are stronger in favor of the defendant herein than were the facts in favor of the plaintiff in the *Domenigoni* Case. In that case a subscription agreement was specifically authorized upon condition that 25 per cent. of the purchase price be paid in cash. Promissory notes for the balance were also authorized. The promissory notes representing 75 per cent. were therefore taken in direct conformity with the conditions of the permit. It was the promissory note for the remaining 25 per cent. that voided the transaction. In the present case no subscription agreements were authorized, and no promissory notes were au-

thorized. On the contrary, the whole purchase price was required to be paid in cash. Notwithstanding this requirement of the permit, the whole purchase price was represented by promissory notes. If a promissory note for 25 per cent. was sufficient to avoid the transaction in that case, it would follow beyond question that promissory notes for the whole purchase price, when none was permitted, would likewise void this transaction. Furthermore, the contract in that case, in its executory features as to the 25 per cent., was the same in effect as the contract in the present case. The finding and conclusion of the trial court that the transaction here involved was void as in violation of the permit and the declared policy of the state was therefore well supported.

Our conclusion on the point just discussed renders it unnecessary to consider the alleged lack of authority of Mr. Manker in his endeavor to bring about a mutual rescission of the contract. Nor is it necessary to discuss other points made.

The judgment is affirmed.

We concur: RICHARDS, J.; LANGDON, J.

202 Cal. 593

HOMAN v. BOARD OF DENTAL EXAMINERS OF CALIFORNIA et al. (S. F. 12483.)★

Supreme Court of California. Dec. 13, 1927.

Rehearing Denied Jan. 12, 1928.

1. *Certiorari* ⇐4—*Certiorari* cannot be used to correct errors or defects in pleading not affecting jurisdiction of inferior tribunals (Code Civ. Proc. §§ 1068, 1074).

Under Code Civ. Proc. §§ 1068, 1074, providing that writ of *certiorari* may be had where there is no appeal, or no plain, speedy, and adequate remedy, and that its function cannot be further extended, *certiorari* cannot be used to correct errors, or as demurrer against pleading on ground of uncertainty or defects not affecting question of jurisdiction.

2. *Certiorari* ⇐64(2)—On *certiorari*, in determining sufficiency of complaint to give jurisdiction, greatest liberality in construction will be indulged.

On *certiorari*, in determining whether complaint was sufficient to have given the lower tribunal jurisdiction, the greatest liberality of construction must be indulged, in view of Code Civ. Proc. §§ 1068, 1074.

3. *Certiorari* ⇐64(2)—On *certiorari*, complaint stating facts giving inferior tribunal jurisdiction will be held sufficient, notwithstanding other irrelevant or immaterial facts are stated, or law violated is inaccurately cited.

In view of Code Civ. Proc. §§ 1068, 1074, on *certiorari*, a complaint stating facts which gave the inferior tribunal jurisdiction will be held sufficient, notwithstanding the law violated by the alleged acts is inaccurately stated, or other

facts are stated which are immaterial, and an allegation that the acts violate an inapplicable law will be disregarded.

4. Physicians and surgeons § 11(3)—Evidence held to sustain finding that dentist aided and abetted unlicensed person to practice dentistry unlawfully (Dental Law).

On appeal from judgment denying certiorari to review an order of the board of dental examiners revoking petitioner's dental license, evidence held to sustain finding that petitioner aided and abetted unlicensed person to practice dentistry unlawfully, contrary to provisions of Dental Law (St. 1915, p. 698).

5. Physicians and surgeons § 11(3)—Accusation charging dentist with unprofessional conduct, in that he bartered for license to protect illegal practitioner, held sufficient, in absence of demurrer, to give board of dental examiners jurisdiction (Dental Law, § 12, and § 13, subd. 3).

Accusation charging petitioner with unprofessional conduct as defined in section 12 of the Dental Law (St. 1915, p. 698), and specifying as the basis of such charge that he bartered for the license of another dentist to protect an illegal practitioner in his office, held sufficient, in absence of demurrer, to give board of dental examiners jurisdiction, even if facts alleged constituted violation of section 13, subd. 3, and not of section 12.

6. Physicians and surgeons § 11(3)—Board of dental examiners will take judicial notice of records to ascertain whether person employed had license.

Board of dental examiners will take judicial notice of its records, to ascertain whether a person alleged to have been wrongfully employed had a license.

In bank.

Certiorari by W. W. Homan to review an order of the Board of Dental Examiners of California and others. On hearing in Supreme Court, after judgment in District Court of Appeals. 254 P. 907. Trial court's judgment, denying certiorari, affirmed.

Rehearing denied; LANGDON, J., dissenting.

Paul F. Fratessa and Stanislaus A. Riley, both of San Francisco, for petitioner.

Frank J. Burke, of Petaluma, and Jesse W. Carter, of Redding, for respondents.

SEAWELL, J. The license of petitioner, Dr. W. W. Homan, a duly licensed dentist under the laws of this state and engaged in the practice of dentistry in the city and county of San Francisco during the year 1924, was on December 4, 1925, by an order made by the board of dental examiners of this state, revoked. The revocation was placed upon the ground that petitioner was "guilty of the acts charged in the accusation." The accusation was sworn to by W. B. Luckenback, and charged the petitioner with "unprofessional conduct," as the same is defined in section 12 of the act, regulating the practice

of dentistry in this state, specifying as the basis of said charge the following facts:

"That on or about the 26th day of September, 1924, said W. W. Homan did in writing barter for the license of one Frank J. Ryan, of Chicago, Illinois, said license to be used by Homan for the purpose of protecting an illegal practitioner in his office, or, in other words, to be used as evidence of the holder's qualification to practice dentistry; that by said acts and conduct of W. W. Homan, as herein set out, said W. W. Homan did barter for the license of F. J. Ryan, a legal practitioner; that all the acts as above set out are contrary to the provisions of said Dental Law."

Upon the foregoing accusations the accused was cited to appear before the board of dental examiners and answer said accusations. The citation referred to the accusations as "charging the said W. W. Homan with unprofessional conduct as the same is specified in section 12, subdivision —, thereof, of the Dental Law of said state, which said accusation sets forth the facts supporting said charge; and whereas, said verified accusation has been presented to this board for its consideration, which this board deems sufficient, * * * the said W. W. Homan is required to appear and answer the said accusation," etc. The petitioner appeared at the time appointed by the board of dental examiners, was informed of his right to counsel, and replied that he did not desire the aid of counsel, whereupon witnesses were sworn and testified, and documentary evidence was received in the proceeding, and the board, upon a consideration of the evidence, found the accused "guilty of the acts charged in the accusation," whereupon it made the order revoking the license of petitioner to practice dentistry in this state.

A writ of review was granted by the superior court of the city and county of San Francisco upon the application of petitioner, and upon a hearing said court gave judgment affirming the proceedings below. Upon an appeal taken from said judgment to the District Court of Appeal, the judgment of the trial court was reversed, with a direction to said trial court to enter a judgment granting the writ as prayed for.

[1] Objection is taken to the sufficiency of the accusation. It is well settled that the function of the writ of review is to determine whether an inferior tribunal, board, or officer exercising judicial functions has exceeded the jurisdiction of said tribunal, board, or officer where there is no appeal, nor, in the judgment of the court, any plain, speedy, and adequate remedy (Code Civ. Proc. § 1068), and its function cannot be further extended (Code Civ. Proc. § 1074). Its function is not to correct errors, nor is its office that of a demurrer, to be employed against a pleading by reason of uncertainty or mere defects not affecting the question of jurisdiction. 4 Cal. Jur. 1022 et seq.

[2, 3] In determining the sufficiency of the

charge alleged in a complaint, the greatest liberality of construction must be indulged; if the complaint states facts which constitute a crime, it will not be held insufficient because other facts are stated which are irrelevant or immaterial, or because the law violated by the alleged acts is inaccurately stated. An allegation in a complaint that the acts in question are a violation of another and different law may be disregarded as immaterial, for it does not alter the nature of the acts charged, nor prevent them from constituting a violation of the law. *In re Culver*, 187 Cal. 437, 202 P. 661.

[4] The admissions of petitioner at the hearing and his letters to Dr. F. J. Ryan in negotiating for the use of the latter's license disclose as forcibly as words can express meaning the illegal intent to commit the acts charged against petitioner. The letters and the testimony of the defendant cannot be otherwise construed than as an admission of the acts charged in the accusation. Dr. F. J. Ryan was a friend of petitioner, who had come to San Francisco from Chicago to engage in the practice of dentistry. After pursuing his profession in San Francisco for a time, he returned to Chicago, where he resumed the practice of dentistry, with no intent of ever returning to San Francisco. Dr. Homan thereafter by correspondence solicited Dr. Ryan to lease to him his California dental license for the express purpose of being used by Dr. Homan in this state. He contracted to pay Dr. F. J. Ryan \$25 per month for the use of said license. Upon the receipt of Dr. Ryan's license he kept the same in his office and paid the agreed monthly sum of \$25. He had in his employ a person whose surname was claimed to be Rhyner. He said that he did not know Rhyner's Christian name, nor his initials, but that he was an assistant laboratory man, and he believed that he was formerly a bartender.

At the time the inspector visited Dr. Homan's office upon an investigation as to whether he had any one in his employ practicing dentistry without a license, he found Rhyner alone in the office attired in the garb of a dentist. He inquired for Dr. Homan, and was told that he was not in. He asked Rhyner if he was the dentist in charge, and was informed that he was. He inquired his name, and was told that it was F. J. Ryan. Dr. Homan early in the transaction insisted that he had no one in his employ. The inspector had reason to believe that Dr. Homan had the license of Dr. F. J. Ryan in his office, and he demanded the same. Dr. Homan for a time denied possession of Dr. F. J. Ryan's license. The inspector procured a search warrant and instituted search of his office for the license, but was unable to find it. A police officer was shortly brought into the case. Homan told the officer that he would not find the license in his office.

Later the license was delivered to the police station. Dr. Homan had it all the while concealed in his safe and finally produced it. The letters of Dr. Homan to Dr. Ryan and of Dr. Ryan to Dr. Homan are highly incriminatory. No other rational inference can be drawn from them and the circumstances of the case than that Dr. Homan planned to use the license as a shield to ineligible persons whom he intended to, and no doubt did, employ to practice dentistry.

It is a convincing case upon the facts of unlawful bartering for a license, to the end that a person not entitled to practice dentistry might impersonate a duly licensed dentist. Clearly the evidence in the case sustains the finding that Dr. Homan aided and abetted an unlicensed person to practice dentistry unlawfully. He had an unlicensed person in his office, who had the manner and appearance of the dentist in charge, which he represented himself to be. He gave the name of the dentist whose license Dr. Homan had obtained to protect himself and said person, or any other persons he might employ to engage in an unlawful employment. In short, by his acts he not only aided and abetted one unlicensed person to practice dentistry unlawfully, but he had put himself in a position to evade the provisions of the law absolutely. No other construction can be placed upon the conduct of appellant, under the circumstances of the instant case, than that he obtained and used said license for the purpose of aiding and abetting an unlicensed person in the practice of dentistry. It would serve no purpose to reproduce Dr. Homan's letters. The inferences to be drawn therefrom are irresistible.

[5] The accusation, which was not demurred to, undoubtedly states facts which gave the board jurisdiction. It does not matter whether the acts set out were alleged to come within section 12 or section 13 of said act. The question is: Did the facts alleged come within any section of the act? If they did, the numerical order is immaterial. Section 12 of the act regulating the practice of dentistry in this state (Stats. 1915, p. 693) provides that it is a misdemeanor for any person to purchase or procure by barter any diploma, certificate, or transcript with intent that the same shall be used as evidence of the holder's qualification to practice dentistry, or in fraud of the laws regulating the practice of dentistry. Section 13, subdivision 1, provides for the revocation of the license of any dentist upon his conviction of a felony or misdemeanor involving moral turpitude, in which case the record of conviction, or a certified copy thereof, shall be conclusive evidence of the fact; subdivision 3 thereof defines several acts which are declared to constitute unprofessional conduct, viz. aiding or abetting an unlicensed person to practice dentistry unlawfully, the use of any false, as-

sumed or fictitious name, or any name other than the name under which he is licensed.

[6] The point that it was not shown that Rhyner was not a licensed dentist is answered by *Anderson v. Board of Dental Examiners*, 27 Cal. App. 336, 149 P. 1006, wherein it is held that the board will take judicial notice of its records, for the purpose of ascertaining whether or not a dental license was ever issued to the person alleged to have been wrongfully employed. That Rhyner was employed and was in the occupancy of the office is an admitted fact. That he was not again seen or found, and no effort was made by Homan to produce Rhyner at the investigation, has its significance. The legal inferences drawn by the board of dental examiners from the evidence support the findings.

The judgment of the trial court affirming the order of said board of dental examiners is affirmed.

We concur: WASTE, C. J.; RICHARDS, J.; CURTIS, J.; PRESTON, J.; SHENK, J.; LANGDON, J.

202 Cal. 638

YOUNG v. VALLEJO ELECTRIC LIGHT & POWER CO. (Sac. 3809.)★

Supreme Court of California. Dec. 15, 1927.

Rehearing Denied Jan. 12, 1928.

1. Electricity ☞ 19(5)—In action for destruction of house by fire caused by electric wires, evidence held to sustain finding of defendant's negligence and plaintiff's lack of contributory negligence.

In action against electric light company for destruction of house by fire caused by current carried through wires on roof of house, evidence held to sustain finding that defendant was negligent in transmitting electricity through wires after actual notice that they were resting on roof of house, and that plaintiff was not guilty of contributory negligence in erecting house in such manner that it came in contact with wires.

2. Appeal and error ☞ 1064(1)—Errors in instruction as to contributory negligence were without prejudice on total failure of proof of contributory negligence.

Where, in action for destruction of house by fire caused by electric wires, there was total failure on part of defendant to show existence of contributory negligence of plaintiff, whatever alleged errors trial court may have made in instructions to jury in regard to contributory negligence were errors without prejudice.

In Bank.

Appeal from Superior Court, Solano County: W. T. O'Donnell, Judge.

Action by Carrie S. Young, widow of William S. S. Young, deceased, substituted for Carrie S. Young, as executrix of the last will

and testament of William S. S. Young, against the Vallejo Electric Light & Power Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Superseding opinion of District Court of Appeal (259 P. 973).

Rehearing denied; LANGDON, J., dissenting.

Frank E. Powers, of San Francisco, and Joseph M. Raines, of Fairfield, for appellant.

Clarence N. Riggins, of Napa, and Francis C. McInnis, of Fairfield, for respondent.

RICHARDS, J. This appeal is from a judgment of the superior court in and for the county of Solano, based upon the verdict of the jury in favor of the plaintiff in the sum of \$2,000 and costs, in an action brought by the plaintiff to recover damages from the defendant resulting from the destruction of a dwelling house of the plaintiff through a fire which was alleged to have been caused by contact with the electrically charged wires of the defendant which it was alleged to have negligently maintained in such a position as to permit them to rest upon the roof of the plaintiff's said dwelling, after being notified to remove the same therefrom. The complaint alleged that the plaintiff's predecessor, William S. S. Young, had, on or about the 30th day of April, 1919, entered into a written agreement for the purchase of a certain vacant lot in a tract known as "Vallejo Heights," located near the city of Vallejo, from William D. Pennycook and his wife, the then owners thereof, whereby they had given to said Young the right to take and hold possession of said property, and to occupy and improve the same. At the time of making said agreement, and for some time prior thereto, there was extended and maintained over and across said lot from a service pole of the defendant located on one of the streets of said tract two live electric wires for the purpose of supplying a house which adjoined said vacant lot with electricity. The complaint further alleged that the defendant had so constructed and extended said wires across said vacant lot while the same was owned by said Pennycook without his consent or knowledge, and had thereafter maintained the same across said premises without the permission or consent of the owner thereof. The complaint further alleged that, immediately after entering into the said contract for the purchase and sale of said lot, Young entered upon the same, and commenced the construction thereon of a one-story wooden dwelling house at such a position upon the lot that it was located immediately beneath the said electric wires, and that said Young continued the construction of said dwelling house to completion, so that, when the same was erected, said live electric wires rested upon its roof; that, during the course of the construction of said

house, Young notified the appellant to remove said wires, but that it failed and neglected so to do, but continued to carelessly and negligently maintain said wires upon and across said lot and in immediate contact with the roof of the said dwelling which Young had thus erected. Shortly after the completion of said building Young apparently undertook to diminish the danger resulting from the contact of said live wires with the roof of his dwelling by inclosing the same, at their place of contact, with a piece of rubber hose about three feet long and three and a quarter inches in circumference, but, notwithstanding this action on his part, the roof of said house took fire at or about the place where said wires crossed and came in contact with the roof of said house, with the result that the house with its contents were entirely destroyed by said fire, to the damage of said Young in the amount for which said suit was brought. The answer of the defendant denied all the material allegations of the complaint with reference to these imputed negligences, and alleged contributory negligence on the part of the owner of said dwelling in erecting the same, so that its roof came in contact with the defendant's wires, and also in attempting to inclose said wires within said piece of rubber hose, which directly and proximately caused or contributed to the destruction of said house by said fire. The issues in the case were submitted to a jury, which returned a verdict in favor of the plaintiff for the aforesaid sum. From the judgment rendered thereon the defendant has prosecuted this appeal.

[1] The evidence in the case was contradicted in so far as it related to the location of said wires, and that they had been so placed and maintained without the consent of the owner of the premises, and, since there was no evidence introduced which showed that the defendant was maintaining its wires and electric service across said lot under any acquired right so to do from the previous owner thereof, it must be assumed in support of the verdict that the jury found the defendant to have been a trespasser on said property in so doing, and that, being such trespasser, it had no right to maintain said wires in their then position to the exclusion of any building which the owner of the lot might see fit to erect thereon, and that it therefore became the duty of the defendant, upon notice of the proposed and proceeding construction of the building in question, to so remove its wires or change the location thereof as not to interfere with or endanger said building. The evidence sufficiently showed that, while said building was in course of construction, the builder thereof, Young, had notified the defendant's officials to so remove the wires that they would not come in contact with said building. It was

the defendant itself which offered such evidence, for the purpose of showing that said Young had notice and knowledge of the position of the wires and of the resultant danger therefrom before he had so far completed the building as to bring the same in contact with the defendant's wires. But it does not follow from this fact that said Young was chargeable with negligence in constructing his dwelling so that the same would come into dangerous proximity to said wires, for the reason that he would be entitled to rely upon the defendant's seasonable compliance with his request for the removal of the wires before the same became a menace to his building. The evidence in the case further shows it to be a fact that said Young, after he realized the danger from the wires, undertook to minimize the same by the placing of a piece of rubber hose around the same at the point where they came in contact with the roof of his dwelling. The defendant alleged that his act in so doing was negligence, but the record contains no evidence in support of such allegation, but, on the contrary, shows that the placing of said rubber hose around the wires in the manner in which it was placed would lessen the danger from fire.

Upon the question as to whether the defendant was a trespasser upon the premises, the verdict of the jury must be assumed to have upheld the plaintiff's averment in that regard. The evidence in the case would thus seem to have been sufficient to sustain the allegations of the complaint to the effect that the defendant was grossly negligent in transmitting electricity through its said wires upon and across said premises during the time when it had actual notice that said wires were resting upon the roof of said house, and that neither Young nor the plaintiff, his successor in interest, was guilty of contributory negligence in the erection of said dwelling in such a manner that the same came in contact with the defendant's wires, and which it was the plain duty of the defendant to remove, and over the removal of which it had at all times full control.

[2] The question of contributory negligence of said Young or of the plaintiff was removed from the consideration of the jury by the total failure on the part of the defendant to show the existence of such negligence, and, this being so, whatever alleged errors the trial court may have made in its instructions to the jury in that regard were rendered harmless, and could not, therefore, be made the basis of a reversal of this cause upon appeal. The only rational conclusion to be drawn from the evidence was that of the defendant's negligence in the maintenance of its wires upon and across the plaintiff's dwelling, and which, as the jury probably found, was the sole proximate cause of the

fire. It is, however, earnestly contended by the appellant that in several of its instructions upon the subject of contributory negligence the court stated that contributory negligence was a defense only "as against any ordinary negligence of the defendant." This the appellant insists was error, under the authority of *Tucker v. United Railroads*, 171 Cal. 702, 704, 154 P. 835; and it may be conceded that the appellant's contention in that regard is correct in the light of said case; but since, as we have seen, there was no showing of contributory negligence on the part of plaintiff, or her predecessor, the error was without prejudice. We find no error in the other instructions of which the appellant complains.

We are of the opinion that the defendant's demurrer to the plaintiff's complaint was properly overruled, and also that the court properly denied defendant's motion for a nonsuit.

The judgment is affirmed.

We concur: WASTE, C. J.; SHENK, J.; CURTIS, J.; PRESTON, J.; LANGDON, J.; SEAWELL, J.

202 Cal. 743

WYMAN et al. v. SECURITY INS. CO. OF CALIFORNIA. (L. A. 8882.)

Supreme Court of California. Dec. 23, 1927.

1. Insurance ☞282(13)—Verbal agreement to sell truck, reserving title but delivering possession, held not to preclude recovery under fire policy containing unconditional ownership clause.

Truck owner is not precluded from recovering, under fire insurance policy containing an unconditional ownership clause, merely by reason of verbal agreement entered into by him prior to issuance of policy to sell truck to another, reserving title in himself, but delivering possession of truck.

2. Insurance ☞280—Replacing original motor block with another having different motor number held not to preclude recovery under fire policy.

That original motor block of insured truck was removed and another bearing a different motor number substituted, while original was being repaired, did not preclude recovery on destruction of truck by fire, since motor number given in policy is merely for purpose of identifying truck, and any warranty that might be implied therefrom was not a material warranty, a breach of which would void policy.

Department 1.

Appeal from Superior Court, San Diego County; W. P. Cary, Judge.

Action by O. J. Wyman and another against the Security Insurance Company of California. Judgment for defendant, and plaintiffs

appeal. Reversed, with directions to enter judgment in favor of plaintiffs.

H. J. Bischoff, of San Diego, for appellants.

W. I. Gilbert and Heskett & Weinberger, of San Diego, for respondent.

CURTIS, J. Action by plaintiffs to recover for loss by fire of an automobile truck under a policy of insurance issued by the defendant. The court found that the plaintiff Union National Bank of San Diego was the owner of a chattel mortgage on said truck, given to secure the payment of a promissory note for \$1,500 and interest, executed by the plaintiff O. J. Wyman. It further found that the defendant on April 8, 1924, had issued its policy of insurance, insuring said truck against loss by fire for the period of one year from said date in consideration of the payment by plaintiff Wyman to defendant of the regular premium of \$124.24; that said truck had been destroyed by fire on April 23, 1924; and that its value was \$2,500 at the time it was destroyed. It further found that Wyman on January 1, 1924, had entered into a verbal agreement to sell said truck for the sum of \$3,000 to J. R. Davee, who had paid to Wyman the sum of \$100 and had agreed to assume or pay the chattel mortgage thereon. By the terms of this agreement of sale Wyman retained the title to said truck until final payment of the purchase price, but Davee was given the possession thereof, and was in possession of said truck at the time it was destroyed. The court also found that the original motor number of said truck was 8863, and that said truck was described in said policy by said number, but that prior to the date of said policy and in the month of September, 1923, Wyman had removed the motor block bearing said number from said truck and substituted a motor block with the No. 88191; that said motor No. 8863 was removed in order that it might be repaired, and the motor No. 88191 was substituted to be used until the repair of the original motor block; that it remained in said truck from the date of its substitution until the truck was destroyed by fire; that the substitution of said number by Wyman was not made for the purpose of deceiving or defrauding defendant, nor was the No. 8863 given by Wyman to the insurance company at the time of the issuance of said policy given for the purpose of deceiving or defrauding said insurance company.

From the findings of fact the plaintiffs are entitled to a judgment in their favor, unless the facts found by the court relative to the ownership of said truck at the time of the issuance of said policy of insurance, or the facts found regarding the substitution of the No. 88191 for the No. 8863 on the motor

block of the engine of said truck are sufficient to defeat a recovery on their part.

[1] The policy provided that:

It shall be void, "if the interest of the assured in the subject of this insurance be other than unconditional and sole ownership."

Respondent relies upon this provision of the policy when applied to the finding of the court that at the time the policy was issued Wyman had agreed verbally to sell the machine to Davee, reserving title to the truck in himself, but delivering possession of the truck to Davee. It has been held in this state that, under such a contract and in case of the loss or destruction of the property involved, the loss falls upon the vendor. *Potts Drug Co. v. Benedict*, 156 Cal. 322, 334, 104 P. 432, 25 L. R. A. (N. S.) 609; *Waltz v. Silveria*, 25 Cal. App. 717, 719, 145 P. 169. "The interest of the insured is sufficient when the whole loss will fall upon him in case of the destruction of the insured property." 14 Cal. Jur. 499; *Phenix Ins. Co. v. Hilliard*, 59 Fla. 590, 52 So. 799, 138 Am. St. Rep. 171; *Burson v. Fire Ass'n of Philadelphia*, 136 Pa. 267, 20 A. 401, 20 Am. St. Rep. 919. Under these authorities we are of the opinion that plaintiffs were not precluded from recovery upon the insurance policy merely by reason of the verbal agreement entered into by Wyman prior to the issuance of the policy to sell the truck to Davee upon the terms and conditions of such agreement.

[2] The original motor number of said truck was 8863 and the policy of insurance so described the truck. As we have already seen, the motor block bearing this number had been removed prior to the issuance of the policy of insurance for the purpose of repairing said motor block and a motor block bearing the No. 88191 substituted in the place of the original block, and that this substituted block remained in the truck up to the time of its destruction by fire. Respondent contends that these facts are a bar to any recovery on the policy by plaintiffs. The principal authority relied upon by respondent in support of this contention is the case of *Solomon v. Federal Ins. Co.*, 176 Cal. 133, 167 P. 859. In that case it was held that describing an automobile as having been made in 1909 when in fact it was made in 1907 was such a material misdescription as to constitute a breach of an express warranty provided by section 2607 of the Civil Code and avoided a policy of insurance. It was pointed out in the opinion in that

case that the value of a used automobile is governed largely by the year of its manufacture, and that a car made in 1907 is of much less value than a car made in 1909, and that the insurable value is also much less. It was accordingly held that a warranty as to the year a car is made was a material warranty and a breach of such warranty in a policy of insurance voided the policy. This same rule, however, does not apply as to a misdescription of an automobile in a policy of insurance as to its number. *White v. Home Mut. Ins. Ass'n*, 189 Iowa, 1051, 179 N. W. 315; *Caldwell v. City of New York Ins. Co.* (Mo. App.) 245 S. W. 602; *Tomato Products Co. v. Manufacturers' Liability Ins. Co. of New Jersey*, 203 App. Div. 678, 197 N. Y. S. 497; *Douglas v. Insurance Co. of North America*, 215 Mich. 529, 184 N. W. 539; *Moore v. North River Ins. Co.*, 111 Kan. 420, 207 P. 760; *Giles v. Citizens' Ins. Co. of Missouri*, 32 Ga. App. 207, 122 S. E. 890. In the case of *White v. Home Mut. Ins. Ass'n*, supra, the court said:

"The number of the automobile was inserted merely for the purpose of identification. The insurance is intended to be and was on the automobile; not the number plate. It was the car insured quite as certainly, if fully identified, without resort to the number. There was such identification, for the evidence, without conflict, shows that the automobile burned met the description contained in the policy in all other respects, was the only automobile owned by the insured, and was the one intended to be covered by the policy."

The truck here in question was described in the policy of insurance as a 1921 G. M. C. 3½-ton truck, motor No. 8863. There was no question but that the truck destroyed by the fire was the truck which the defendant insured. The motor number given in the policy of insurance was merely for the purpose of identifying the truck, and as the truck could be and was positively identified without resort to this number, this portion of the description became immaterial, and any warranty that might be implied therefrom was not a material warranty, a breach of which would void the policy of insurance.

In our opinion, the plaintiffs were entitled to judgment upon the findings. Judgment is reversed, with directions to the trial court to enter judgment in favor of plaintiffs upon the facts already found by the court.

We concur: PRESTON, J.; SEAWELL, J.

202 Cal. 695

SPENCER v. STEWART et al. (L. A. 8911.)

Supreme Court of California. Dec. 19, 1927.

1. Homestead ⇨38—Wife living with husband may declare homestead on appropriate property to value of \$5,000, when husband has not made selection (Civ. Code, §§ 1260-1262).

Under Civ. Code, §§ 1260-1262, wife while living with husband may declare homestead on appropriate property to value of \$5,000, when husband has not made selection.

2. Homestead ⇨57(3)—Evidence held to support finding that homestead declared by wife covered certain lot.

In action to quiet title, evidence including wife's declaration of homestead held sufficient to support finding, that certain lot was included in homestead declared by wife.

3. Executors and administrators ⇨3(2)—Homestead ⇨150(1)—On husband's death, title to homestead declared by wife in community property vested in surviving wife without order setting it apart and without administration.

On death of husband, title to homestead previously declared in community property by wife vested immediately in her as survivor without order setting it apart and without necessity of administration.

4. Executors and administrators ⇨3(2)—Title to homestead declared by wife prior to husband's death vesting in her held subject to administration through probate of her will without requiring administration of husband's estate.

On husband's death, title to homestead in community property previously declared by wife vested in her and was subject to administration in her estate by proceedings culminating in admission to probate of her will, precluding necessity of propriety in subsequent proceedings to administer estate of husband for purpose of disposition of homestead.

Department 2.

Appeal from Superior Court, Los Angeles County; C. P. Vicini, Judge.

Action by Mary E. Spencer, administratrix with the will annexed of the estate of William Hobbs, deceased, against Thomas M. Stewart and another, executors of the last will and testament of Anna Hobbs, deceased, to quiet title. From a judgment for defendants, plaintiff appeals. Affirmed.

Will D. Gould, of Los Angeles, for appellant.

Stewart & Stewart, of Los Angeles, for respondents.

SHENK, J. This is an appeal by the plaintiff from a judgment in favor of the defendants in an action to quiet title to real property. The complaint was filed in December, 1924, by plaintiff as administratrix with the

will annexed of the estate of William Hobbs, deceased, against the defendants, as executors of the last will and testament of Anna Hobbs, deceased, to determine which of the two estates has legal title to the real property in question. A sale of the property to one Boshyshell for the sum of \$7,650 had been confirmed by the probate court in the matter of the estate of William Hobbs, when a formal transfer was delayed by reason of what was claimed by the prospective buyer to be a defect in or a cloud on the title occasioned by an unrevoked declaration of homestead filed by Anna Hobbs in 1877, when she and William Hobbs were husband and wife and were residing on lots 1, 2, and 7 in block 3 of the Sanchez tract, in the city of Los Angeles. The property was community property and was declared to be of the value of \$5,000. The declaration recited that the husband "has not made any declaration of homestead." In January, 1880, William Hobbs, the husband, died, leaving a will wherein he devised and bequeathed all of his property to his wife, Anna Hobbs. Thereafter Anna Hobbs lived on the property, paid all taxes, etc., and at the time of her death in January, 1911, was still possessed of lot 7, which is the subject of the controversy. Anna Hobbs' will left possession of all of her property to Mary E. Spencer, a granddaughter of William and Anna Hobbs, until the property should be sold, when the proceeds were to be divided one-fourth to her and the balance to other heirs as provided in the will. Anna Hobbs' will, appointing Stewart and Adams the executors thereof, was admitted to probate on July 19, 1911, and the will of William Hobbs, who had died in 1880, was admitted to probate on January 11, 1912. Mary E. Spencer enjoyed possession of the property and received the rents therefrom from 1911 to the time when this action was brought, and so far as the record shows nothing further was done in either of these estates until about that time. The trial court found in favor of the defendants, adjudged the declaration of homestead to be valid and subsisting at the time of the death of William Hobbs, and quieted the title to the property in the estate of Anna Hobbs.

[1] Appellant's first contention is that the declaration is invalid on its face. It is claimed that the law did not and does not allow the wife, while living with her husband, to declare a homestead on a dwelling in excess of \$1,000 in value. This contention of appellant is without merit inasmuch as the provisions of the Civil Code (sections 1260-1262) have been construed to accord to the wife the right to declare a homestead on appropriate property to the value of \$5,000 when the husband has not made the selection (*MacLeod v. Moran*, 11 Cal. App. 622, 105 P. 932; 13 Cal. Jur. 444).

[2] The next contention is that the court on the evidence should have found that the homestead did not cover lot 7. The declaration included this lot, but it is insisted that it was improperly included. Plaintiff attempted to prove by the oral testimony of old residents in the neighborhood that William and Anna Hobbs lived in the dwelling on lots 1 and 2, but did not live on lot 7. All those lots were adjoining, and the oral evidence was too indefinite and uncertain to overthrow the solemn statement of the ancient declaration. In view of this uncertainty on the part of plaintiff's testimony, the declaration itself was sufficient evidence upon which the trial court could make its finding that lot 7 was included in the homestead.

[3] Upon the death of William Hobbs in January, 1880, the title to the homestead vested immediately in Anna Hobbs, the surviving wife, without any order setting apart the homestead and without the necessity of administration. *Estate of Shirey*, 167 Cal. 193, 195, 138 P. 994; *Williams v. Williams*, 170 Cal. 625, 628, 151 P. 10; 11 Cal. Jur. 567 et seq.; 13 Cal. Jur. 526 et seq.

[4] The title to lot 7, being so vested, remained in the surviving spouse until her death in January, 1911, and was subject to administration in her estate by proceedings culminating in the admission to probate of her will in July, 1911. There was therefore no necessity or propriety in subsequent proceedings to administer the estate of William Hobbs for the purpose of the disposition of the homestead. Whatever appropriate method might otherwise have been taken to show of record the death of William Hobbs and thus permit the certification of the title to the homestead in Anna Hobbs or her estate need not be discussed. It is enough here to say that the issues framed in this proceeding to quiet title, wherein affirmative relief was sought on behalf of the estate of Anna Hobbs, were sufficient upon which to establish that record.

No other point involved in the appeal requires specific notice.

The judgment is affirmed.

We concur: RICHARDS, J.; LANGDON, J.

202 Cal. 738

SHIBLEY v. SUPERIOR COURT IN AND FOR CITY AND COUNTY OF SAN FRANCISCO et al. (S. F. 12627.)

Supreme Court of California. Dec. 23, 1927.

1. Contempt ☞23—Party present when court indicated certain order would be made but outside state when it was made may be held in contempt for violation thereof.

Where defendant in action for separate maintenance was in court when court indicated

intention to make certain order, he may be held in contempt for violation of such order, notwithstanding that he was outside state when it was made.

2. Contempt ☞23—Defendant, with knowledge of contents of order, may be put in contempt for violation without service of copy.

Service of copy of order on defendant in action for separate maintenance held not required, in order to put him in contempt for violation of its provision nor to lay foundation for issuance of order to show cause why he should not be punished for such contempt, where such defendant was shown by undisputed record to have knowledge of such order.

3. Contempt ☞23—Service on attorney of order to show cause why defendant should not be punished for civil contempt held proper.

Where defendant, in action for separate maintenance, was present in court when court indicated that certain order would be made, and knew contents of such order, but subsequently left state, service of order requiring him to show cause why he should not be punished for contempt for violating such order, contempt being civil, held properly served on his attorney.

In Bank.

Application of Kenneth Shibley for a writ of prohibition, prayed to be directed to the Superior Court in and for the City and County of San Francisco, Walter Perry Johnson, Judge, to restrain further consideration of a contempt proceeding. Writ dismissed.

Milton T. U'Ren, of San Francisco, for petitioner.

Livingston & Livingston, of San Francisco, for respondents.

RICHARDS, J. The petitioner applied for a writ of prohibition whereby he sought to have the respondents, the superior court in and for the city and county of San Francisco, and the judge thereof, required to refrain and desist from further considering a contempt proceeding instituted in said court in an action for separate maintenance pending in said court, wherein the petitioner is the defendant and his wife, Marion Shibley, is the plaintiff. The plaintiff commenced her said action on November 17, 1926. The defendant having appeared therein, the plaintiff, on March 11, 1927, presented a motion for an order allowing her temporary maintenance pending said action. The defendant appeared on said day in response to said motion and testified in his own behalf. At the conclusion of the hearing, the court indicated that it would make the order sought; and it did in fact then make an order directing the payment of \$250, in addition to other payments which had already been made by the defendant applicable to the month of March, and also ordered the payment of a fixed sum on account of counsel fees and costs. The court continued the further hearing as to the def-

inite allowance to be made for the plaintiff's temporary maintenance until March 18, 1927. The foregoing orders were made in court in the presence of the defendant and his counsel. On March 18 the hearing upon said matter being concluded, counsel for both parties being present, at which time the court directed the entry of an order for a monthly allowance to plaintiff of \$600 and for an additional allowance of \$100 for the month of March. The written order embodying the foregoing allowances was signed and filed on March 21, 1927. In the meantime, and on March 14, 1927, the defendant Shibley had left California and gone to Seattle, Wash., where for some years he had been engaged in business, although he had always maintained a home in Berkeley, Cal., where his family had resided. During the month of April, 1927, under compulsion of a contempt proceeding, the defendant paid the April installment as provided in the foregoing order. Early in May he paid the sum of \$250, which was credited on account of the May installment. He also served and filed a motion to reduce the amount of the allowance made by the order of March 21 to the sum of \$200 a month, and in support thereof filed, on May 16, 1927, an affidavit, verified by him at Seattle, Wash., on May 12, 1927, wherein he deposed that on March 21, 1927, the judge of said court had made the order of said date, describing with particularity the contents of said order, and asserting his compliance with it for the months of March and April. The defendant's said motion was not prosecuted and was eventually dropped from the calendar. The defendant was in San Francisco during the month of April, leaving that city on April 29 for Seattle, since which time he has not returned to California.

The contempt proceeding which he now seeks to have said court restrained from further prosecuting, was instituted by the plaintiff on May 13, 1927. In support thereof, the plaintiff filed her affidavit alleging that her temporary maintenance for the month of May had not been paid pursuant to the order of March 21, 1927, and that by reason thereof said defendant was in contempt of said order. She also deposed that said defendant was not within the state of California, and that it was therefore impossible to obtain personal service of an order to show cause upon him, and she, therefore, prayed for an order permitting service upon his attorney of record in his place and stead. The court issued its order to show cause and also its order for the service thereof accordingly, making the same returnable on May 20, 1927. On said day said defendant's attorney of record appeared for said defendant, specially to make a motion to quash said order for substituted service, which motion the court denied on June 8, 1927. Thereafter, and on June 13, 1927, the order to show cause was taken under submission by said court. Thereafter and on

July 28, 1927, the defendant instituted in this court the present proceeding.

[1, 2] The foregoing facts were conceded to be true upon the hearing hereon, at which time the petitioner presented and now urges two main contentions why the permanent writ should issue herein. The first of these contentions is that, the defendant being outside of the state of California at the time said order of March 21 was made and never having been served with a copy of said order, he cannot now be held in contempt for a violation of said order; second, that, the defendant being outside of the state of California when the order to show cause why he should not be adjudged guilty of contempt issued May 13, 1927, was made, and that not having been served personally with said order, the court has acquired no jurisdiction to proceed thereunder, and in that behalf the petitioner urges that the substituted service of said order upon his attorney of record was and is void, and that the court obtained no jurisdiction over the person of the petitioner thereby.

As to the first of the foregoing grounds for the issuance of a permanent writ herein, we find the same to be without merit, in view of the undisputed facts showing that the defendant and petitioner herein was present in court when the proceedings of March 13, 1927, which preceded the making of said order on March 21, 1927, were held, and during which the court indicated its intention to make said order. The fact that the defendant left the state of California between said dates did not in any way affect the jurisdiction of the court to make and enter the same; nor did the fact that the defendant was absent from the state of California militate against the power of the court to enforce said order against the defendant having knowledge of the content of said order and with such knowledge failing or refusing to comply with the terms and requirements thereof. That the defendant had such knowledge sufficiently appears from the undisputed record herein, showing not only that he yielded reluctant compliance during the months of March and April with the terms of said order, but that early he sought a modification thereof and accompanied his motion for such modification with his own affidavit, wherein he not only referred specifically to the existence of such order, but even undertook to set forth the substance and somewhat of the details thereof. Under such circumstances service of a copy of said order would not be required in order to put the defendant in contempt for a violation of its provisions nor to lay the foundation for the issuance by the trial court of the subsequent order to show cause why the defendant should not be cited and punished for such contempt. *Golden Gate Mining Co. v. Superior Court*, 65 Cal. 187, 3 P. 628; *Romine v. Cralle*, 83 Cal. 432, 23 P. 525; *Mitchell v. Superior Court*, 163 Cal. 423, 125 P.

1061. The case of *Johnson v. Superior Court*, 63 Cal. 578, upon which the petitioner relies in support of his contention in the foregoing regard is not in point, for the reason that the trial court in that case had never gained that jurisdiction over the person of the defendant which was a prerequisite to the making of any order having the effect of a personal judgment for the payment of money.

[3] The petitioner herein being thus in contempt for his disobedience of the order of March 21, 1927, of the contents of which he had knowledge, we are to consider his second contention as to the sufficiency of the service of the order of the trial court, made and entered on May 13, 1927, requiring the defendant to show cause on May 20, 1927, why he should not be punished for his said contempt. At the time of the making and entry of its said order it was made to appear to the court and the judge thereof that the defendant was absent from the state and was therefore without the reach of a personal service of whatever order the court might make in the premises. It was also made to appear to said court from its own records not only that the defendant had his residence in California, but that he was represented in this very action by an attorney of record who had but recently filed upon his behalf and was then prosecuting a motion to set aside or modify the very order of which said defendant was then in contempt. These facts having been shown to the trial court, it proceeded to add to its said order of May 13, 1927, the provision directing service thereof to be made upon the defendant's attorney of record in due time before the return day thereon. That the trial court had jurisdiction to make such order for substituted service upon the defendant's then existing and then acting attorney of record in a proceeding for a civil contempt such as this proceeding we entertain no doubt. The distinction between civil and criminal contempts in the foregoing regard was clearly pointed out by Mr. Chief Justice Myers in the Matter of *Morris*, 194 Cal. 63, 227 P. 914. In the early case of *Eureka Lake, etc., Co. v. Superior Court*, 66 Cal. 311, 5 P. 490, it was decided that an order to show cause why a corporation should not be punished for contempt might be served upon the attorney for the corporation when its managing agents were shown to be concealing themselves for the purpose of avoiding such service. No difference can be discerned between the case of a defendant who, being within the state, by concealment avoids process of this character, and a defendant who, being in contempt and being willfully without the state, cannot be personally served. The effect in each case is the same, and hence the power of the court to enforce its lawful orders should be the same. A like ruling was made in the case of

Foley v. Foley, 120 Cal. 33, 52 P. 122, 65 Am. St. Rep. 147, upon the authority of the earlier case. We find nothing in the cases relied upon by the petitioner which contravenes this salutary rule as applicable to cases wherein it appears, as it does in this case, that the defendant had full knowledge of the contents of the order which he was charged with having violated, and whose violation was willful, and who absents himself from the state, and from that point of vantage undertakes by motion and special appearances made through his attorney of record to obstruct the court in the enforcement of its lawful orders in a proceeding still pending before it.

We find no merit in either of the petitioner's contentions herein.

It is therefore ordered that his petition for a writ herein be, and the same is hereby, dismissed.

We concur: WASTE, C. J.; CURTIS, J.; LANGDON, J.; SHENK, J.; SEAWELL, J.; PRESTON, J.

202 Cal. 660

ATLAS MIXED MORTAR CO. v. CITY OF BURBANK et al. (L. A. 8956.)

Supreme Court of California. Dec. 16, 1927.

1. Municipal corporations $\S$ 592(1)—Motor Vehicle Act does not violate Constitution placing certain regulations not conflicting with general laws in cities' control (Motor Vehicle Act, as amended in 1923; Const. art. 11, § 11).

Motor Vehicle Act, as amended in 1923 (St. 1923, p. 517), regulating motor vehicle traffic, does not violate Const. art. 11, § 11, vesting certain regulations not in conflict with general laws in cities, towns, etc., since regulation and control of travel and traffic along public roads, streets, and highways of state is not matter of local concern.

2. Municipal corporations $\S$ 592(1)—Whenever state assumes to regulate traffic on highways, entire control vests in state.

Whenever state sees fit to adopt general scheme for regulation and control of motor vehicles on public highways of state, entire control of whatever phases of the subject are covered by state legislation ceases in so far as municipal or local regulation is concerned.

3. Pleading $\S$ 214(1)—Allegations of amended complaint are taken as true on demurrer.

Allegations of plaintiff's amended complaint are taken as true for purposes of demurrer.

4. Municipal corporations $\S$ 592(1)—Ordinance regulating weight of vehicles traveling on "improved public highway" held void as conflicting with Motor Vehicle Act (Motor Vehicle Act, as amended in 1923, §§ 21, 85, 86, 88).

Ordinance of city of sixth class, organized under general law attempting to regulate weight of vehicles traveling on "improved public highway," within meaning of term as defined by

Motor Vehicle Act, as amended in 1923 (St. 1923, p. 517), § 88, held void as in violation of sections 21, 85, 86, and 88, wherein regulation of such vehicles as used in travel or traffic along improved public highway, whether within or without cities, was completely covered.

Department 2.

Appeal from Superior Court, Los Angeles County; Hartley Shaw, Judge.

Action by the Atlas Mixed Mortar Company against the City of Burbank to enjoin enforcement of certain ordinances regulating the use of commercial vehicles. Judgment of dismissal, and plaintiff appeals. Reversed, with directions.

E. R. Young, of Los Angeles, and E. L. Searle, for appellant.

George D. Blair, of Los Angeles, E. E. Kirk, of Burbank, and James H. Mitchell, of Los Angeles, for respondents.

RICHARDS, J. This is an appeal from a judgment of the superior court of the county of Los Angeles directing a dismissal of this action after an order of the court sustaining the demurrer of the defendants to the plaintiff's amended complaint. The action was instituted by the plaintiff for the purpose of obtaining an injunction restraining the respondent, city of Burbank, a municipal corporation, and also its codefendants, its board of trustees, and other officers of said city, from the enforcement of certain ordinances enacted by said city through its said officials, regulating the use of commercial vehicles upon certain streets and highways within the corporate limits of said city, and to have said ordinances declared illegal and void. The facts out of which said action arose are briefly these: The plaintiff and appellant is a corporation which has for many years been engaged in the business of mixing and manufacturing mortar, plaster, cement, and kindred products, and of supplying its customers with such products, and also of furnishing to them, sand, gravel, and crushed rock from its quarries. For these purposes plaintiff maintains a mixing and manufacturing plant in the city of Los Angeles, and it also owns and operates certain quarries upon a leasehold interest in certain lands located in Stough Canyon, which lies to the eastward and contiguous to the city of Burbank. The appellant's quarries thus located are surrounded by steep hills; the only road leading to and from the same traversing said Stough Canyon, and at the mouth thereof entering the limits of the city of Burbank on its northeasterly side. At the point of its said entry into the city of Burbank said roadway connects with, and merges into, a certain street or highway in said city officially named as Eleventh street, but sometimes known as Sunset Canyon drive, which street or drive leads into certain other streets within said city, including a street or avenue known as

Cypress avenue, which extends from Sunset Canyon drive to the San Fernando road within said city. The plaintiff alleges that its only means of ingress to and egress from its said quarries, and its only means of travel therefrom, whereby its trucks, drays, or other vehicles can convey the sand, gravel, and crushed rock, the products of its said quarries to its customers or to its mixing plant in the city of Los Angeles, is on and along the aforesaid streets, highways, and avenues of the city of Burbank in order to reach said San Fernando road. Plaintiff further alleges that, commencing with August 21, 1923, and continuing at intervals thereafter down to April 7, 1925, the city of Burbank proceeded to enact a series of ordinances undertaking to regulate the weight and travel of commercial vehicles upon and along certain of its streets, and among these the streets or avenues above named, the effect of which ordinances, if valid, was to render unlawful the use and travel of commercial vehicles carrying such products or loads as the plaintiff produces at his quarries, in excess of the weight, in some instances, of 6,000 pounds, and in others of 8,000 pounds, upon or along said designated streets. It further alleges that the city of Burbank is proceeding to enforce said ordinances through the arrest, or threatened arrest, of its agents and employees when engaged in transporting its said products in its trucks, drays, or other vehicles carrying loads in excess of the weights described in said ordinances, and that, unless the city of Burbank and its officials are restrained from so doing, the plaintiff will be forced to abandon and discontinue the use of its property and equipment located in Stough Canyon and its quarries and the transportation of the products thereof by its only means of ingress to and egress from its said properties. The plaintiff avers that said ordinances of the city of Burbank are void as in violation of the provisions of that certain act of the Legislature known as the Motor Vehicle Act, as amended in 1923 (Stats. 1923, p. 517). The trial court sustained a general demurrer interposed by the defendants to the plaintiff's amended complaint, and, upon the latter's failure to amend within the time allowed, made and entered its order and judgment dismissing said action.

[1, 2] The sole question presented upon this appeal is as to the validity of the aforesaid ordinances of the city of Burbank, in view of the action of the Legislature in the adoption of the Motor Vehicle Act and of the content of said act, in so far as it relates to the weight of motor vehicles in the course of their use and transport upon and along streets and highways within the limits of municipal corporations. It is the contention of the respondents that, in so far as the state Legislature has attempted, by means of said Motor Vehicle Act, to prohibit municipalities from the passage of laws regulating the weight of

motor vehicles in the course of their use and transport upon and along the streets and highways of such municipalities, other than strictly state highways, the provisions of said act are unconstitutional as in violation of the provisions of article 11, section 11, of the state Constitution. The theory of the respondents in making this contention is that the control of streets and highways for the purpose of regulating traffic thereon is a municipal affair. That this contention is without merit has been made clear by this court and also by the appellate court of this state in recent decisions, wherein it has been held that the regulation and control of travel and traffic along the public roads, streets, and highways of the state of California, if it ever was such, has ceased to be a matter of local concern. The leading recent case upon this subject is *Ex parte Daniels*, 183 Cal. 636, 192 P. 442, 21 A. L. R. 1172, which decision has been generally followed by the appellate tribunals of this state since its pronouncement in 1920, in their interpretation of the Motor Vehicle Act and its several amendments adopted since that date. The most recent decision of this court touching this subject is to be found in the case of *In re Murphy*, 190 Cal. 286, 212 P. 30, wherein the rule laid down in *Ex parte Daniels*, supra, was given application to chartered cities whenever the ordinances of such cities in attempted regulation of traffic and travel upon or along their streets, highways, or avenues were found to be in conflict with the Motor Vehicle Act. For a better reason, the rule thus declared would have application to municipalities formed under general laws, of which the city of Burbank is one, being a municipality of the sixth class. The effect of these several decisions is to declare that, whenever the state of California sees fit to adopt a general scheme for the regulation and control of motor vehicles upon the public highways of the state, the entire control over whatever phases of the subject are covered by state legislation ceases in so far as municipal or local regulation is concerned.

Having in view the state of the law as declared by these recent decisions, we are brought to a consideration of the terms of the Motor Vehicle Act as amended in 1923, in so far as the provisions of the act relate to the weight of motor vehicles when in use upon the public streets or highways of the state of California, in and out of cities. Section 21 of the Motor Vehicle Act (Stats. 1923, pp. 519, 520) defines public highways, as that term is employed in the provisions of said act, to include "every highway, road, street, alley, lane, court, place, trail, drive, bridge, viaduct or trestle laid out or erected as such by the public or dedicated or abandoned to the public, or intended or used by or for the general public, except such portions thereof as are used or prepared for use, by pedestrians as sidewalks," the only limitation upon this defi-

nition of a public highway being that it shall not be deemed to include private driveways, roads, or places used by the owner or by his guests or those having business with him, and not intended to be otherwise used by the general public. Sections 85, 86, and 88 of said act proceed to deal with the gross weight of vehicles or loads which shall be operated or moved upon any public highway. Without going into detail as to the somewhat involved provisions of these several sections of the act, it may be generally stated that they permit the operation of such vehicles, whether loaded or unloaded, having a minimum weight of 22,000 pounds and a maximum weight of 34,000 pounds, depending upon the number and kind of wheels with which such vehicles are equipped. The provisions of section 88 of the act refer to the authority which is thereby given to local governmental bodies with regard to the limitation of the weight limit specified in the immediately preceding sections of the act. Its provisions read as follows:

"The legislative body of any county or city shall have power by ordinance to permit the operation and moving of vehicles and loads upon public highways and streets under their respective jurisdictions other than upon state highways of a maximum gross weight in excess of the maximum gross weight of vehicles and loads specified in section eighty-five of this act but shall have no power to require lighter loads than specified in this act on any improved public highway as such highway is defined herein, except as in this section otherwise provided."

In a succeeding paragraph of said section 88 the term "improved public highway" is thus defined:

"For the purposes of this act an improved highway is hereby defined to be a highway paved with cement concrete or asphaltic concrete, or a highway having a hard surface and distinct roadway not less than four inches thick made up of a mixture of rock, sand, or gravel bound together by an artificial binder other than natural soil."

[3, 4] The plaintiff in its amended complaint alleged that Cypress avenue, within said city of Burbank, was an "improved public highway" within the meaning of said term as defined in the aforesaid provisions of section 88 of the Motor Vehicle Act, and was such at the time of the arrest, or threatened arrest, of plaintiff's agents and employees thereon for the alleged violation of the aforesaid ordinances of said city, attempting to regulate the weight of motor vehicles used in commercial transportation upon and along the streets of said city. The allegations of plaintiff's amended complaint being taken to be true for the purposes of demurrer, it would seem irresistibly to follow that the provisions of the ordinances of said city which purport to limit the operation of such vehicles upon and along its said street, having a gross weight in excess of 6,000 or 8,000 pounds, are

void as in violation of the aforesaid provisions of the Motor Vehicle Act wherein the regulation of the weight of such vehicles when used in travel or traffic along improved public highways, whether in or out of cities, is completely covered. We can perceive no difference in principle between the questions presented to this court in the case of *Ex parte Daniels*, supra, and *In re Murphy*, supra, and those presented upon this appeal.

It follows that the judgment of the trial court in dismissing this action must be, and the same is, reversed, and said court is directed to enter an order overruling the defendants' demurrer to plaintiff's amended complaint.

We concur: SHENK, J.; LANGDON, J.

87 Cal. App. 590

FERGUSON v. FONNER et al. (Civ. 6030.)★

District Court of Appeal, First District, Division 1, California. Dec. 15, 1927.

Hearing Denied by Supreme Court Feb. 9, 1928.

1. Appeal and error ⇨345(1)—Notice of intention to move for new trial, filed in time, is as regards time for appeal, "commencement of new proceeding," which remains pending until disposed of (Code Civ. Proc. § 939).

Filing of notice of intention to move for a new trial in time is commencement of new proceeding under Code Civ. Proc. § 939, which remains pending, for purposes of fixing time for appeal, until disposed of by the court or by operation of law.

2. Appeal and error ⇨345(1)—Notice of appeal, filed within 30 days after denial of new trial, based on notice of intention, held timely, notwithstanding failure to bring motion to hearing within 60 days after notice of judgment entry (Code Civ. Proc. § 939).

Notice of appeal, filed within 30 days after denial of motion for new trial, held timely, where notice of intention to move for new trial was filed in time, though no steps were taken to bring motion to hearing within 60 days after service of notice of entry of judgment under Code Civ. Proc. § 939.

3. Limitation of actions ⇨146(1)—Requirement that promise to pay outlawed debt must be in writing and signed establishes rule of evidence (Code Civ. Proc. § 360).

Code Civ. Proc. § 360, providing no acknowledgment or promise to pay is sufficient evidence of new or continuing contract, taking case out of operation of statute of limitations unless in writing, signed by party to be charged, relates to kind of evidence by which promise shall be proved and not to character of promise or acknowledgment.

4. Limitation of actions ⇨196(2)—Payment accompanied by writing, signed by debtor, which recognizes outlawed debt, is admissible to show acknowledgment (Code Civ. Proc. § 360).

While part payment alone is insufficient as an acknowledgment of a debt barred by lim-

itations under rule established by Code Civ. Proc. § 360, payment accompanied by writing signed by debtor, which recognizes debt as subsisting, is relevant evidence on question of debtor's willingness to pay.

5. Limitation of actions ⇨196(2)—Letter signed by debtor, inclosing payment "to help out" on outlawed note, held admissible to establish acknowledgment of debt (Code Civ. Proc. § 337, subd. 1, and § 360).

In action on note claimed to be barred by statute of limitations (Code Civ. Proc. § 337, subd. 1), signed letter from defendant, written after expiration of statutory period, inclosing payment, and reciting that money was to help out until the debtor could get hold of G., who was other party liable on note, held admissible under section 360, to show new promise or acknowledgment taking debt out of statute.

6. Limitation of actions ⇨145(5)—Promise to pay debt after expiration of statutory period is supported by sufficient consideration.

New promise of debtor to pay debt, made after expiration of statutory period, is sufficient consideration to take debt out of statute.

7. Limitation of actions ⇨148(1)—Debtor's promise to pay obligation, barred by statute, held not limited by subsequent letter in which debtor promised payments from surplus earnings (Code Civ. Proc. § 337, subd. 1).

Debtor's promise to pay, made after expiration of limitation period under Code Civ. Proc. § 337, subd. 1, held not limited by subsequent letter in which debtor stated that he did not recall promising to pay specified installments on obligation and promised to pay only from surplus earnings.

Appeal from Superior Court, City and County of San Francisco; Edmund P. Mogan, Judge.

Action by Mrs. A. Ferguson against John F. Fonner and another. From an adverse judgment, defendant named appeals. Motion to dismiss appeal denied, and judgment affirmed.

Henry L. Corson, of San Francisco, for appellant.

J. W. Henderson, of San Jose, for respondent.

CASHIN, J. An appeal from a judgment entered against appellant, Fonner, in an action to recover a debt.

Respondent moved to dismiss the appeal on the ground that the notice of appeal was not filed within the time prescribed by statute.

The judgment appealed from was entered on June 12, 1925, and on June 15, 1925, a notice of its entry was served on appellant. On June 25, 1925, a notice of intention to move for a new trial was filed, the notice stating that the motion would be presented on the minutes of the court and by affidavits. The motion was not presented until August 24, 1925, on which date it was denied for lack of jurisdiction, and the notice of ap-

peal was filed on the same day. Respondent contends that, no steps having been taken to bring the motion to a hearing within 60 days after the service of the notice of entry of judgment, there was no proceeding for a new trial pending within the provisions of section 939 of the Code of Civil Procedure, which would extend the time for an appeal from the judgment, and that the notice of appeal was filed too late.

[1, 2] As held in the matter of the Estate of Bergland, 177 Cal. 227, 170 P. 400, the filing of a notice of intention to move for a new trial in time is the commencement of a new proceeding, which remains pending until disposed of by the court or by operation of law. The facts of the present case were similar to those of the case cited, and, the notice of appeal having been filed within 30 days after the termination by operation of law of the proceeding for a new trial, the motion to dismiss the appeal should be denied.

A promissory note for \$2,296.18, payable to respondent 30 days after date, was executed by appellant and James W. Gough on April 26, 1917. Payments were made thereon aggregating the sum of \$662.80, the last payment being made on October 23, 1922. The complaint, which was filed on March 19, 1924, alleged that appellant, on various dates before and after May 21, 1921, acknowledged his indebtedness on the note and promised to pay the same. These allegations were denied by appellant, who also pleaded by his demurrer and answer to the complaint as a bar to the action the provisions of subdivision 1 of section 337 of the Code of Civil Procedure.

The note matured on May 26, 1917, and the record contains no evidence that a written acknowledgment of the debt was made during the four-year period following the date of maturity. Subsequent to the expiration of that period, however, certain payments on the debt were made by appellant, each payment being accompanied by a letter signed by him and addressed to respondent. The letters with their respective dates were as follows:

November 7, 1921: "Inclosed find ten (\$10) dollars to help out until I can get hold of Gough."

March 22, 1922: "Inclosed find ten (\$10) dollars."

August 29, 1922: "Your letter of the 27th at hand. As you say that I made the statement that I would pay you ten dollars per month I don't remember of ever promising to do that, but nevertheless I will try and do that if I can. And as far as making trouble for me and yourself, it would be worthless for you to start anything, for if you did I would file one of those things in court that pays everything off as I have nothing only what I earn every day, and after living there is very little left. I shall try and help you until I can get hold of him and that is the best I can do under the circumstances. Inclosed find ten dollars (\$10), as he has got all the money I had besides what I have spent since he disappeared trying to get him."

November 28, 1922: "Inclosed find ten (\$10) dollars."

December 8, 1922: "Inclosed find ten (\$10) dollars."

[3] As provided by statute, no acknowledgment or promise to pay is sufficient evidence of a new or continuing contract by which to take the case out of the operation of the statute of limitations unless the same be contained in some writing signed by the party to be charged thereby (Code Civ. Proc. § 360; it being the purpose of the section to establish a rule, not with respect to the character of the promise or acknowledgment from which a promise may be inferred, but with respect to the kind of evidence by which the promise or acknowledgment shall be proved. *Biddel v. Brizzolara*, 56 Cal. 374.

With respect to the sufficiency of the writing, it was held in *Concannon v. Smith*, 134 Cal. 14, 66 P. 40, that the statute does not prescribe any form in which the new promise shall be made; it being sufficient if the writing shows that the writer regards or treats the indebtedness as subsisting, and from the acknowledgment of a subsisting indebtedness the law implies a promise to pay; and in *Searles v. Gonzalez*, 191 Cal. 426, 216 P. 1003, 28 A. L. R. 78, that the writing must contain some reference to the debt which, either of itself or with the aid of competent evidence of extraneous facts in explanation, amounts to an admission that there is a debt existing to the creditor to whom the writing is sent for which the debtor is liable and which he is willing to pay.

It is not contended that a debt other than that represented by the note executed by appellant and his codefendant Gough existed; and it was admitted by the former that the several sums referred to in the letters were paid thereon. None of the letters, however, directly referred to the debt; but in that of November 7, 1921, appellant states that the remittance inclosed is "to help out until I can get hold of Gough." The reference therein to Gough, taken with the circumstances shown by the testimony, clearly indicated that the amount was paid on the debt in question which, as the letter sufficiently shows, the writer regarded as a subsisting obligation.

[4, 5] While part payment alone has been held insufficient as an acknowledgment within the above rule (*Clunin v. First Federal Trust Co.*, 189 Cal. 248, 253, 207 P. 1009), such payment, nevertheless, when accompanied by a writing signed by the debtor and which recognizes the debt as subsisting, is relevant on the question of the writer's willingness to pay, and the above facts sufficiently supported the conclusion of the trial court in that respect.

[6, 7] In his letter of August 29, 1922, appellant attempts to qualify the promise implied from the transaction of November 7, 1921, and to limit his obligation to such

monthly payments as he might be able to make from his surplus earnings. The new promise, however, was supported by a sufficient consideration (*Concannon v. Smith*, supra), and the subsequent letter was insufficient to limit the obligation of appellant thereunder.

The motion to dismiss the appeal is denied, and the judgment is affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

87 Cal. App. 359

DALE v. DALE. (Civ. 6059.)

District Court of Appeal, First District, Division 2, California. Dec. 8, 1927.

1. Husband and wife $\S$ 266—Husband's conveyance to wife with intention to make it her separate property, though purchased from community funds, makes it wife's "separate property" (Civ. Code, $\S$ 164).

Where property is conveyed from husband to wife with intent to make it her separate property, even though it were purchased from community funds, conveyance operates as gift from husband, and wife takes it as "separate property," under Civ. Code, $\S$ 164.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Separate Property.]

2. Husband and wife $\S$ 266—Whether husband intended to make property conveyed to wife her separate property must be determined from language of instrument and from circumstances.

Whether husband, conveying property purchased from community funds to wife, intended to make it her separate property, must be determined from language of instrument, together with all facts, circumstances, and declaration of parties disclosed by evidence as occurring at time of transaction.

3. Husband and wife $\S$ 262(1)—Recital in deed to wife that land is conveyed as wife's separate property creates presumption of husband's intention to relinquish claim of community property, which can be contradicted only by evidence of fraud, mistake, or undue influence.

Where deed from husband to wife contains specific declaration that land is conveyed as her separate property, this recital is strong evidence of his intention to relinquish his claim on it as community property, and this presumption can only be rebutted by satisfactory evidence that this form of conveyance was procured by fraud, mistake, or undue influence.

4. Husband and wife $\S$ 266—Where one spouse obtains advantage over the other, transaction is presumed to have been without adequate consideration (Civ. Code, $\S$ 158).

Under Civ. Code, $\S$ 158, relating to contracts between husband and wife, their relationship is in fact presumed to be confidential, and,

where either obtains an advantage over the other, transaction is presumed to have been without adequate consideration, and to have been secured through undue influence, and burden is then cast on him who has advantage to show that it was fair and free from fraud or undue influence.

5. Deeds $\S$ 17(3)—Husband and wife $\S$ 266—Conveyance from husband to wife as inducement for reconciliation and resumption of marital relations was based on sufficient consideration.

Deed and bill of sale of property from husband to wife, executed and delivered to wife as an inducement for reconciliation, restoration of harmony, and resumption of marital relations, were based on sufficient consideration.

6. Deeds $\S$ 69, 70(1)—Where husband conveyed property to wife as inducement for reconciliation, that wife afterwards failed to fulfill agreement was insufficient to set aside deed on ground of fraud or mistake.

Where husband executed deed and bill of sale of property to wife as an inducement for reconciliation, restoration of harmony, and resumption of marital relations, both parties entering into negotiations in good faith, fact that wife afterwards failed to fulfill her agreement was an insufficient showing on which to set aside deed upon ground of fraud or mistake.

7. Deeds $\S$ 19—Deed without fraud in its inception conveys title, and is not void on account of failure of consideration.

A deed without fraud in its inception conveys title, and is not void on account of failure of consideration, either in whole or in part, and, inasmuch as acts done subsequent to execution of deed cannot affect its integrity, subsequent failure of consideration or breach of personal covenant not amounting to a condition will not avoid deed.

8. Divorce $\S$ 286—Where plaintiff did not deny testimony, court must assume that record was undisputed that plaintiff instructed attorney regarding drawing conveyances as attorney testified.

In divorce action, where plaintiff testified that attorney drawing conveyances for him to his wife did not read or explain conveyances to him, but failed to deny that he had told his attorney what attorney had testified regarding his intention and purpose in making conveyances to wife, appellate court must assume that record was undisputed that plaintiff instructed his attorney to draw conveyances, so that wife could handle it exactly as her own, without necessity of his signature, and so that she could not demand of him future support after he had left her, as attorney had testified.

9. Divorce $\S$ 253—In divorce action, evidence did not support findings that plaintiff was ignorant of terms of conveyances to wife, and that clause "as and for her separate property" was inserted through inadvertence.

In divorce action, evidence held insufficient to support findings to effect that plaintiff, who had executed deed and bill of sale of property to wife as an inducement for reconciliation and resumption of marital relations, was ignorant

of terms of instruments, and that clause "as and for her separate property" was inserted in them through inadvertence or mistake.

10. Reformation of instruments *§*45(1)—In action to reform instrument on ground of fraud or mistake, evidence must be convincing.

In action to reform instrument on ground of fraud or mistake, evidence must be clear and convincing, and not merely equivocal or contradictory, leaving question of fraud or mistake in doubt.

11. Attorney and client *§*81—Husband could not complain because he failed to understand terms of instruments conveying property to wife, where he employed attorney to draw documents.

Husband could not complain in divorce action that he failed to read or understand terms of instruments he had executed, conveying property to wife as an inducement for reconciliation and resumption of marital relations, where he employed attorney to draw documents, since this duty was imposed on his attorney.

12. Deeds *§*68(1)—Grantor, executing deed, ordinarily will not be relieved from effect of clear terms because he neglected to read it.

A grantor, who executes a deed of conveyance, in absence of showing of fraud or mistake, will not be relieved from effect of clear terms of instrument merely because he neglected to read it, or even if he is unable to read or understand it, since reasonable prudence requires one to either read document he proposes to execute, or, if he is unable to do so, to procure assistance of some one who can read and explain its terms.

Appeal from Superior Court, Humboldt County; Denver Sevier, Judge.

Action for divorce by Otto A. Dale against Ida Dale. From a portion of an interlocutory judgment regarding property, defendant appeals. Reversed in part, and in part affirmed.

H. C. Nelson and J. F. Coonan, both of Eureka, for appellant.

Metzler & Mitchell, of Eureka, for respondent.

THOMPSON, Justice pro tem. This is an appeal from that portion of an interlocutory judgment of divorce, which holds that 60 acres of land in Humboldt county, and certain personal property, which was conveyed from a husband to his wife "as her separate property," was in fact community property.

Appellant and respondent intermarried at Eureka September 8, 1904, and lived together as husband and wife until April, 1924. The respondent, on October 23, 1918, executed and delivered to appellant a deed of conveyance of 60 acres of land, and a bill of sale of certain personal property, which are involved in this appeal. The habendum clause of this deed recited that said land was conveyed

"unto the party of the second part, and her heirs and assigns forever, *as and for her separate property.*" A similar phrase was incorporated in the bill of sale. Domestic trouble arose between the parties. April 29, 1924, respondent commenced an action for divorce on the ground of extreme cruelty, and alleged that said land was conveyed to appellant to be held by her in trust as community property, that she had made false and unjust accusations against respondent, and that she feared he might dispose of their property to her detriment. It was then alleged that these conveyances of property were made to appellant to induce her to refrain from such treatment and false accusations, and to assure her that the property would not be disposed of without her knowledge and signature. In an amended complaint the respondent further alleged that he was unable to speak or understand the English language well, that neither the deed nor the bill of sale were read or explained to respondent, and that he did not know that either of the instruments purported to convey to the appellant the absolute title as her separate property. An answer was filed, specifically denying all of the allegations of the complaint, and affirmatively alleging that the land and personal property involved were conveyed to appellant as her separate property, and that the action, so far as it related to the real property, was barred by the provisions of section 318, Code of Civil Procedure, and by the provisions of sections 337, 338 and 343, Code of Civil Procedure. A cross-complaint was also filed in behalf of appellant.

Upon respondent's motion, after the case had been tried and submitted for decision, the submission was set aside, and the respondent was permitted to file an amended complaint, which added little of importance, except the allegation that "the said parties did not know that the phrase 'as and for her separate property' had been written into the deed and bill of sale, by the scrivener, together with the further allegation that neither the deed nor the bill of sale had been read to the parties, or explained, before their execution." Further evidence was then adduced, and subsequently the court rendered an interlocutory judgment of divorce in favor of respondent, on the ground of extreme cruelty and awarded him the custody of the two minor children. It was also decreed that all of the real and personal property in question was community property, and reformation of both instruments was ordered by eliminating therefrom the clause "as and for her separate property," and a division of all this property between the respective parties was decreed, share and share alike.

Appellant contends that (1) the property described in the deed and bill of sale as con-

clusively presumed to be her separate property; (2) that the action to recover the real property was barred by the statute of limitations; (3) that the findings of court, to the effect that the real and personal property described in the deed and bill of sale were community property, is not supported by the evidence; and (4) that the court abused its discretion in permitting the amendment of the complaint, after the case was submitted for decision.

[1-3] Where property is conveyed from a husband to his wife, with intent to make it her separate property, even though it were purchased from the community funds, the conveyance operates as a gift from the husband, and the wife takes it as her separate property. Civ. Code, § 164; 13 Cal. Jur. 752, § 50; 5 R. C. L. 846, § 26; *Alferitz v. Arrivillaga*, 143 Cal. 646, 77 P. 657. The intention with which the conveyance is made must be determined from the language of the instrument, together with all the facts, circumstances, and declaration of the parties disclosed by the evidence as occurring at the time of the transaction. *Gilmour v. N. Pasadena L. Co.*, 178 Cal. 6, 171 P. 1066; *Fanning v. Green*, 156 Cal. 279, 104 P. 308; *Cohn v. Smith*, 37 Cal. App. 764, 174 P. 682. Where a deed is executed from a husband to his wife, and it contains the specific declaration that the land is conveyed as her separate property, this recital is strong evidence of his intention to relinquish his claim upon it as community property, and this presumption can only be rebutted by satisfactory evidence that this form of conveyance was procured by fraud, mistake or undue influence. 13 Cal. Jur. 855, § 50; *Miller v. Brode*, 186 Cal. 409, 199 P. 531; *Estate of McCauley*, 138 Cal. 546, 71 P. 458; *Swain v. Duane*, 48 Cal. 358. In the case of *Miller v. Brode*, supra, it is said:

"* * * Although the property is purchased with community funds, and is conveyed to the wife with the husband's consent by a deed expressly describing it as her separate estate, it is as if the husband himself had conveyed community property to her by deed expressing that she took it as her separate estate. Such a conveyance would be nothing more nor less than an express gift by the husband to the wife of community property. *Swain v. Duane*, 48 Cal. 358; *Shanahan v. Crampton*, 92 Cal. 9 [28 P. 50]. There is no impediment to a husband making such a gift if he desires, and if he does it the property at once becomes the wife's separate property, and the effect of the conveyance in this respect cannot be avoided, except by avoiding the conveyance itself. This, of course, cannot be done, except for fraud, mistake, or some similar ground. In the absence of some such ground for setting aside the transaction, it is wholly immaterial that the property was community property before the husband conveyed it to the wife, or in case it were conveyed to her by a third person that the consideration given for it was community prop-

erty. Its character is changed at once by the conveyance to the wife as her separate property, either by the husband directly or by a third person with his consent."

[4] In transactions between a husband and wife, the rule with respect to confidential relations obtains (Civ. Code, § 158), and precludes either from obtaining an unfair advantage of the other through fraud, mistake or undue influence. Such transactions are considered subject to the rules which affect the relationship between a trustee and beneficiary; their relationship is in fact presumed to be confidential (13 Cal. Jur. 860, § 54; *Estate of Cover*, 188 Cal. 133, 143, 204 P. 583), and, where either obtains an advantage over the other, the transaction is presumed to have been without adequate consideration, and to have been secured through undue influence, and the burden is then cast upon him who has the advantage to show that it was fair and free from fraud or undue influence. 13 Cal. Jur. 860, §§ 54-56; *Locke Paddon v. Locke Paddon*, 194 Cal. 73, 80, 227 P. 715; *Fenley v. Bursell*, 61 Cal. App. 511, 516, 215 P. 114; *Williamson v. Williamson*, 41 Cal. App. 721, 183 P. 301. But where dissension exists between a husband and wife, and they have become estranged on that account, the execution of a conveyance of property from the husband to the wife, which is free from fraud or undue influence, made as an inducement for reconciliation, harmony, and the renewal of marital relations, constitutes a sufficient consideration for the execution of the instrument. *Williamson v. Williamson*, supra; *Tillaux v. Tillaux*, 115 Cal. 663, 47 P. 691.

[5] The evidence in the instant case is without substantial conflict, to the effect that the deed and bill of sale were executed and delivered from respondent to appellant as an inducement for reconciliation, the restoration of harmony, and resumption of marital relations. The respondent testified that, for several years prior to the execution of the instruments, they had lived in a state of domestic turbulence; quarrels were frequent, and the wife often accused him of abusing her, and of spending his money on other women. Upon inquiry as to the seriousness of their trouble prior to the execution of the instruments, appellant replied: "That is the point; we were going to have some separation." In response to the question as to why he had executed the conveyances, respondent said:

"I thought, if I deeded the place to her, and she was not worrying, * * * it would be better. She was grumbling and growling all the time. I thought to myself, it would be [a] better way, and make a better home, if I deeded the property to her, and lived there just the same. I spoke to her, and asked her if it would be all right, and she said, 'Yes.' I said, 'All right; but you must quit your grumbling, and

growling, and [we must] go ahead and live together, if I do it.' And she agreed to it."

[6] It further appears that at the time the deed and bill of sale were executed in the office of Senator Nelson another instrument was executed and delivered to the respective parties, which was subsequently lost, but which apparently provided, in effect, that in the event of future trouble between them, resulting in a separation, this property which had just been conveyed should be in lieu of maintenance. When asked for the contents of this document, appellant replied:

"It was an agreement, if I left him, or either one left the other, each would * * * support ourselves."

After the execution of these instruments, the parties appear to have lived together for several years in comparative harmony, and then hostilities were renewed, and the condition became more intolerable than before, according to respondent's testimony. There was, however, ample evidence to indicate that the trouble was not due entirely to the conduct of appellant; but, accepting it most favorably to respondent, the record is entirely devoid of evidence that the instruments in question were procured by fraud, deceit, or undue influence. They were voluntarily made by the grantor at his own suggestion, for the purpose of reconciling their differences. Evidently this effort was a failure. Respondent then brought this suit for divorce, and sought to set aside these conveyances. This, then, was nothing more than a failure of purpose, or of consideration. Neither the complaint, the findings, nor the evidence warrants a charge of a lack of good faith on the part of appellant. It was not alleged, and is not contended, that she deceived respondent in making this agreement to avoid trouble, or that she procured the conveyances by this means with a previous intention not to fulfill her promise. Nor is it alleged that respondent relied upon any such promises. So far as the record is concerned, both parties entered upon the negotiations in perfect good faith with a view of securing a reconciliation. All that is charged is that she afterwards failed to fulfill her agreement. This is an insufficient showing upon which to set aside a deed upon the ground of fraud or mistake.

The case of *Tillaux v. Tillaux*, supra, is very similar to the instant case in both facts and issues presented. In that case the parties were husband and wife. Serious domestic trouble existed between them. With the apparent object of reconciliation, the husband voluntarily made a deed of conveyance to certain real property to his wife. At the same time they executed another instrument, which purported to declare their relationship toward each other in the event of a future

separation. This agreement contained this statement:

"They do hereby each of them agree not to molest or interfere with one or the other, in or about the business or living of the other."

Thereafter the parties continued to live together for about four years, when domestic trouble again arose. They were separated, and a suit was commenced to set aside the deed upon substantially the same grounds contended for in this case. A demurrer to the complaint was sustained, and the order was affirmed on appeal. The appellant there contended that the deed was void, because there was no consideration for the deed; that the defendant's promise not to molest or disturb plaintiff did not constitute a consideration, because it was a mere agreement to perform the duties required by law; that the deed was void, because the wife secured advantages through the confidential relationship of husband and wife. To all of which contentions Mr. Justice McFarland replied: "We do not think that these positions are tenable." After reasoning these contentions to a logical conclusion, the able jurist finally holds:

"There is no averment that she had no intention to perform the agreement * * * to live peaceably with appellant in the usual affectionate relation of husband and wife."

[7] This appears to be the precise situation in the instant case. There are neither allegations, proof, nor findings in this case to the effect that appellant did not intend to carry out her agreement to preserve harmony, nor that respondent relied upon her promise, or was deceived thereby. Giving respondent's evidence its full force, it falls far short of proof of fraud, deceit, mistake, or undue influence. 12 Cal. Jur. 812; *Lawrence v. Gayetty*, 78 Cal. 126, 20 P. 382, 12 Am. St. Rep. 29; *Mitchell v. Cal. Pac. T. I. Co.* (Cal. App.) 248 P. 1035; *James v. James* (Cal. App.) 251 P. 666. In the last case above cited the syllabus correctly states the law applicable as follows:

"A deed without fraud in its inception conveys the title, and is not void on account of failure of consideration, either in whole or in part. And inasmuch as acts done subsequent to the execution of a deed cannot affect its integrity, a subsequent failure of consideration, or breach of personal covenant not amounting to a condition, will not avoid the deed."

Appellant challenges the findings of the court to the effect that the phrase "as and for her separate property" was written into the deed and bill of sale by inadvertence and mistake, and that respondent understood and spoke English poorly, and that the instruments in question were neither read nor explained to respondent before he executed them. A careful examination of the record

forces us to the conclusion that these findings are not supported by the evidence. Sifted to a final analysis, the bare presumption which accompanies confidential relationship of a husband and wife is about all that is left to support the issue of fraud or mistake. Senator Nelson, one of appellant's attorneys, who drew the deed and bill of sale at the request of respondent, testified that Mr. and Mrs. Dale came to his office October 23, 1918, and that respondent told him he wanted to deed this property to his wife; that he intended to leave her, and he wanted it so arranged that she could not come back on him for support in the future; that he wanted her to be able to collect the money from the creamery and handle the property without his signature, exactly as her own. Mr. Nelson also said that he thereupon drew the deed and bill of sale so as to carry out respondent's desire, incorporating the clause "as and for her separate property" in each document, and explained the instruments to respondent, who said that was exactly what he wanted. These instruments were then delivered to appellant, who was advised to record them, which she subsequently did. At the same time at which these two conveyances were made, the senator also drew up an agreement in duplicate, providing that the property described in the deed and bill of sale in the event of a separation of the parties, was to be in lieu of all future maintenance of appellant, and prohibiting her from coming back upon respondent for further support. This agreement was drawn pursuant to the directions of respondent, and a copy was given to each of the parties. Mr. Nelson was then asked regarding his explanation of these instruments to respondent:

"Q. Did you read the deed and bill of sale to Mr. Dale? A. The language used in the deed was explained to Mr. Dale. * * * I explained to him * * * that it would give her full title and control of the land described and the personal property mentioned, and that was just exactly what he wanted. * * *

"Q. At the time you drew this deed and bill of sale, you were acting as attorney for Mrs. Dale, and not for him? A. No, sir; Mr. Dale was doing the talking, and Mrs. Dale assented to what he had to say. * * * I was acting for both parties."

Respondent substantially admitted that Mr. Nelson was acting as his attorney in preparing the documents. He testified that he voluntarily went to Senator Nelson's office to have them drawn.

"Q. Why did you go back to Mr. Nelson's office? A. Well, I understood that Mr. Nelson would be willing on account of his position (as assistant district attorney) to help a man out for a reasonable fee, for anything like that—of course, he was an attorney, and that is the reason I went there. * * *

[8] Moreover, while respondent did testify, in a very unsatisfactory manner, that Mr. Nelson did not read or explain the deed or bill of sale to him, he failed to deny that he had told his attorney just what Mr. Nelson charged him with saying with relation to his intent and purpose in making the conveyances to his wife, as above related. It must therefore be assumed that the record is undisputed to the effect that respondent instructed his attorney to draw the conveyances to the property in favor of his wife, so that she could handle it exactly as her own without the necessity of his signature, and so that she could not demand of him future support, after he had left her, as he intended to do. This is precisely what Mr. Nelson attempted to do by the terms of these instruments, and it would therefore appear to be true that the purport and effect of the clause "as and for her separate property" was duly authorized by respondent, and hence was not inserted in the documents by inadvertence or mistake.

There is no evidence that respondent was ignorant of the English language. Carefully scrutinizing the lengthy examination of respondent as a witness, this court is satisfied that he possessed a very good knowledge of the English language, and appeared to clearly understand every question, which he invariably answered directly and intelligently. Regarding his opportunity for knowing the terms of the instruments, he testified:

"Q. Did you read the deed and bill of sale? A. I did partly. * * *

"Q. Did Mr. Nelson read them over? A. I can't say whether he did or not. * * *

[9] In view of the positive statements of Mr. Nelson that he drew the instruments according to respondent's directions, and that he explained them to him, that they expressed a reasonable solution of the situation existing between the parties at that time and that respondent failed to deny the statements he was alleged to have made to his lawyer with respect to his intent and purpose in making the conveyances to his wife together with his equivocal replies regarding the reading or explaining of the instruments to him by Mr. Nelson, the record falls far short of supporting the findings to the effect that respondent was ignorant of the terms of the instruments, or that the clause "as and for her separate property" was inserted in them through inadvertence or mistake.

[10] In an action to reform an instrument upon the ground of fraud or mistake, the evidence must be clear and convincing, and not merely equivocal or contradictory, leaving the question of fraud or mistake in doubt. 3 Jones Comm. on Ev. 2784, § 1525; 2 Pomeroy's Eq. Jur. (4th Ed.) 1756, § 859; Id. 4740, § 2103; 22 Cal. Jur. 739, § 22; *Lestrade v. Barth*, 19 Cal. 660, 675; *Burt v.*

L. A. Olive Growers Ass'n, 175 Cal. 668, 675, 166 P. 993. In the last case above cited, the court says:

"Where so solemn an instrument * * * is sought to be reformed for mistake, 'evidence of the mistake must be clear and convincing, and not loose, equivocal, or contradictory leaving the mistake open to doubt.'"

[11, 12] Under the facts of this case the respondent may not complain because he failed to read or understand the terms of the instruments. This duty was imposed upon his attorney whom he employed to draw the documents. A grantor who executes a deed of conveyance, in the absence of a showing of fraud or mistake, will not be relieved from the effect of the clear terms of the instrument, merely because he neglected to read it, or even if he is unable to read or understand it. Reasonable prudence requires one to either read the document he proposes to execute, or, if he is unable to do so, to procure the assistance of some one who can read and explain its terms. *Burt v. L. A. Olive Growers Ass'n*, supra; *Russell v. Riley & Peterson* (Cal. App.) 256 P. 557; *Hawkins v. Hawkins*, 50 Cal. 558. In the last case above cited, it is said:

"The care and diligence of a prudent man in the transaction of his business would demand an examination of the instrument before signing, either by himself or by some one for him in whom he had a right to place confidence. The fact that the plaintiff was illiterate, and could read manuscript only with difficulty, did not render this precaution less necessary."

It is unnecessary to pass upon other points raised by the appellant.

For the foregoing reasons, the judgment is reversed, so far as it purports to reform the deed and bill of sale involved, by striking therefrom the clause "as and for her separate property," and so far as it purports to distribute the property described in said instrument as community property, to the respective parties, share and share alike. Otherwise, the judgment is affirmed, and will remain in full force and effect.

We concur: KOFORD, P. J.; STURTEVANT, J.

87 Cal. App. 733

PEOPLE v. PULK. (Cr. 1568.)

District Court of Appeal, Second District, Division 1, California. Dec. 21, 1927.

Criminal law — 274—Denial of motion to withdraw plea of guilty of rape held not abuse of discretion.

In prosecution for rape, evidence that defendant did not understand nature of charge to which he was pleading guilty held not sufficient

to render denial of motion to withdraw plea of guilty of rape abuse of discretion.

Appeal from Superior Court, Los Angeles County; Douglas L. Edmonds, Judge.

Albert Pulk was convicted of rape, and he appeals. Affirmed.

George E. Stoddard, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for the People.

CONREY, P. J. The defendant, by an information in two counts, was charged with the crime of rape of a 12 year old girl. The counts are alike, except that the dates are different. When the case was called for trial the defendant, who was then represented by counsel, pleaded guilty on the first count and the second count was ordered off the calendar. He made an application for probation. While that application was under consideration the defendant gave notice of motion that he be permitted to withdraw the plea of guilty for the purpose of entering another and different plea. The notice did not state upon what ground the motion would be made, and was not supported by any affidavits. However, the court received oral testimony of several witnesses, and from a reading of that testimony it appears that the principal reason relied upon by defendant's counsel in claiming that this motion should be granted was that at the time of entering the defendant's plea of guilty he did not understand that he was pleading guilty to the crime of rape, but thought that he was pleading guilty to the lesser offense of contributing to the delinquency of a minor. The sole ground of appeal now presented is that the denial of defendant's motion was an abuse of discretion.

At the hearing on said motion the defendant was not sworn as a witness but was permitted to state to the court that at the time when his plea was entered he understood that he was pleading guilty "to contributing." He said that he had heard that offense of contributing to delinquency spoken of several times. But on closer examination defendant admitted that he had not heard it "in these proceedings." Mr. Bush, who had been the defendant's attorney when the plea was entered, stated to the court on the hearing of said motion, in substance, that at the time the plea was entered he made it clear to the defendant that it would be advisable for him to enter a plea of guilty to one count of rape, and that the district attorney would allow the other count to go off the calendar. If we disregard these unsworn statements of the defendant and of his former counsel, there remains the fact that in his application for probation the de-

defendant stated that he had pleaded guilty to the crime of rape. As against the defendant's statement that he signed that application in blank and had not known how it was filled out, there is the direct testimony of Miss Scott, secretary of defendant's counsel at that time, that she obtained from the defendant the data for filling out said application, and after filling it out she took it back to the defendant and he signed it. There is some evidence tending to prove that on the day in question Miss Scott was given only one pass at the jail to see the defendant, and that it is the custom to have a separate pass for each visit. But this, at most creates only a conflict in the evidence. We think the court was fully justified in its conclusion that the defendant, at the time when he pleaded guilty, clearly understood the nature and effect of his plea, and that he was not misled or caused to act under any misapprehension concerning his situation as the result of such plea.

The judgment is affirmed.

We concur: HOUSER, J.; YORK, J.

GRANUCCI v. CLAASEN et al. (Civ. 6062.)★

District Court of Appeal, First District, Division 2, California. Dec. 15, 1927.

Hearing Granted by Supreme Court Feb. 9, 1928.

1. Municipal corporations §808(9)—If owner knew or by exercise of reasonable diligence could have known of dangerous condition of driveway over sidewalk, statutory notice was unnecessary.

Owner and lessee in possession had duty to exercise reasonable care to keep part of sidewalk, over which abutting property owner had driveway in safe condition, and if they knew or by exercise of reasonable diligence should have known of dangerous condition of driveway, statutory notice to them was not required to render them liable to person injured through defect therein.

2. Appeal and error §901—Burden of showing error is on appellant.

Burden is on appellant to show error.

3. Municipal corporations §808(9)—Pedestrian alleging injuries by defect in driveway over sidewalk must show defendants' knowledge indicating lack of ordinary care.

In action against owner and lessee in possession of premises for injury through defect in driveway over defendants' sidewalk, maintained by abutting property owner, appellant from judgment on directed verdict for defendants must, by printing from record, show defendants had such knowledge that defects in driveway could be attributed to their failure to use ordinary care to keep it in safe condition.

4. Pleading §129(2)—Failure of defendants denying ultimate facts to deny specifically allegation that driveway over sidewalk, on which plaintiff fell, required constant attention to keep it safe held not to take place of evidence.

In action against owner and lessee in possession for fall on driveway over sidewalk, in which ultimate facts alleged by plaintiff were denied, failure to deny specifically allegation that condition of driveway was such as to require constant care and attention to keep it safe did not take place of evidence, in determining whether evidence showed knowledge by defendants and lack of care.

5. Municipal corporations §808(9)—Defendants not shown to have notice or knowledge of defects in driveway over sidewalk held not liable for pedestrian's injury.

In action against owner and lessee in possession for injury from fall on driveway built over their cement sidewalk, evidence failing to show either notice or knowledge of defects by defendants held to justify directing verdict for them, regardless of city ordinance requiring nails and spikes in wooden sidewalks to be kept driven down, even if such ordinance were applicable to driveway over cement sidewalk.

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Action by Rosa Granucci against Mary J. Claasen and another. From a judgment for defendants, plaintiff appeals. Affirmed.

J. Maxwell Peyser and Joseph E. Isaacs, both of San Francisco, for appellant.

Andrew F. Burke, of San Francisco, for respondents.

KOFORD, P. J. Defendant Mary J. Claasen was the owner of certain property on Mission street, in San Francisco. Defendant John J. Claasen, Jr., her son, was the lessee in possession of the property. A plank driveway had been maintained for 10 years across the cement sidewalk in front of the premises for the accommodation of defendants' heavy wagons and teams going in and out of the premises. Where the plank driveway intersected the cement sidewalk its woodwork took the place of the cement for the distance of its width, and its surface was level with the surface of the cement sidewalk on either side. Plaintiff in using the sidewalk as a member of the public, and while crossing the driveway, fell and became injured by tripping upon some spikes which had partly worked up from the surface of the planks. This action was for plaintiff's damages thus caused. The court at the conclusion of the evidence directed a verdict in favor of the defendants. From the judgment upon that verdict the plaintiff appeals upon a typewritten record.

The motion for a directed verdict was

granted because the court was of the opinion that there was no evidence of either notice or knowledge which would make defendants liable for the plaintiff's injury caused by protruding nails. In granting the motion for a directed verdict, the court said:

"Where is your evidence to show that the defendant knew, or by the use of ordinary diligence should have known? You introduced no testimony on that point at all. That is where your case is lacking."

[1] Upon this appeal it is the contention of respondent that the driveway in question was a part of the sidewalk, and that the property owner is not liable for defects in it except in the same way as for any ordinary sidewalk; that is to say, after certain designated kinds of notification prescribed by street laws and city ordinances. The appellant contends that the defendants are liable for their failure to use ordinary care to keep the driveway, where it coincides with the surface of the sidewalk, in sound and safe condition, upon the authority of *Monsch v. Pellissier*, 187 Cal. 790, 204 P. 224. That case distinguishes between the property owner's duty and liability in case of the ordinary sidewalk and in a case where the property owner uses the sidewalk area for some private use. It is there said that, in the latter case, the law casts upon the owner a duty, to be discharged with reasonable care, of keeping that part of the sidewalk in proper and safe condition, and that if the property owner knew, or if by the exercise of reasonable diligence should have known, of the dangerous condition of the sidewalk, no statutory notice is required. The sidewalk area here was in part put to the private use of the abutting property owner. The duty of the defendants here is the same as in *Monsch v. Pellissier*, *supra*; whether their liability is the same depends upon whether they had certain knowledge or information.

[2, 3] The burden of showing error is on the appellant. She must, by printing from the record, show that the defendants had such knowledge that the defects in the driveway could be attributed to their failure to use ordinary care to keep it in safe condition. Appellant's only attempt to point out evidence of the defendants' knowledge consists of piecing together one admission in the pleading, and one part of the testimony of defendant Mary J. Claasen in the following manner: First, the complaint alleged that:

"By reason of said use of said driveway by said defendants, the said driveway was, * * * being constantly worn, and was in such a condition as to require constant repair and attention in order to keep the same in such a condition as to permit the public to pass safely over and upon said driveway."

This allegation was not specifically denied in defendants' answer. Second, defendant

Mary J. Claasen testified, upon cross-examination, that the driveway had been down for 10 years, and that during that time no repairs whatsoever had been made.

Counsel's statement concerning the designated testimony sounds like 10 years of neglect. The testimony itself is equally consistent with 10 years of vigilance. It follows:

"Q. You say that you examined this runway, and you used to go out there and look at it, and that when you looked at it it was in good condition? A. Exactly.

"Q. Did you ever do anything or order any work to be done on that runway or keep it in repair? A. Well, it was not necessary. It was in first-class condition all the time.

"Q. I ask you did you ever do anything or order any work to be done in that period of 10 years on that runway? A. No; I did not have to.

"Q. All that you did was to go out there and look at it occasionally? A. Exactly."

[4] The specified allegation of the complaint, which is claimed to be admitted by failure to deny, is not material to plaintiff's cause of action. The exact amount of supervision called for by the driveway is a matter of evidence. Where the allegations of ultimate facts are denied as in this case, the failure to deny evidentiary allegations does not take the place of evidence. *Canfield v. Tobias*, 21 Cal. 349; *Siter v. Jewett*, 33 Cal. 92, 96; *Weinberger v. Weidman*, 134 Cal. 599, 66 P. 869.

[5] The evidence wholly failing to show either notice or knowledge on the part of defendants, we need not concern ourselves with determining exactly what kind and what amount of such notice or knowledge is prescribed by law for defendant Mary J. Claasen, as the lessor out of possession, nor for defendant John H. Claasen, Jr., lessee in possession.

Ordinance No. 890 of San Francisco requires all persons owning real property fronting upon any street where wooden sidewalks are laid to keep all nails and spikes driven down. It is a matter of argument between the parties as to whether the violation of such an ordinance would violate a duty owed to the plaintiff. It is doubtful whether a plank driveway laid across or intersecting a cement sidewalk constitutes a wooden sidewalk within the meaning of the ordinance. But if it is to be considered a wooden sidewalk, it would be unreasonable to so construe the ordinance that at the very moment a nail showed its head above the surface of the wood for any cause whatever, the owner then and thereby would be guilty of a misdemeanor and consequently of negligence *per se*. The owner should have some notice or some knowledge of the defect. At the very least, the owner should have knowledge of some fact, or there must be shown to exist

circumstances from which a reasonable person ought to know of the defect, otherwise a misdemeanor or a case of negligence *per se* is not made out. For this reason the deficiency of evidence pointed out by the trial court justified the directed verdict, even if the ordinance is applicable.

The judgment is affirmed.

We concur: STURTEVANT, J.;
NOURSE, J.

87 Cal. App. 379

DOW v. BANK OF ITALY. (Civ. 5048.)★

District Court of Appeal, Second District, Division 2, California. Dec. 8, 1927.

Hearing Denied by Supreme Court Feb. 6, 1928.

1. Executors and administrators $\S$ 221(5)—Finding that services rendered deceased were fully paid under agreement whereby automobile and home were purchased for claimant held proper under evidence.

In action to recover under claim for services rendered deceased, and for care and board, finding of court that services were fully paid for under agreement whereby deceased purchased automobile and home for joint use of herself and claimant, held proper under the evidence.

2. Executors and administrators $\S$ 449—Evidence of executed agreement to purchase automobile and home for claimant held not variance from issue of validity of claims against estate (Code Civ. Proc. $\S$ 469).

Under issue raised by pleadings in action against estate for services as to whether or not claims presented represented valid unpaid indebtedness, testimony as to executed agreement to purchase automobile and home for claimant held not fatal variance, under Code Civ. Proc. $\S$ 469.

Appeal from Superior Court, Los Angeles County; Ira F. Thompson, Judge.

Suit by Robert H. Dow against the Bank of Italy, as executor of the estate of Elizabeth Scott, deceased. Judgment for defendant, and plaintiff appeals. Affirmed.

Dwight V. Maurice and Charles L. Evans, both of Los Angeles, for appellant.

Walter E. Burke, of Los Angeles, for respondent.

STEPHENS, Justice pro tem. Plaintiff, the appellant herein, brought this suit in the superior court against the defendant, the respondent herein, as executor of the estate of Elizabeth Scott, deceased, to recover on two claims for services alleged to have been performed for the deceased by himself and his wife, Sophia A. Dow. The trial was before the court sitting without a jury, and the findings are that all of the allegations of the complaint, referring specifically to the basis of the claims, are untrue. There is little, if

any, conflict in the evidence, the contest before the trial court and here being on points of pleading and the construction of oral testimony.

One of the claims is for services rendered deceased at her request by plaintiff and his wife for "household work, sewing, nursing, and general care continuously from June 26, 1920, to August 26, 1922," the alleged reasonable value thereof being \$3,920; and another is for "board furnished and cooking from June 26, 1920, to August 26, 1922," by plaintiff and his wife at the request of and to the deceased, the alleged reasonable value thereof being \$1,300. There is no contention but that the services were rendered and were worth the sums claimed. Defendant, however, denies any liability, upon the ground that the services were included in an agreement upon which full payment has been made.

[1] Mrs. Dow had lived in the house of deceased and her husband, Charles Scott, in Indiana, ten years before her marriage. In March, 1920, she was living in California, and at Scott's request and expense she returned to the Scotts' home, finding Mr. Scott quite ill. Scott said to Mrs. Dow, quoting from the transcript, page 36:

"Well, he said to me, he said he had had a talk with the doctor, and the doctor said he positively could not get well; and he said, 'Sis is blind and not able to do a thing'—that was his wife—and for your coming here and taking care of me—I don't know how long that will be—and taking care of her—I want you to take her out there to California, and she will buy a home and an automobile; and for coming back here and taking care of us, and that you take care of her and keep her nice and clean, you will be well paid for your care.'"

Scott lived but a short time, and Mrs. Dow and Mrs. Scott came to Los Angeles. An automobile was purchased by Mrs. Scott for the use of the Dows and herself, and a home was purchased for \$7,000, being taken under a joint tenancy in the names of Mr. and Mrs. Dow and Mrs. Scott; \$5,000 of this sum was paid directly from Mrs. Scott's funds, and the other \$2,000 was paid by plaintiff, which sum was derived from money Scott had furnished Dow. After Mrs. Scott's death, her joint tenancy was terminated, and the title to the property was held by Mr. and Mrs. Dow.

Several witnesses testified to conversations with Mrs. Scott in the Los Angeles home in which she confirmed in general the conversation above related, and repeated that they (the Dows) would be well paid for what they were doing for her. At the conclusion of the testimony the court, responding to an offer by one of counsel to furnish authorities, remarked:

"No; I don't care for the authority, because I don't think the plaintiff has made out a case. The record shows that, according to the testi-

mony of plaintiff's witnesses, she came out here for the purpose of fulfilling the wishes of her deceased husband; and I am convinced that the testimony of those witnesses, particularly the testimony of Mrs. Daly, that she was to have the home and the automobile in consideration of taking care of the husband during his lifetime, during his illness there, and during the illness of the deceased here."

It needs but a statement of the case to see that the court was within its discretion in arriving at its conclusion.

[2] Plaintiff contends that a fatal variance exists between the proof and the issues as raised by the pleadings, and that stipulations arrived at during the trial defined the issues differently from those found upon by the trial court. We have carefully examined these contentions, and find that the issue fairly tried was whether or not the claims presented were valid unpaid indebtednesses due from the estate to plaintiff, and that the conclusions of the court as quoted herein were based upon testimony within the issues. The findings more formally speak only the conclusion of the court. "No variance between the allegation in a pleading and the proof is to be deemed material, unless it has actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits. * * *" Code Civ. Proc. § 469.

Judgment affirmed.

We concur: WORKS, P. J.; CRAIG, J.

87 Cal. App. 552

STUART v. SMITH et al. (Civ. 5979.)★

District Court of Appeal, First District, Division 2, California. Dec. 14, 1927.

Hearing Denied by Supreme Court Feb. 9, 1928.

1. Taxation ⇨615—Validity of tax sale must be determined by law at time.

The validity of a tax sale is to be determined by the law as it stood on the date thereof.

2. Taxation ⇨770—Auditor's failure to annex affidavit to book containing assessment on which tax deed was based held cured by statute (Pol. Code, § 3732; Stats. 1915, c. 24).

Auditor's failure to annex his affidavit to book containing assessment on which tax deed was based, as required by Pol. Code, § 3732, was cured by Stats. 1915, c. 24, which imposed no new conditions of redemption, but merely waived irregularity not affecting substantial rights of parties.

3. Taxation ⇨745—Statute curing auditor's failure to annex affidavit to book containing assessment on which tax deed was based held not impliedly repealed by amendment of Code section violated (Stats. 1915, c. 24; Act June 4, 1915, amending Pol. Code, § 3732).

Stats. 1915, c. 24, curing auditor's failure to annex affidavit to book containing assessment on which tax deed was based, was not

impliedly repealed by Act June 4, 1915, amending Pol. Code, § 3732, requiring such affidavit.

4. Statutes ⇨159—Inconsistency must be such that both statutes cannot be given effect to work repeal by implication, which is not favored.

Inconsistency between two acts must be of such degree that both cannot be given force and effect before there is a repeal by implication, which is not favored.

5. Taxation ⇨319(2)—Proof that public officials performed duties mentioned in statute, curing auditor's failure to annex affidavit to book, containing assessment on which tax deed was based, is unnecessary (Code Civ. Proc. § 1963, subd. 15; Stats. 1915, c. 24).

Under Code Civ. Proc. § 1963, subd. 15, proof that public officials performed duties mentioned in first sentence of Stats. 1915, c. 24, curing auditor's failure to annex affidavit to book containing assessment on which tax deed was based, is not necessary.

6. Taxation ⇨630—Delinquent notice, first inserted on June 5th before tax sale on July 2d, held timely (Pol. Code, §§ 3764, 3766, 3767).

Delinquent notice, inserted on June 5th, 12th, and 19th, before tax sale on July 2d, was given within time required by Pol. Code, §§ 3764, 3766, 3767, which do not require that all insertions be made prior to June 5th.

7. Taxation ⇨793—Holder of tax deed held not estopped to sue to quiet title by asking quitclaim deed.

Holder of tax deed held not estopped to bring action to quiet title by asking former owner to sign a quitclaim deed.

8. Taxation ⇨734(7)—Tax deed held not void because tax collector did not file copy of publication of delinquent list (Pol. Code, §§ 3769, 3787).

Tax deed held not void because of tax collector's failure to file copy of publication of delinquent list in county clerk's office, as provided by Pol. Code, § 3769, in view of section 3787, declaring deed conclusive evidence that copy was filed.

9. Taxation ⇨734(7)—Invalidity of tax sale for failure of delinquent list publication to state penalties due held not shown, where record did not disclose whether document omitting such statement was part of tax record of 1913-1914 or 1918-1919 (Pol. Code, § 3764).

Invalidity of tax sale for failure of publication of delinquent list to set forth amount due for penalties, as required by Pol. Code, § 3764, held not shown, where record did not disclose whether document omitting such statement was part of tax record of 1913-1914 or of 1918-1919.

10. Taxation ⇨630—Omission of statement that tax sale was for penalties, in document constituting only part of publication of delinquent list, held not fatal (Pol. Code, § 3764).

That document, constituting part of publication of delinquent tax list and attached to notice of sale, omitted statement that sale would

be for penalties, as well as taxes and costs, as provided by Pol. Code, § 3764, was not fatal, as one is bound to read entire publication.

11. Taxation $\hookrightarrow$ 810(1)—It must be assumed, contrary not appearing, that part of sum paid by tax purchaser to acquire state's title was for subsequent delinquent taxes, and that property theretofore sold to state was designated on delinquent list (Pol. Code, § 3764).

Nothing to contrary appearing, it must be assumed that at least part of sum paid by tax purchaser "in pursuit of state's title" was for unpaid taxes for subsequent year, that such taxes became delinquent, that property was on delinquent list for latter year, and that such list was so arranged as to designate in particular manner property theretofore sold to state, as required by Pol. Code, § 3764.

Appeal from Superior Court, Los Angeles County; M. S. Sayre, Judge.

Action by James H. Stuart against Harold R. Smith and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Charles Lantz, Winslow P. Hyatt, Frederick C. Huber, and Samuel M. Garroway, all of Los Angeles, for appellants.

John F. Poole, of Los Angeles, for respondent.

STURTEVANT, J. Action to quiet title. If the tax deed held by the plaintiff is invalid by reason of any of the irregularities mentioned by the defendant, the judgment should be reversed, otherwise it should be affirmed.

[1, 2] 1. The defendant calls to our attention the fact that the auditor did not annex his affidavit to the assessment book of 1913 which contained the assessment on which the tax deed was based. He claims that the omission was fatal, and he cites Political Code, § 3732, and *Moyer v. Wilson*, 166 Cal. 261, 135 P. 1125. The sale involved in this action took place July 2, 1914. The validity of the sale is to be determined by the law, as it stood on the latter date. *Teralta Land, etc., Co. v. Shaffer*, 116 Cal. 518, 48 P. 613, 58 Am. St. Rep. 194. At that time the curative act, chapter 24 of the Statutes of 1915, was in force. If the alleged defect existed, it was cured by the express terms of that statute if the statute did not "apply new and more onerous conditions to the right to redeem than those which existed when the sale was made." *Teralta Land, etc., Co. v. Shaffer*, supra. A most careful reading of the act of 1915 does not disclose that it imposed any "new conditions." It merely waived an irregularity that did not affect the substantial rights of the parties. *Baird v. Monroe*, 150 Cal. 560, 567, 89 P. 352.

[3-5] Nor may it correctly be said that when on June 4, 1915 (St. 1915, p. 1170), the Legislature amended Political Code, § 3732, it did by implication repeal the above-mentioned curative act. Repeals by implication

are not favored. The inconsistency between two acts must be of such a degree that the two cannot be given force and effect before there is a repeal by implication. *Bateman v. Colgan*, 111 Cal. 580, 586, 44 P. 238. It may not be said, therefore, that the Code section as amended repealed the curative act. The defendant quotes and emphasizes the first sentence of the act in question and argues that the plaintiff should have introduced proof to the effect that the public officials had performed their duties as mentioned in that sentence. The proof was not necessary. Code Civ. Proc. § 1963, subd. 15.

[6] 2. Because all of the insertions of the delinquent notice were not made prior to June 5, 1913, the defendant claims that the notice was not given in time. Pol. Code, §§ 3764, 3766, and 3767. The statute contains no words to that effect, and no reason whatever appears why the statute should be so construed. The notice was inserted on June 5th, 12th and 19th, and the sale was held July 2d. The statute was followed in every respect.

3. Because the auditor did not attach his affidavit to the corrected assessment roll of 1913 the defendant argues that the auditor had no authority to compute the tax, the assessor had no authority to levy the tax, there was no tax to become a lien, there was no sale to the state, the state acquired no title, and the property in question should not have been listed on the delinquent list of 1919. He cites and relies on *Leonard v. Jaffray*, 175 Cal. 371, 165 P. 956. The case cited is not in point. The value, as a factor in this action, of the failure of the auditor to execute and attach his affidavit, has been considered above.

[7] 4. The plaintiff testified that before he commenced this action he called on Moyer, the grantor of Chapman, and asked him if he would sign a quitclaim deed, and that Moyer replied he could not do so and directed the plaintiff to commence an action to quiet title. The defendant claims that the plaintiff is therefore estopped. The record presents no questions of estoppel.

[8] 5. It is next claimed that the tax deed was void because the tax collector did not file in the office of the county clerk a copy of the publication of the delinquent list. Pol. Code, § 3769. The statute does not say the effect of such omission invalidates the deed. On the other hand, the statute provides that plaintiff's deed is conclusive evidence that a copy of the publication was filed. Pol. Code, § 3787. That such is the meaning of that section was held in *Haaren v. High*, 97 Cal. 445, 447, 32 P. 518.

[9] 6. The last point presented is that in printing the delinquent list the publication "did not set forth the amount due for penalties," and therefore the sale was void. Bus-

senius v. Warden, 71 Cal. App. 717, 722, 236 P. 371. In making the point we do not understand the defendant to claim that the delinquent list should show separately the amount of the delinquent tax, the amount of the cost, the amount of the interest, and the amount of the penalties. But it should show "the amount of taxes, penalties, and costs." Pol. Code, § 3764. The vice in the contention rests in this, the record does not disclose facts on which the defendants can predicate their point of law. The record contains some oral testimony and some deleted written instruments. The oral testimony touching on the subject was given by the witness Pfeiffer, a deputy tax collector. He testified:

"That the delinquent tax list of the county of Los Angeles of taxes delinquent in 1913 was published on June 5, 12, and 19, 1914. The sale for delinquent taxes of 1913 was held July 2, 1914, the date fixed in the notice of delinquent tax sale for that year. The notice of sale does not contain a detailed statement of all delinquent taxes, penalties, costs, interest, and expenses up to the date of such sale, as to lot 9, block F, The Palms, but does state what purports to be an amount as follows."

Then follow the deleted instruments. Of the publications for the year 1913-1914 the record purports to contain (1) the notice of sale (folios 99-103), and (2) the affidavit of the tax collector (folios 104, 105). In so far as the foregoing instruments are concerned, it is not claimed that either of them contained a misstatement. Immediately following the affidavit above mentioned appears an "Addenda Notice" (folios 105-111). That notice does not purport to be of the proceedings of 1914, but does purport to be of the proceedings had in 1919. It contains no false recital. It is signed "W. O. Welch, Tax Collector of Los Angeles County, California." Then follows immediately without any separation the following:

"The property to be sold and the subject of the notice is situated in the county of Los Angeles, state of California, particularly described as follows, to wit:

"No. 2151, The Palms, as per Book 21, p. 43 of Misc. Records, lot 9, block F, assessed to David B. Moyer. Lowest acceptable bid, \$2.53.

"Dollars and cents.

"Public notice is hereby given that the figures opposite, following, and last after each description of property in the foregoing list were intended to and do represent, respectively, in dollars and cents, or in dollars and cents, as the case may be, *the amount due for taxes and costs* in the manner as follows: * * *

"W. O. Welch,

"Tax Collector, Los Angeles County, Cal."

[10] The document just quoted does contain a misstatement, to wit, it recites that the sale will be for "the amount due for taxes and costs," instead of "the amount of taxes, penalties, and costs due. * * *" But the record does not disclose whether the document

is a part of the tax record of 1913-1914 or of the tax record of 1918-1919. It does not appear to be a document required by any statute. On its face it appears to be a collateral instrument explaining the abbreviations used in some other instrument—possibly the delinquent list. Assuming that it was a part of the publication of the year 1918-1919, the other papers which went to make up that publication are not set forth, and we are unable to ascertain from the record the entire contents of the publication. We may not assume that the document last mentioned was the entire publication—it does not purport to be the notice of sale or the delinquent list itself. On the other hand, assuming it was a part of the delinquent publication of 1913-1914, then it follows that it was attached to the notice of sale which is printed in the transcript and which was not subject to the attack made by the appellant. Still assuming the document to be a part of the publication of 1913-1914, and that it was attached to the notice of sale, and that it contained a misstatement, to wit, that the sale would be for "taxes and costs," instead of "the amount of taxes, penalties and costs due," the error was not fatal. This is so because one is bound to read the entire publication and may not stop with reading only a portion. In the case of *Best v. Wohlford*, 153 Cal. 17, 94 P. 98, the court was considering a delinquent notice. One part of the notice was ambiguous, and in a different place the notice on the same subject was quite clear. Speaking for the court, Mr. Justice Angellotti, at p. 22 (94 P. 100), said:

"We do not see how the owner of lot 4 in block 178 of the Rancho Rincon del Diablo could have failed to know therefrom exactly what property was referred to, and if this be true, the description was sufficient. In addition, the notice specified, immediately after the specification of the date upon which the sale would be made, that certain 'abbreviations throughout the advertisement are used as follows: * * * "R. R. del Diablo" for Rancho Rincon del Diablo.' We know of no reason why the taxpayer was not required to observe this part of the notice, which left no room for conjecture or surmise as to the meaning of the abbreviation. The notice sufficiently complied with the law."

Immediately following the document last mentioned the transcript sets forth the testimony of the witness Longworth, a deputy county recorder. That portion of the record contains nothing which tends to change the facts stated above.

[11] The defendants cite and rely on *Scott v. Beck* (Cal. Sup.) 259 P. 933. A rehearing has been granted in that case. However, the facts are not the same as the facts in this case, and a ruling will be of little help. In the case at bar there was a sale for delinquent taxes for the year 1913. The questions involving that sale have been discussed. Fur-

thermore, the record discloses that other taxes were delinquent and not paid, and that "plaintiff paid taxes, penalties, and costs in pursuit of the state's title" in the sum of \$59.-21. Nothing to the contrary appearing, it must be assumed that at least a part of said sum was for the taxes levied for the year 1918-1919, that such taxes became delinquent, that the property was on the delinquent list for the year last named, and that the delinquent list for the year 1918-1919 was by the tax collector and auditor so arranged that "said publication shall designate in some particular manner the property contained in said list which was sold to the state five years previous (that is, in 1914). * * *" Pol. Code, § 3764.

The defendant has not shown that the tax deed which the plaintiff holds is invalid in any particular or for any reason. It follows that the judgment should be affirmed, and it is so ordered.

We concur: KOFORD, P. J.; NOURSE, J.

87 Cal. App. 500

CAPITOL WOOLEN CO. v. BERGER et al.
(Civ. 4738.)

District Court of Appeal, Second District, Division 2, California. Dec. 12, 1927.

1. Judgment ⇨253(1)—Trial court could not give judgment for greater sum than asked for in pleadings.

Where pleadings asked only for amount of trade acceptance, trial court could not give plaintiff judgment for a greater sum.

2. Bills and notes ⇨226—Where indorser signed draft to obtain goods for drawer and goods were not shipped, indorser held not liable.

Where indorser signed draft under agreement with payee's agent, who had apparent authority, to promise further goods and credit to drawer, and goods were not shipped, indorser held not liable to payee.

3. Payment ⇨82(3)—Where corporation accepted money paid by debtor's friend without knowledge of agent's agreement to ship more goods, money held not recoverable on failure to ship especially where friend expected reimbursement from debtor.

Where corporation accepted money paid by friend of debtor who had purchased goods, without knowledge of its agent's agreement that corporation would ship more goods on credit, money held not recoverable by friend from corporation on failure to ship goods ordered, especially where friend had looked to debtor for reimbursement.

Appeal from Superior Court, Los Angeles County; Benjamin K. Knight, Judge.

Action by the Capitol Woolen Company against J. Berger, doing business under the firm name and style of the Model Cloak Manufacturing Company, and A. D. Hughes, wherein A. D. Hughes filed a cross-complaint. Judgment for plaintiff as against J. Berger and for A. D. Hughes on cross-complaint, and plaintiff appeals. Judgment under the complaint affirmed and judgment under the cross-complaint reversed.

Isaac Pacht, Clore Warne, and Michael Rudolph, all of Los Angeles, for appellant.

Daniel Beecher, of Los Angeles, for respondent.

PEAIRS, Justice pro tem. This is an appeal by the plaintiff the Capitol Woolen Company, a corporation, of New York, from a judgment in the above-entitled action in which the plaintiff was granted a judgment in its favor against the defendant J. Berger, doing business under the firm name and style of Model Cloak Manufacturing Company, for \$346.78, together with costs, and a judgment against them in favor of defendant and cross-complainant A. D. Hughes for the sum of \$350. The facts as alleged were that the said Berger, doing business as stated, was indebted to the plaintiff appellant herein, in the sum of \$696.78 and that one Bernard Aftergut was the representative of the appellant, taking orders for them, and, upon instructions, collecting money and arranging credits. The plaintiff states that the said Aftergut did not have authority except when special authority was given for making collections, and that his orders were all subject to their approval. When the said Aftergut called upon the defendant J. Berger for payment and for a further order, he stated in the presence of defendant Hughes, respondent herein, that, unless arrangements were made to pay the whole account of \$696.78, there would be no credit extended on further orders, but that, if the whole indebtedness were paid or provided for, he would accept his order for jersey cloth to the value of \$1,200 or more, and give him 60 days' credit. After considerable discussion in the presence of and with the said A. D. Hughes, respondent, the said Hughes agreed to pay the sum of \$350 on account of the past indebtedness of said Berger, to the appellant, and to indorse a trade acceptance to the amount of \$346.78, the balance of the former indebtedness of the defendant Berger, provided that the appellant herein would furnish the said defendant Berger with the said jersey cloth to the extent of \$1,200 or more and give him 60 days' credit, and upon that understanding and promise of the appellant to furnish the said cloth the said Hughes signed said guaranty and paid to the appellant the sum of \$350. The appellant received the check for \$350 and gave credit there-

for and acknowledged receipt of the order for cloth as follows:

"Model Cloak Mfg. Co., Los Angeles, Cal., Gentlemen: We are in receipt of order from you from our representative, Mr. Aftergut. We were all sold up on this merchandise when your order reached us, but we expect some of these goods in within the next week or ten days and as soon as they come in, we will advise you, and you can then let us know just what you want. Trusting same is satisfactory to you and thanking you for the past favors and continuance of such, we remain, Very truly yours,"

—but never notified the said Berger nor did they ever ship any of the order to defendant Berger. Later, upon the presentation of the draft or trade acceptance to the bank, it was not honored, and the same was protested. Thereafter the appellant brought suit against said Berger for the amount of the trade acceptance and also against the said A. D. Hughes as indorser thereon. The said Berger defaulted, but the said A. D. Hughes, respondent herein, answered, stating three defenses and further filed a cross-complaint for \$350, the amount of money paid by him under the agreement with the said Aftergut, agent for the appellant. The court, after considering the evidence offered in the case, rendered judgment as heretofore stated against the said Berger, who defaulted, for \$346.78, and costs, but found no judgment against the said A. D. Hughes, and found judgment for the respondent A. D. Hughes in the sum of \$350 and for his costs.

The appellant's claim is that the payment of \$350 by the respondent was purely voluntary and done out of friendship for the defendant Berger, and appellant's first pleading stated that they had furnished cloth under an agreement with the said Berger and Hughes to the extent of the said \$346.78, but later asked leave to amend to show that the draft or acceptance was for the balance of an old account, and that they never had agreed to furnish any cloth to the said defendant Berger through any arrangement made with the respondent Hughes; that they never received any order from the defendant Berger for jersey cloth after the time of the conversation between Aftergut and the said Hughes and that no arrangement had ever been made with the said respondent to furnish anything by reason of his payment of the \$350 and indorsement of the draft or trade acceptance. They further alleged and attempted to prove that the said Aftergut had no authority to make any arrangement with the said defendant Berger to furnish him more cloth upon the payment of the said \$350 and the guaranty or indorsement of the trade acceptance for \$346.78, as aforesaid, and that he had no authority to make such promise either to defendant Berger or to the respondent Hughes. Further, the appellant

alleges that the respondent was entirely a stranger to them, and that his indorsement and agreement to pay the amount of \$350 was because he expected to go into partnership with the said defendant Berger, and that he made such payment and such indorsement purely for his own business reasons in furtherance of his plan of partnership.

From the evidence in the bill of exceptions in this case, we quote from the deposition of Victor E. Meyer, a witness on behalf of the appellant, in answer to questions propounded by counsel for respondent Hughes, as follows:

"I am manager of the Capitol Woolen Company, plaintiff in this action. Up to November, 1922, I was also the president and treasurer of the company. In such official position my duties were that of supervising all the business of the corporation, including making of contracts on behalf of the company, conducting and signing checks. During the month of October, 1922, I was occupying the same official position with the Capitol Woolen Company. I am familiar with the deals and transactions had with J. Berger, doing business as the Model Cloak Manufacturing Company in Los Angeles. The transactions had between me and the said J. Berger stated in full, and any communications and correspondence received by me from the said J. Berger and copies of any communications sent by me to said J. Berger are as follows: The plaintiff in this case received from the defendant, J. Berger, doing business as the Model Cloak Manufacturing Company, an order through the plaintiff's representative in Los Angeles. This order was for 10 pieces of Jersey at \$1.35 per yard, net 60 days. On June 1, 1922, the plaintiff shipped to the said defendant, six pieces of the said Jersey, containing 305½ yards, amounting to \$412.42; on June 8, 1922, the plaintiff shipped to the said defendant, three pieces of the said Jersey, containing 158½ yards, amounting to \$214.15; on June 12, 1922, the plaintiff shipped to the said defendant, one piece of the said Jersey, containing 52 yards, amounting to \$70.20. The total invoice price of these three shipments is \$696.78. On October 23, 1922, the plaintiff received from the said defendant a check for \$350 on account, which check has been paid and credited to his account. At the same time, the plaintiff received from the said defendant, a trade acceptance dated October 18, 1922, for \$346.78, representing the balance of the purchase price of the said Jersey. This trade acceptance was payable in 30 days after date and was indorsed by A. D. Hughes. The action is brought to recover this. When this trade acceptance became due, it was presented for payment and not paid. It was thereupon protested for nonpayment. Thereafter there was some correspondence between the plaintiff and the said defendant J. Berger, and I attach the same hereto. It consists of a letter written by the said defendant to plaintiff dated September 12, 1922; copy of a letter written by the plaintiff to the said defendant, dated September 5, 1922; copy of letter written by plaintiff to said defendant dated September 18, 1922. * * * I knew Bernard Aftergut during his lifetime. He was employed by the plain-

tiff in this case, the Capitol Woolen Company, as salesman, and his territory as said representative of the plaintiff was Los Angeles and San Francisco, Cal. His duties consisted of soliciting orders for the plaintiff, which orders were subject to the plaintiff's acceptance and approval. He worked on a commission basis. No order for the shipment of any merchandise was received by us from J. Berger subsequent to the receipt of said trade acceptance; the plaintiff received from the said Bernard Aftergut a memorandum of an order which the defendant Berger wished to place with the plaintiff. * * * The plaintiff received check for \$350 to be credited on the account of the defendant J. Berger, but I do not remember the details of the said account. * * * The plaintiff received the trade acceptance, dated October 18, 1922, sued on in this action, through Bernard Aftergut. The trade acceptance and check were received in an envelope with just a memorandum written in pencil, 'Inclosed please find check and trade acceptance for the amount of J. Berger & Co.' B. Aftergut took up the collection of accounts and claims for the plaintiff when specifically requested to do so and not otherwise. His employment by the plaintiff consisted of the solicitation of orders subject to the acceptance and approval of the plaintiff and not otherwise."

From the testimony of Mr. Hughes we quote the following:

"Mr. Aftergut had taken an order for merchandise, and at the same time he took an order for certain amount of merchandise, he took the check and trade acceptance and went out with them with the understanding that Berger was to get merchandise. * * * An order was given at the time by Mr. Berger to Mr. Aftergut for the shipment of twenty pieces of merchandise, a variety of cloths. The understanding was that the merchandise would be shipped at once. Of course, it was on the receipt of that merchandise that the whole thing hinged. With reference to the payment of that new order of merchandise, it was said that Berger was to have regular terms on it—60 days to pay for it. I have stated in substance all the conversation that took place at that time. I had no business relations whatever with Berger at this time. * * * I was at his place of business on the 18th day of October when Mr. Aftergut came in. I was there before he came in. On this particular day I just dropped in there as I had before to see what was going on. I don't recall any particular appointment to meet Mr. Aftergut and Mr. Berger. After I was there, I agreed to pay the \$350 and to guarantee the trade acceptance which was executed at that time. Before I paid this \$350, nothing was said by me with reference to completing any association with Mr. Berger. * * * It is not correct that I was going into business with him and that part of the consideration of allowing me to get in on it was the paying off of these obligations. Nothing to that effect, or in substance, was ever discussed by us at any time. There was no other agreement or arrangement of any kind between us with reference to the payment of the \$350 except just the fact that I thought he would pay it back to me. I never wrote to Capitol Woolen Company or communicated

with them in any way demanding that this merchandise be shipped."

From the evidence quoted it is clear that there had been an arrangement between A. D. Hughes, respondent, and Bernard Aftergut. It is also clear that Mr. Aftergut was in the employ of the appellant and that at the time the \$350 was paid by respondent, there was an order given to Mr. Aftergut which was received by the appellant at the same time that they received the check for \$350 and trade acceptance for \$346.78. The letter of the appellant acknowledging the receipt of the order from the Model Cloak Company, through their representative, Mr. Aftergut, is set out herein, and it is not denied that it was written by the appellant. Whatever the understanding may have been between the respondent and Mr. Aftergut, it certainly could not have been that the appellant did not intend to sell any further goods to the defendant Berger. Had the respondent advanced \$350 in cash and indorsed an acceptance or draft for the amount stated, the same to be credited on a new order, if the order were never shipped the respondent certainly would have been entitled to his money back. The argument by appellant outside of that concerning the reasons for payment on the part of the respondent is that there was no privity between respondent and appellant arising out of the contract or otherwise by reason of which he would have a right to recover the \$350 paid for defendant Berger, and that their representative, Mr. Aftergut, had no authority to make any settlement or arrangement with either defendant Berger or respondent Hughes, but the appellant accepted the money paid under his arrangement with the respondent and defendant Berger and acknowledged the receipt of an order through Mr. Aftergut, their representative.

[1, 2] The trial court found judgment as stated heretofore for the respondent in the sum of \$350 and gave judgment to the appellant against defendant Berger in the sum of \$346.78 and costs. Under the pleadings, the appellant only sued for the sum of \$346.78, and in conformity with their action the trial court could not allow them judgment for any greater sum, and, further, the appellant not having furnished any goods in accordance with its agreement with respondent when he paid them the \$350 and indorsed the acceptance or draft, could not expect respondent to honor the draft which he had indorsed for the purpose of obtaining further goods for the defendant Berger and 60 days' credit allowance.

In *San Francisco Gas Co. v. San Francisco*, 9 Cal. 462, it is said:

"Mr. Justice Hosmer observes, in the same case: 'More than a century ago, the case of *Rex v. Biggs*, 3 P. Wms., 419, went the full length of deciding that, as against a corporation, an authority to its agents different from

the prescriptions of its charter might be implied. * * * 'I consider it undoubted law,' continues Mr. Justice Hosmer, in the same case, 'that a corporation may incur a liability different from the prescriptions of its charter. Like individuals, it is responsible in the manner in which it permits its agents to hold it out to the world. The corporation should disavow the practice or usage of its agents in the transaction of business, or they shall be presumed to have its sanction. * * * It may be implied, from the acquiescence in the usual mode of transacting the business of the corporation, and expressing no objection to it. * * *' The rule in regard to estoppel is thus correctly laid down by Judge Parsons, in his work on Contracts vol. 1, p. 118: 'In general, if a person not duly authorized make a contract on behalf of a corporation, and the corporation take and hold the benefit derived from such contract, it is estopped from denying the authority of the agent.' In *Selma & Tenn. R. R. Co. v. Tipton*, 5 Ala. 808 [39 Am. Dec. 344], it is held that 'not only estoppels, technically so called, but estoppels in pais, operate both for and against corporations.' * * * 'Matter in pais, as I understand the phrase, is where some admission has been made—or some act done or acquiesced in, or some party has permitted an act to be done for his benefit, knowing the fact, without objection—or has failed to speak out when he ought to have done so, and by reason of the same another party has been induced to part with some advantage, or, in some respect, to change his position.'"

In *Davis v. Pacific Studios Corporation* (Cal. App.) 258 P. 440, it is said:

"It is the policy of the law and the endeavor of the courts to hold corporations as well as natural persons to their contracts. Such defense introduced against a contract which has been executed in whole or in part by the corporation is looked upon with disfavor. * * * Authority of the corporation may be shown by evidence that the person does business for the corporation and on its behalf as agent with the knowledge and acquiescence of its directors or by their direction. The corporation in such case is bound by his acts and declarations within the scope of the business intrusted to him. * * * *Eells v. Gray Bros., etc., Co.*, 13 Cal. App. 33, 108 P. 735, holds that, if a corporation clothes its officer or agent with apparent authority to act for it in a particular matter, it will be estopped to deny such authority as against persons dealing with such officer or agent in good faith and in ignorance of any limitations on his authority. See, also, *Fowler Gas Co. v. First Nat. Bank*, 180 Cal. 471 181 P. 663. * * *"

[3] The judgment against the appellant in favor of respondent A. D. Hughes was given

on the cross-complaint of the said Hughes, and it is from this portion of the judgment that the appellant seeks relief. The opinion of the court thus far would indicate an affirmation of the judgment of the trial court, but we have been unable to find anywhere in the evidence that there was brought home to the appellant, at the time that they accepted the check of respondent for \$350, any knowledge of the fact that the check was paid upon the promise of their agent Aftergut, or that they had any reason to believe that the check was anything other than one which had been paid for defendant Berger by some one owing him, or who was willing to pay Berger's debts and look to him for payment. The mere fact that they had received the check and an indorsed acceptance which wiped out the former indebtedness of the Model Clothing Company was only in accordance with the instruction which they had given their agent and does not in itself prove that the agent Aftergut had any authority to make any promise or arrangement with any one outside of a customer of the appellant, the Model Clothing Company, as represented by Mr. Berger—in fact, the respondent in his own testimony volunteered the statement as follows:

"No arrangement was made between me and Berger whereby he was to repay that amount to me that I advanced at that time. Nothing was said at that time about me getting my money back, no more than I felt quite sure Mr. Berger, if he got on his feet, would reimburse me for what I had paid out to help him get his merchandise. * * * I got pretty well acquainted with Berger, and I knew that if he got on his feet—if he got this merchandise, it would put him on his feet and he would take care of me. * * *"

It would therefore appear that the respondent, in addition to not bringing home to the appellant the understanding under which he advanced the \$350, shows by his own testimony that he was looking to defendant Berger for reimbursement, and therefore he should not have had judgment in his favor in that regard.

We coincide with the lower court in its judgment rendered under the complaint, and the same is affirmed, but, in view of the above statement, the judgment under the cross-complaint is reversed.

We concur: WORKS, P. J.; CRAIG, J.

FIRST TRUST & SAVINGS BANK OF PASADENA v. LOS ANGELES COUNTY. ★
(Civ. 5039.)

District Court of Appeal, Second District, Division 2, California. Dec. 13, 1927.

Hearing Granted by Supreme Court Feb. 9, 1928.

1. Taxation §47(1)—Double taxation is never favored unless clearly required by statute.

Double taxation is never favored unless clearly required by statute of the particular state which claims that right.

2. Taxation §98—Right to corporate stock held in trust in Wisconsin, returnable to executor upon trustor's death, was not "solvent credit" taxable in California March 1, where trustor died prior thereto but executor was subsequently appointed (Pol. Code §§ 3617, 3628, 3629).

The right of a trustor's executor in California to corporate stock held by a trustee in Wisconsin under provision that the trustee was to convey the trust fund and undistributed income to the executor after the trustor's death held not a solvent credit within Pol. Code, § 3617, so as to be assessable for taxation in California on March 1, under Pol. Code, §§ 3628, 3629; executor being appointed March 7, and trustor having died the preceding January 30.

[Ed. Note.—For other definitions, see Words and Phrases, Solvent Credits.]

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by the First Trust & Savings Bank of Pasadena against the County of Los Angeles. Judgment for plaintiff, and defendant appeals. Affirmed.

Edward T. Bishop, Co. Counsel, and Woodward M. Taylor, W. Sumner Holbrook, Jr., and J. A. Tucker, Deputy Co. Counsels, all of Los Angeles, for appellant.

J. W. Morin, of Pasadena, and James S. Bennett, of Los Angeles, for respondent.

THOMPSON, J. This action was brought to recover taxes paid under protest, levied upon solvent credits of the estate of Caroline Frances Dillingham. The "solvent" credits thus assessed and claimed to exist are said to arise out of the following situation: During the lifetime of Caroline Frances Dillingham she entered into a written agreement with the First Wisconsin Trust Company of Milwaukee, Wis., whereby she transferred 900 shares of the preferred and 2 shares of the common capital stock of the Dillingham Manufacturing Company of Sheboygan, Wis., to the trust company, in trust, with the power in the trustee to hold the stock, to collect the dividends, to receive and collect moneys available for the retirement and redemption of the preferred stock, to invest and reinvest the proceeds of the trust other than the net income which was to be remitted to the trustor, to sell or

exchange the stock and reinvest the proceeds, and to vote the stock at corporate meetings. The trustor reserved the right to revoke the trust upon giving to the trustee written notice thereof and a reasonable time to it to render an accounting and to reconvey. It is expressly stated, however, that during the existence of the trust "the only right, title or interest of the donor in the property, the subject-matter of this trust, is the right to receive such net income as shall be derived therefrom and a right to an accounting from time to time from the trustee." The agreement also contained the following stipulation:

"Upon the death of the donor the trust hereby created and defined shall terminate and be closed. The trustee shall distribute and convey the trust fund and any undistributed income thereof after its deductions, to the executor or administrator of the said donor, appointed and duly qualified."

Caroline Frances Dillingham died January 30, 1922. Her will was admitted to probate and the respondent was appointed executor thereof on March 7, 1922. The trustee subsequently sold the capital stock and remitted the proceeds to the executor. The first Monday in March of the year 1922 fell on the 6th, the day before the executor was appointed. Some time thereafter the assessment was levied.

Section 3617 of the Political Code says:

"Whenever the terms mentioned in this section are employed in this act, they are employed in the senses hereafter affixed to them:

"First. 'Property.'—The term 'property' includes moneys, credits, bonds (except railroad or quasi-public corporations), stocks, dues, franchises, and all other matters and things, real, personal, and mixed, capable of private ownership. * * *

"Sixth. 'Credits.'—The term 'credits' means those solvent debts, not secured by mortgage or trust deed, owing to the person, firm, corporation, or association assessed. The term 'debt' means those unsecured liabilities owing by the person, firm, corporation, or association assessed to bona fide residents of this state, or firms, associations or corporations doing business therein. * * *

The pertinent portion of section 3628 of the Political Code provides:

"Except as otherwise provided in the Constitution of this state, all taxable property shall be assessed in the county, city, and county, town, township, or district in which it is situated. * * * The assessor must, between the first Mondays in March and July of each year, ascertain the names of all taxable inhabitants, and all the property in his county subject to taxation, except such as is required to be assessed by the state board of equalization and must assess such property to the persons by whom it was owned or claimed, or in whose possession or control it was, at twelve o'clock meridian of the first Monday in March next pre-

ceding. * * * In assessing solvent credits, not secured by mortgage or trust deed on real estate, a deduction therefrom shall be made of debts due to bona fide residents of this state."

Subdivision 6 of section 3629 of the Political Code provides, with respect to the assessor exacting from each person a statement under oath, that it shall include:

"All solvent credits, unsecured by deed of trust, mortgage, or other lien on real or personal property, due or owing to such person, * * * deducting from the sum total of such credits such debts only, unsecured by trust deed, mortgage, or other lien on real or personal property, as may be owing by such person, firm, or corporation to bona fide residents of this state. * * *"

[1, 2] The first question to be determined is whether there were solvent credits of the estate taxable in California. In this connection it is asserted by respondent that the authority of *Lowry v. County of Los Angeles*, 38 Cal. App. 158, 175 P. 702, is conclusive. In that case William Morgan, a resident of this county, established a trust with three trustees resident in Illinois, giving to his trustees the power of management and to collect the dividends accruing on capital stock, constituting the corpus of the trust, paying the net income to himself or other beneficiaries, with the further proviso that if the stock were sold with the joint consent of the trustees and owners of the beneficial interest, the trust should cease. The action was one to recover taxes levied against the capital stock thus held by the trustees and paid under protest by the executor of the last will of William Morgan. It was there held that the situs of the capital stock was at the domicile of the trustees who held the legal title and that the stock was not taxable in California, the court saying:

"It seems very clear to us that the stock in the hands of the trustees is within the jurisdiction of the taxing power of the state of Illinois. And to hold that it may be assessed in California also, would be to subject it to double taxation, which is never favored unless clearly required by the statute of the particular state which claims that right."

So far as the tax upon the capital stock is involved it is disposed of succinctly and lucidly by this opinion, and the principle of this case was reaffirmed in the authority of *Westinghouse Co. v. Los Angeles*, 188 Cal. 491, 205 P. 1076, wherein the court refused to sustain taxes upon solvent credits within the state of a foreign corporation maintaining a sales agency in this state, where the business transacted here was "through and for and under the immediate control and management of the home office at Pittsburgh." However, the court with apparent care in the *Lowry* Case made use of this sentence:

"It is clearly expressed by the complaint that the assessment made was upon the whole value

of the full number of shares, and was not an assessment upon dividends or upon any contingent or equitable interest of the testator."

In the instant case it is very clearly alleged that the assessment was upon solvent credits in the sum of \$45,100. Undoubtedly this was upon the theory that the estate, through the executor, had the right on the first Monday in March, 1922, to demand and receive of the trustee the full number of shares of the capital stock or its equivalent in money and was not an assessment upon any contingent or equitable interest of the estate. The trial court found that the interest of the estate was not a solvent credit and with this conclusion we are bound to agree. It will be remembered that in case of a revocation of the trust by the trustor, the trustee was allowed a reasonable time within which to account and reconvey and that in the clauses providing that the trust should terminate upon the death of the trustor it is stated:

"The trustee shall distribute and convey the trust fund and any undistributed income thereof after its deductions, to the executor, or administrator of the said donor, appointed and duly qualified."

Construing these provisions of the agreement, we are compelled to the conclusion that it was intended that the trustee should retain the management and control and the legal title to the corpus of the trust for a reasonable time after notice of termination and at least until in the words of the agreement the "executor" was "appointed and duly qualified." Viewing this intent with the definition of credits as heretofore quoted from section 3617 of the Political Code, further explained by the quotation from section 3629 of the Political Code, we cannot escape the determination that there was no solvent credit to be taxed. Two of the definitions, found in *Bouvier's Law Dictionary*, of credits, are as follows:

"A debt due in consequence of a contract of hire or borrowing of money." "That which is due to a merchant, as distinguished from debit, that which is due by him."

In *People v. Eastman*, 25 Cal. 601-603, in discussing a tax upon a judgment, the court said:

"The property to be assessed in such cases is money at interest, or debts. The money at interest, debt or obligation, is the principal thing, and the mortgage is only a security—a mere incident to the debt or obligation."

In this case it cannot be gainsaid that on March 6, 1922, the trustee was in no way indebted to the estate of Dillingham, and until after the appointment and qualification of the executor its relation thereto was not different from its relation to the trustor.

This conclusion is further strengthened by the fact that inasmuch as the legal title to

the corpus of the trust was in the trustee until after March 7th, the stock was taxable in the state of Wisconsin. Therefore the remarks of the court in the Lowry Case, heretofore quoted, are very pertinent.

Counsel rely upon the authority of *City of St. Albans v. Avery*, 95 Vt. 249, 114 A. 31, and strenuously urge its application to the facts of the instant case. Without in any way attempting to deny the force of that opinion it cannot avail the appellant here, for the very patent reason that the court there determined that the beneficial interest in the cestui que trust is a property interest "which the Legislature may subject to taxation." As already observed, the assessment here did not purport to be and was not an assessment levied upon the beneficial interest, but upon the supposed right of the estate on the 6th day of March to demand the return of the entire body of the trust.

Judgment affirmed.

We concur: CRAIG, Acting P. J.; COLLIER, Justice pro tem.

87 Cal. App. 382

OHLSON v. CALLENDER. (Civ. 4681.)

District Court of Appeal, Second District, Division 2, California. Dec. 8, 1927.

1. Municipal corporations ☞705(2)—Pedestrian and automobile driver must exercise due care at intersection.

Pedestrians and automobile drivers are both required to exercise due care in crossing a street at an intersection.

2. Municipal corporations ☞706(7)—Court sitting without jury should consider all circumstances in passing on question of contributory negligence of pedestrian struck by automobile at intersection.

Where plaintiff was struck by automobile while crossing street at intersection, in broad daylight, when view was unobstructed, in passing on question of contributory negligence court sitting without jury should consider surrounding circumstances and situation generally as disclosed by all the testimony.

3. Appeal and error ☞1010(1)—Unless court sitting without jury abused discretion in trying automobile negligence case, its judgment will not be disturbed where supported by any evidence.

Unless court sitting without jury abused its discretion in trying automobile negligence case, appellate court will not interfere, if any evidence, on a reasonable view thereof, supports the findings and the judgment.

4. Municipal corporations ☞706(7)—Contributory negligence of pedestrian injured by automobile at intersection held question of fact.

In suit to recover damage for injuries sustained by being struck by defendant's automobile at street intersection, tried before court

without jury, evidence held sufficient to make contributory negligence a question of fact, and denial of defendant's motion for nonsuit was not abuse of discretion.

Appeal from Superior Court, Los Angeles County; M. S. Sayre, Judge.

Action by John Ohlson against R. F. Callender. Judgment for plaintiff, and defendant appeals. Affirmed.

Jennings & Belcher, of Los Angeles, for appellant.

A. C. Verge, O. V. Willson, and J. B. Joujon-Roche, all of Los Angeles, for respondent.

PEAIRS, Justice pro tem. This is an appeal on the part of the defendant from a judgment rendered by the court sitting without a jury, under a complaint concerning an accident which occurred on the 9th day of July, 1920, at or about 9 o'clock a. m. on Eleventh street at the easterly side of Los Angeles street, where the plaintiff was struck by the defendant while the plaintiff was crossing Eleventh street from south to north, in line with the general direction north and south of the easterly sidewalk of Los Angeles street. The evidence shows that plaintiff had looked in both directions before starting across Eleventh street and that at that time plaintiff saw no automobile approaching nor in the intersection, and plaintiff states that when near the center of Eleventh street, where there is a manhole, he was struck by the defendant's automobile, but says that he did not see the automobile approaching, nor did he even remember just when or where it hit him, except that he had a dim recollection of being placed in an automobile and taken, as he afterwards learned, to the Emergency Hospital. The defendant also states that he did not see the plaintiff until just before he struck him and that he was so close to the plaintiff at that time that he could not see plaintiff's feet. That the plaintiff was badly injured there is no dispute and that there was negligence on the part of the defendant seems to be conceded by counsel, leaving, therefore, the one main issue of contributory negligence.

[1, 2] The appellant argues the question of contributory negligence as a matter of law, saying that, as the plaintiff did not observe the approach of defendant's automobile in broad daylight when the view was unobstructed, that fact was in itself evidence of contributory negligence, and the same argument goes to the question of error on the part of the court in denying defendant's motion for a nonsuit on the ground of contributory negligence, and of error in failing to find on the issue of contributory negligence. The argument concerning contributory negligence, of course, must take into consideration the

surrounding circumstances and the situation generally. Four other parties who testified in this case saw the accident, and the testimony of each of these witnesses was that the defendant was driving approximately at the rate of 30 miles per hour or more, and approaching on Eleventh street from the west, and that at the time the plaintiff started to cross Eleventh street on the east side of Los Angeles street, the defendant was some distance to the west of Los Angeles street, driving at about 10 feet from the southerly curb of Eleventh street, directly across Los Angeles street; that he did not noticeably slacken his speed until just at the time he struck the plaintiff, at which time he, according to the skid marks of his car, applied his brakes and his car skidded a little to the north, struck the plaintiff, and carried him on the bumper of the car for a distance measured at 58 feet and some inches. The manhole, according to the testimony, was in the middle of Eleventh street and about on a line with the sidewalk if extended across Eleventh street, north and south. One of these witnesses stood at the southeast corner in front of an oil service station and observed the defendant from the time he was at least 16 feet west of Los Angeles street. Two of the other witnesses were crossing Los Angeles street to the east side, south of Eleventh street, and testified that they observed the automobile, their attention being called to it because of defendant's great speed. Another witness was approaching Los Angeles street from the east on Eleventh street near the center of the street on a motorcycle. It appears that just before the plaintiff was struck he was looking to the east and that at that time the defendant was looking down or back into his car.

While the plaintiff and defendant are each required to exercise due care in crossing the street at an intersection, it was, nevertheless, the court's duty to pass upon the question of negligence and contributory negligence, in view of all the testimony.

In regard to error on the part of the court alleged as having occurred by reason of its denial of defendant's motion for a nonsuit, if there is sufficient undisputed evidence to warrant its denial of the motion such action would not be error.

Concerning the contention that the court erred in failing to find on the issue of contributory negligence, it will be noted in the findings of fact by the court that it found the allegations contained in paragraphs 2 and 3 of the complaint were true, and in paragraph 3 of the complaint it says:

"That said plaintiff was proceeding, at said time and place, with due care and caution, and that when the plaintiff was about midway of the distance across said East Eleventh street the said defendant at said time and place, carelessly, recklessly, and negligently, and at a high

and excessive rate of speed, drove and operated and propelled a certain automobile, to wit, a Buick touring car, so as to cause the same to strike and collide with the plaintiff with great force and violence."

The entire argument of appellant set forth in his brief revolves around the point that, if other observers could see defendant's car, the respondent should also have seen it. In order that we may more clearly discuss this question, we will include, from time to time, quotations from the testimony. The evidence would indicate that, when the respondent looked to the west just as he stepped from the curb on to Eleventh street, about four seconds before he was struck, the appellant's car was about 200 feet at least west of respondent on Eleventh street and was being driven at a speed of from 30 to 35 miles or more per hour or at least 10 or 12 times as fast as respondent was walking. At that time appellant was, to quote his own words, "just a reasonable distance away from cars parked on Eleventh street west of Los Angeles street. My car was not at any time out as far as the manhole or in the center of the street." Witness Aselin says: "There were no cars on Los Angeles street which were traveling at that time. I do not recall any cars parked on Eleventh street—there was one or two I believe over by the laundry if I recall right." Taking these two portions of evidence together, it would seem quite possible that respondent, when on the curb or on the south edge of Eleventh street, could not see appellant's car because of the cars on Eleventh street mentioned by appellant. Drawing a line from respondent's position to a point 200 feet west, 6 or 8 feet cut from the south curb of Eleventh street. It would probably pass through the position of the cars parked on Eleventh street, and from the testimony of Crawford, appellant's car was crossing Main street, about 375 feet west of respondent, at that time. The fact that Crawford could see the appellant's car, being farther south and west of the respondent, would indicate that the cars parked on Eleventh street were near the southwest corner of Los Angeles and Eleventh streets. Witness Aselin did not see appellant's car until near the fire plug on the southwest corner of the intersection, at which time respondent was going across Eleventh street, which indicates that Aselin did not see the car until it came out from behind the cars parked on Eleventh street.

It must be taken into consideration that the burden was with the appellant as to contributory negligence and if these parked cars did not interfere with the view of respondent, the appellant, defendant below, should have proven it by showing size, height, and position relatively. Aselin testifies that at that time the appellant's car was going around 30 miles per hour. He also testifies that the

skid marks made after the brakes were set on appellant's car were over 58 feet long, indicating even greater speed than 30 miles per hour, especially when it is remembered that the body of respondent was being dragged in front under the bumper. Witness Bodey, who was looking directly west and nearer to the respondent than appellant was, did not see the car until it was coming into Los Angeles street. Crawford, who saw appellant's car when it was passing out of Main street nearly 400 feet away did not see the motorcycle coming from the east nor 100 feet away from him. Crawford estimated the speed of the appellant's car at from 30 to 35 miles per hour, and on redirect examination when asked what had called his attention to the car replied: "On account of the terrific speed." The witness Denu used the term "excessive speed" and stated that he first saw the car within 10 feet of the fire plug. Both Crawford and Denu were experienced drivers, as was also Aselin. These three men were in fact all professional drivers. The fact that none of the witnesses, except Crawford, saw appellant's car until it was in the vicinity of the fire plug at the southwest corner of the intersection, does not discredit their testimony, and up to that time it should not discredit the testimony of the respondent. In approximately one second after that time respondent was hit and rendered unconscious.

[3, 4] It is not the intention of this court to discuss the facts of this case, further than to show that the parked cars, the excessive speed of appellant's car, the severe injury to the respondent, and his lapses of memory caused thereby, as evidenced by the testimony, and other facts therein, all go to show that this was a case for determination of the facts as to contributory negligence rather than for any determination of contributory negligence as a matter of law.

We would call attention to those decisions in steam and electric railroad cases, which refer to looking and failing to see, for there is a distinction between such cases and cases like the one at issue—it is held that the tracks themselves in those cases are notice of danger.

The respondent was crossing the street at a point and in a manner approved by the law and, as found by the court, with due care and caution when he was struck by the car driven by the appellant at a high and excessive rate of speed.

There is no question left, except the one as to whether the respondent is to be found guilty of contributory negligence under the law for the reason that after so terrible an injury he testifies that he looked in all directions and did not at the time of the trial recollect having seen the automobile of the appellant approaching. It is to be observed that in addition to the evidence of the respondent there was the testimony of other

witnesses and other evidence which tended to show that the respondent may not have seen the car at all, and in this connection we refer to the matter of *Estate of Arnold*, 147 Cal. 586, 82 P. 253, a portion of which reads as follows:

"Every favorable inference fairly deducible and every favorable presumption fairly arising from the evidence produced must be considered as facts proved in favor of the [plaintiff]. Where evidence is fairly susceptible of two constructions, or if either of several inferences may reasonably be made, the court must take the view most favorable to the [plaintiff]. * * * If contradictory evidence has been given it must be disregarded."

"A failure to hear or see the car is not, per se, proof of negligence in all cases. Whether such exercise of the faculties as, under all the circumstances of the case, was reasonable, would have averted the injury is a question of fact." *Hamlin v. Pacific Electric Ry. Co.*, 150 Cal. 781-789, 89 P. 1111.

"Unless the court having the duty of trying the case has violated its discretion, this court will not interfere if any of the evidence, upon a reasonable view thereof, supports the findings and judgment." *Davis v. Breuner Co.*, 167 Cal. 685, 140 P. 587.

"There is no positive duty to stop, look, and listen when a pedestrian is about to cross a city street. * * * *Blackwell v. Renwick*, 21 Cal. App. 131, 131 P. 94; * * * *Clark v. Bennett*, 123 Cal. 275, 55 P. 908. Compare, also, *Scott v. San Bernardino Valley Traction Co.*, 152 Cal. 604, 610, 93 P. 677. The question of negligence, under the usual rule of ordinary care that devolves upon foot travelers, must be examined in the light of all the attendant circumstances. * * * *Mann v. Scott*, 180 Cal. 554, 182 P. 282.

"The plaintiff was crossing Hill street from east to west on the north side of Sixth street. When she had reached a point on the north-bound tracks on Hill street she was struck by defendant's automobile, which was going north on Hill street. The court found that the plaintiff exercised ordinary and proper care for her own safety, and that the negligent acts of the defendant were the direct and proximate cause of the accident. These findings are supported by plaintiff's testimony that, when near the curb on the east side of Hill street, she looked up and down the street and saw no vehicles whatever coming; that she looked ahead at the street car coming to a stop on the tracks on the west side of Hill street, 'except I looked both ways as I stepped from the curb and there were no vehicles whatever within my sight.'" *Fisk v. Poplin*, 46 Cal. App. 588, 189 P. 723.

"At any rate, the trial court so concluded, and we are unable to say from the state of this record that its judgment in so doing constituted such a breach of discretion as would compel a reversal of this case. The rule has been laid down, both in the Supreme Court and in this court, that the ruling of a trial court as to whether a given state of facts presented before it does or does not amount to negligence as a matter of law will not be disturbed on appeal in the absence of a clear showing of an abuse of discretion." *Spring v. Tawa*, 49 Cal. App. 100, 192 P. 1051.

"The law imposes upon a trial judge the duty to make findings upon all material issues as to which evidence has been introduced. On the other hand, it is well settled that, where the evidence heard does not support the plea of contributory negligence, a finding upon the issue is not necessary to be made." *Arnaz v. Forbes*, 51 Cal. App. 666, 197 P. 364.

"The question of whether or not the pedestrian is negligent in crossing a street is one which, in the absence of express statutes regulating his conduct, must ordinarily be left to the jury, for the conduct of an ordinarily prudent person under such circumstances must be largely determined by the condition of the traffic at the particular time and place in question." *Burgesser v. Bullocks*, 190 Cal. 677, 214 P. 651.

"The case is closely allied in facts to that of *Haines v. Fewkes*, 190 Cal. 477, 213 P. 490, the only difference being that in that case the pedestrian had crossed the street car tracks and had taken a position which she assumed to be a place of safety to await the passage of an automobile approaching from the south, when she was suddenly struck by another automobile coming from the same direction; while in this case the respondent carefully looked in the direction of approaching traffic before she left her place of safety on the curb and took a position which she assumed to be a place of safety for the purpose of boarding the street car, when she was struck by an automobile which had swerved in front of the street car and approached her unawares. In the *Haines* Case the Supreme Court held that it was not contributory negligence as a matter of law. * * * In support of the appeal the appellant insists that 'the conclusion is irresistible that respondent, had she looked, could have seen and avoided the danger, and it is the sole purpose of this brief to show that it was her duty as a matter of law to look.' More than this is necessary to support a plea of contributory negligence. Mr. Justice Myers, in *Gett v. Pacific Gas & Elec. Co.*, 192 Cal. 621 [631], 221 P. 376, 380, in discussing the plea of contributory negligence, said: 'In this defense the burden is upon the defendant to prove two things: (1) That the plaintiff was negligent; (2) that such negligence was a proximate cause of the injuries complained of. If he fails to prove either of these things this entire defense falls.' " *Bolles v. Boone*, 66 Cal. App. 240, 225 P. 775.

"All of the authorities agree on two principles: First, the pedestrian and the driver of a vehicle have equal and reciprocal rights in the use of the highway; and this rule goes so far as to hold that in the absence of statutory or local regulation this right extends to all sections of the highway, whether at established places of crossing or elsewhere thereon. When we speak of a person having a right, we must necessarily refer to a civil right as distinguished from the elemental idea of rights absolute. We must have in mind a right given and protected by law, and a person's enjoyment thereof is regulated entirely by the law which creates it. If we were to consider these rights as absolute, nothing but chaos could result, and instead of each enjoying the right both would be deprived of its enjoyment. Therefore the rights of pedestrian and auto driver are conceded to be relative to the ex-

tent that each must so restrict and use his right as to permit the other the full benefit of what is his. The second principle upon which all agree is that the facts and circumstances of each case control the amount of care required on the part of both pedestrians and drivers of vehicles. Nothing approaching a rule can be formulated other than the basic principle of ordinary care under the circumstances." *Nickell v. Rosenfield* (Cal. App.) 255 P. 760.

"Ordinary care is all that is required of a pedestrian in crossing a street. The question of the exercise of ordinary care is largely a question of fact to be determined by the jury from all the circumstances surrounding the particular case under consideration. In determining whether a pedestrian used such due care as is commensurate with apparent present dangers, the jury should consider the location involved, the existing state of the traffic, the opportunity for obtaining a clear view of the street from every direction whence approaching vehicles might endanger an attempt to cross the street, the presence of obstructions to the view such as buildings, passing cars, driving storms, clouds of dust, or darkness, and, from these and all other facts and circumstances present, determine whether the particular pedestrian used that degree of care which would be required of an ordinarily prudent person under like circumstances." *Kinnear v. Martinelli* (Cal. App.) 258 P. 686.

In the case of *Katz v. T. I. Butler Co.* (Cal. App.) 254 P. 679, it is said:

"The test is, not whether the plaintiff did all that was possible for him to do, such as seeing everything that was possible to see that could be a source of danger to him, but whether he acted with ordinary care and prudence under all the facts and circumstances."

In the case of *Marini v. Southern Pacific Co.* (Cal. Sup.) 257 P. 74, it is also said:

"It has often been said by this court that it is very rare that a set of circumstances is presented which enables a court to say, as a matter of law, that negligence has been shown. As a general rule, it is a question of fact for the jury, an inference to be deduced from the circumstances of each particular case, and it is only where the deduction to be drawn is inevitably that of negligence that the court is authorized to withdraw the question from the jury." *Hoff v. Los Angeles Pacific Co.*, 158 Cal. 596, 112 P. 53, *supra*, quoting from *Seller v. Market St. Ry. Co.*, 139 Cal. 268, 72 P. 1006."

The foregoing cases discuss very completely the duty of the pedestrian and set out definitely that the facts are for the jury or for the court, sitting without a jury, and further emphasize the duty of the trial judge, and the rule that, unless the court trying the case has violated its discretion, this court will not interfere, if any of the evidence upon a reasonable view thereof, supports the findings and judgment.

Summarizing the conduct of respondent, we find that he looked in both directions before stepping into Eleventh street; that he con-

tinued straight across the street until the time of the accident; that the intersection was clear when he started; that he was near the center of the street when hit; that he was then looking east; that he had no reasonable expectation that any one would so violate the speed regulations as to reach him from the west while he was crossing; that he apparently conducted himself as a reasonably prudent person would under like circumstances and surroundings. The words of the witness Aselin when he said, "I would not have hollered at him if I hadn't noticed that the man that was driving the automobile had his head turned," are significant as indicating that Aselin did not believe the respondent in danger until that time, and then only because of the inattention and speed of appellant.

After a careful consideration of the law of this state as cited, and of the testimony as given in the transcript, we do not find any abuse of discretion, nor prejudicial error on the part of the trial court.

Judgment affirmed.

We concur: WORKS, P. J.; CRAIG, J.

87 Cal. App. 482

PEOPLE v. JONES. (Cr. 1486.)★

District Court of Appeal, Second District, Division 1, California. Dec. 12, 1927.

Hearing Denied by Supreme Court Feb. 9, 1928.

1. Criminal law §137(2)—One indicted for larceny and embezzlement, who, at trial, contended alleged offense was embezzlement, not larceny, held not precluded, on appeal, from contending offense was larceny.

One indicted for both larceny and embezzlement of oil well pipe, who, upon hearing in the trial court, contended that if he had committed a crime it was not larceny, but embezzlement, whereupon the larceny charge was dismissed on motion of the state, held not precluded, on appeal, from contending that the offense, if any, was not embezzlement, but larceny.

2. Embezzlement §47—Whether defendant was intrusted with oil well casing so as to be guilty of embezzlement upon sale thereof held for jury.

Where defendant had taken an assignment of a contract permitting the original party thereto to take oil from a certain lease and had possession of certain of the oil company's personal property, although such original contract was by its terms not assignable, held, in trial of such assignee for embezzlement of oil well casing, that the question whether he was so intrusted with the casing as to make him guilty of embezzlement upon its appropriation and sale was for the jury.

3. Assignments §58—Provisions forbidding assignment of contract without consent may be waived (Civ. Code, §§ 3268, 3513).

Provisions in a contract forbidding assignment thereof without consent may, under Civ.

Code, §§ 3268, 3513, be waived by the party whose consent is required; such provisions being for his benefit.

4. Assignments §58—Party having right to declare forfeiture for breach because of other party's assigning without permission may waive breach and hold assignee (Civ. Code, §§ 3268, 3513).

Where one party to a contract has the right under the terms thereof to declare a forfeiture for breach in assigning contract without permission, he may waive such breach, under Civ. Code, §§ 3268, 3513, and hold the assignee under the terms of the assignment and contract.

5. Embezzlement §23—Defendant assuming to act as bailee of oil casing under contract assignment held estopped to deny he was intrusted with property.

Where defendant had taken an assignment of a contract which permitted the assignor to have possession of certain oil company property and work a certain lease, although the contract was by its terms nonassignable, and assumed to act as bailee of oil well casing under such assignment, held, in prosecution for embezzlement of the casing, that such assignee was estopped to deny that he was intrusted with the property.

6. Embezzlement §11(1)—One assuming to act as agent or bailee, who feloniously converts personalty intrusted to him, is guilty of embezzlement.

Where a person assumes to act as agent or bailee of another, and in such assumed capacity is intrusted with and receives into his custody property for the use of such other, and thereafter fraudulently and feloniously appropriates it, or any part of it, to his own use, or to any use not in the due and lawful execution of his trust, he is guilty of embezzlement.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Embezzle—Embezzlement.]

7. Embezzlement §44(1)—Evidence held sufficient to sustain conviction of embezzlement of oil well casing.

Evidence held sufficient to sustain conviction of embezzlement of oil well casing.

8. Criminal law §511(2)—Evidence corroborating that of accomplice must be more than mere suspicion and must tend to implicate defendant, but need not establish offense (Pen. Code, § 1111).

Under Pen. Code, § 1111, evidence corroborating that of an accomplice must, to be sufficient to establish guilt of the defendant, be more than mere suspicion and must tend to implicate the defendant, but it need not be strong evidence nor establish actual commission of offense.

9. Criminal law §511(3)—Accomplice testimony need not be corroborated by direct evidence (Pen. Code, § 1111).

It is not necessary to corroborate the testimony of an accomplice by direct evidence, under Pen. Code, § 1111, but if the connection of the accused with the alleged crime may be in-

ferred from the corroborative evidence in the case it is sufficient.

10. Criminal law §511(1)—Evidence corroborating that of accomplice held sufficient to sustain conviction (Pen. Code, § 1111).

In prosecution of defendant for having embezzled oil well casing, evidence corroborating that of an accomplice *held* sufficient, under Pen. Code, § 1111, to sustain conviction.

11. Criminal law §757(4)—Instruction that accomplice testimony should be viewed with distrust and acted on with great caution held properly refused as being charge on matter of fact (Code Civ. Proc. § 2061, subd. 4; Const. art. 6, § 19).

An instruction to the effect that testimony of an accomplice should be viewed with distrust and acted upon with great caution *held* properly refused, under Code Civ. Proc. § 2061, subd. 4, and Const. art. 6, § 19, as being a charge upon a matter of fact.

12. Criminal law §1173(1)—Case will not be reversed for refusing instruction unless it was court's duty to instruct exactly as requested.

A case will not be reversed for the refusal of an instruction unless it was the duty of the trial court to give the instruction exactly as requested.

13. Criminal law §1170(1)—Refusal to permit testimony as to amount of defendant's bank deposit on date alleged embezzled casing was sold to show absence of fraudulent intent held not reversible error, in view of other evidence.

In prosecution for embezzling oil well casing, court's refusal to permit defendant to testify as to the amount of money he had on deposit in a certain bank on the date casing was sold, offered on issue of fraudulent intent, *held* not reversible error, in view of the other evidence which would have made the evidence immaterial, even if introduced.

14. Embezzlement §42—Evidence of dishonor of defendant's checks held admissible as tending to show indebtedness to accomplice was satisfied by proceeds of embezzled property.

Where, in trial of defendant for embezzling oil well casing, evidence was admitted relative to the dishonor of defendant's checks, given to alleged accomplice, such evidence *held* proper as tending to show the defendant was indebted to accomplice, and that such indebtedness was subsequently partially satisfied by the proceeds of the embezzled property.

15. Criminal law §982—Refusal to permit filing of application for probation solely because defendant had not pleaded guilty held error (Pen. Code, § 1203).

Court's refusal to permit a defendant to file an application for probation solely because he had not pleaded guilty of the charge of embezzlement, but had stood trial and been convicted, *held* error, under Pen. Code, § 1203.

16. Criminal law §1023(1)—Order made before judgment denying motion for leave to file application for probation held not appealable (Pen. Code, § 1237).

Where, after verdict of guilty of embezzlement but before judgment, an order was made by the trial court denying defendant's motion to be permitted to file an application for probation, such order was not appealable, under Pen. Code, § 1237.

17. Criminal law §1147—On appeal from embezzlement conviction, appellate court could consider abuse of discretion in trial court's refusal to permit filing of probation application (Pen. Code, § 1259).

On appeal from a judgment of conviction of embezzlement of oil well casing, *held*, that under Pen. Code, § 1259, the reviewing court could consider whether the trial court had abused its discretion in its refusal to permit the filing of a probation application.

18. Criminal law §982—Discretion permitted court in referring probation request to probation officer is impartial discretion controlled by fixed legal principles (Pen. Code, § 1203).

The discretion permitted a trial court in referring a matter of request for probation to a probation officer, under Pen. Code, § 1203, is an impartial discretion, controlled by fixed legal principles, and not an arbitrary or capricious discretion.

19. Criminal law §1147—When trial court, after considering merits of probation application denies probation, its discretion is not reviewable on appeal.

When a trial court gives consideration to the merits of an application for probation and from such consideration determines that probation ought not to be granted, its discretion is not controlled by fixed legal principles and rules, and hence is not reviewable on appeal.

20. Criminal law §1144(17)—Record on appeal being silent as to grounds for denying probation application, presumption is denial was founded upon consideration of merits.

Where the record on an appeal is silent as to the court's grounds for its ruling in denying a probation application, the presumption is that the denial was founded upon consideration of the merits of the application.

21. Criminal law §982, 1147—Decision as to whether particular case or defendant is within probation law if departing from correct rule is abuse of discretion and reviewable.

When the court undertakes to deal with the question whether a particular case or a particular defendant is within the scope of the probation law, then it is dealing with fixed legal principles, and a departure from those principles is an abuse of discretion and raises a question of law which may be reviewed on appeal.

22. Criminal law §1134(10)—Order refusing leave to apply for probation after conviction solely for failing to plead guilty held reviewable on appeal from judgment (Pen. Code, §§ 1203, 1259).

An order refusing a defendant, convicted of embezzlement after trial, leave to apply for pro-

bation solely because he did not plead guilty, and without considering the merits, *held* reviewable on an appeal from the judgment, under Pen. Code, §§ 1203, 1259, as affecting defendant's substantial rights.

23. Criminal law ⇨982—Application for probation can be considered only before judgment.

An application for probation can be considered only before judgment.

Appeal from Superior Court, Los Angeles County; Carlos S. Hardy, Judge.

J. Russell Jones was convicted of embezzlement, and he appeals from the judgment, from an order denying his motion for a new trial, and from an order denying permission to apply for probation. Judgment reversed, with directions, order denying new trial affirmed, and appeal from order denying permission to apply for probation dismissed.

Hearing denied by Supreme Court; WASTE, C. J., and LANGDON, J., voting for a hearing.

Leon R. Yankwich and MacDonald & Thompson, all of Los Angeles (Thomas C. Ridgway, of Los Angeles, of counsel), for appellant.

U. S. Webb, Atty. Gen., and Lionel B. Browne, Deputy Atty. Gen., for the People.

SHAW, Justice pro tem. Appellant was tried on an information charging him with larceny and embezzlement of certain pipe belonging to Russell Oil Company, a common-law trust, and after dismissal of the larceny count was found guilty of embezzlement.

The Russell Oil Company had an oil lease on certain land of one Carter, at Santa Fé Springs, Cal., hereinafter referred to as the Carter lease. On this lease were three oil wells equipped with casing and other appurtenances, all of which were owned by said Russell Oil Company. The wells being out of production, Russell Oil Company, on September 8, 1925, made a contract with M. H. Murray, by which it granted to him the sole and exclusive right to operate these wells at his own expense, for doing which he was to have 50 per cent. of the oil and gas produced, but no property interest in the equipment, and reserved the right to dispose of all equipment not actually being used by Murray. Claiming to act under this contract, appellant went into possession of the Carter lease in January, 1926, and attempted to operate the wells. During his operations some 4,500 feet of 6¼-inch casing was pulled from one of the wells, designated as No. 1, and was placed on racks. This work was done under the direction of Orville Pfeiffer, who was appellant's superintendent on the lease, and was completed about June 22, 1926. On June 25, 1926, 771 feet of this casing was sold by Pfeiffer to Commercial Supply House, a dealer in such

commodities at Long Beach, for \$501. In this transaction Pfeiffer used the fictitious name of C. E. Williams and, by indorsing that name on a check, got the money. He deposited \$450 of this amount in the Bank of Norwalk, which is near the Carter lease, in an account which he then opened in his own name. In the latter part of August, 1926, Russell L. Williams, who was acting for Russell Oil Company, learned that some pipe had been taken away from the Carter lease, and early in September he demanded of appellant and of Pfeiffer that it be returned or the value of it paid. He also told appellant that he would take the matter up with the authorities. A few days later, on Monday, September 13th, all but a few feet of the pipe were returned to the Carter lease. This was done by the procurement of Pfeiffer, who gave to Commercial Supply House a forged order in the name of Marland Oil Company for delivery of the pipe to a well at Huntington Beach, then had it hauled by a truck to an abandoned well at Downey, and from there hauled by another truck to the Carter lease.

This transaction is the basis of the charge against appellant. Pfeiffer, who was also under a like charge, was a witness for the prosecution. He admitted upon the stand his above-mentioned acts, gave the details of his conduct in the matter, and testified that it was all done at the direction and under the orders of appellant; that he gave appellant \$50 of the money received from the pipe in cash; and that appellant received the benefit of the remainder of it either as a credit on account of his indebtedness to Pfeiffer or as payment of bills for work done on the lease which were settled by Pfeiffer.

[1] Appellant's first contention is that if he was guilty of any offense it was larceny and not embezzlement. At the trial he made the contrary contention in moving for the dismissal of the larceny charge. However, that charge was dismissed on the motion of the district attorney, and there is no legal barrier to the assumption of such inconsistent positions by appellant. The theory of his argument here is that he was not intrusted by Russell Oil Company with the casing in question, but came wrongfully into its possession. The above-mentioned contract made by Russell Oil Company with Murray contained a clause that it should not be assignable without its consent. Appellant obtained assignments of this contract, but did not procure any express consent thereto by Russell Oil Company, and apparently made no effort so to do. However, he took possession of the lease and operated the wells, or at least attempted to put them into condition to operate, and expended money for that purpose, claiming the right to do this under the Murray contract and not otherwise. Russell L. Williams, who represented Russell Oil Company, testified that at the time the pipe was taken away they

did not recognize the contract as a valid existing contract; that they never recognized appellant at any time; and that appellant was not the agent or servant of Russell Oil Company, but that "the whole property was intrusted to M. H. Murray and any one he might employ or have there"; that Murray had a right to use the equipment in the operation of the property; and that neither Murray, nor appellant, nor Pfeiffer had any authority to sell any property of Russell Oil Company. It was shown that appellant's claim of right and his acts and expenditure of money on the lease were known to Russell Oil Company, and with such knowledge they suffered him to remain in possession of the lease and continue his operations thereon, without taking any steps to put him off until after the occurrences which gave rise to this case.

[2-4] From these facts the jury might properly find that appellant was entrusted with the property of Russell Oil Company, including the casing in question. Under the circumstances, that company might well have been estopped from insisting upon that clause of the Murray contract which forbade assignments without their consent, or be held to have waived it. Such provisions are inserted in contracts for the benefit of the party whose consent is required, and, like all provisions of that kind, may be waived by such party. Civ. Code, §§ 3268, 3513; 3 Cal. Jur. 240; 25 Cal. Jur. 929; *Schnittger v. Rose*, 139 Cal. 656, 661, 73 P. 449; *Frank v. New Amsterdam C. Co.*, 175 Cal. 293, 165 P. 927. The contract in question is analogous to a lease, an assignment of which in violation of a covenant against assignments without the lessor's consent is not void but carries the term. 15 Cal. Jur. 763; *Schnittger v. Rose*, supra; *Potts Drug Co v. Benedict*, 156 Cal. 322, 327, 104 P. 432, 25 L. R. A. (N. S.) 609. In such a case the lessor has a remedy by declaring and enforcing a forfeiture for the breach, but he may waive the forfeiture and allow the assignee to remain in possession, in which case the assignee holds under the lease and the assignment. The same rule must be applied to this contract. This disposes of appellant's contention that the court erred in refusing to give the following instruction:

"You are instructed that, when a contract carries a clause forbidding assignment without written consent, an attempted assignment does not transfer any rights or liabilities unless it is accompanied by said written consent."

This is obviously erroneous.

[5, 6] Moreover, appellant assumed and claimed to be acting in a capacity which would make him a bailee for Russell Oil Company of all their casing and other equipment on the Carter lease. Having so acted and obtained possession of the property on that assumption, and Russell Oil Company having

at least tacitly acquiesced in his conduct, he is now estopped to deny, even in this criminal prosecution, that he was intrusted with the property in question by or for Russell Oil Company. *Ex parte Hedley*, 31 Cal. 108; *People v. Treadwell*, 69 Cal. 226, 10 P. 502; *People v. Gallagher*, 100 Cal. 466, 35 P. 80; *People v. Leonard*, 106 Cal. 302, 39 P. 617; *People v. McLean*, 135 Cal. 306, 67 P. 770; *People v. Robertson*, 6 Cal. App. 514, 92 P. 498; *People v. Steffner*, 67 Cal. App. 23, 227 P. 699. Hence the court did not err in refusing certain instructions requested by appellant in which a contrary statement of the law was made, and for the same reasons instruction No. 18, of which appellant complains, was correct. It reads as follows:

"The court instructs you that if any person assumes to act as the agent or bailee of another, and in such assumed capacity he is intrusted with, and receives into his care and custody, the property of another, for the use of such other person, and thereafter fraudulently and feloniously appropriates and converts such property or any part of the same to his own use, or to any use or purpose not in the due and lawful execution of his trust, he is guilty of embezzlement."

[7] Pfeiffer's testimony, taken with the other facts above stated, was sufficient to show appellant's guilt of the crime of which he was convicted. It is obvious, however, that Pfeiffer, according to his own testimony, was an accomplice of appellant, and the prosecution stipulated at the trial that this was the fact. The question therefore arises whether there was sufficient corroboration of Pfeiffer's testimony, and appellant forcibly contends that there was not.

[8] Section 1111 of the Penal Code provides as follows, regarding the corroboration of accomplices:

"A conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof."

[9] The construction which has been placed on this provision is succinctly stated as follows, in 8 Cal. Jur. 178-180:

"Evidence to corroborate an accomplice need not be sufficient to establish the guilt of the defendant, and it need not establish the actual commission of the offense. Nor need it extend to every fact and detail covered by the statements of the accomplice, or to all the elements of the offense, or prove that the accomplice has told the truth. However, the corroborative evidence must tend in some slight degree, at least, to implicate the defendant. While it need not be strong, more is required by way of corroboration than to raise a mere suspicion. It is sufficient if the corroborating evidence tends to connect the defendant with the commission of

the offense, though if it stood alone it would be entitled to little weight.

"It is not necessary to corroborate the testimony of an accomplice by direct evidence. If the connection of the accused with the alleged crime may be inferred from the corroborative evidence in the case, it is sufficient. While the testimony of one accomplice cannot be corroborated by that of another accomplice in the crime charged, the necessary corroboration may be furnished by the defendant's own testimony, or by admissions or confessions made by him. But under the express provision of the Code mere evidence of the corpus delicti is not sufficient corroboration."

In *People v. Hendricks*, 71 Cal. App. 730, 236 P. 214, the court, after referring to section 1111, said:

"If the defendant told the officers that he knew nothing about the stolen articles, then his statement was false, because he testified that he saw the sun visor in the garage on the 12th of August. If he refused to make any reply when he was asked about the incriminating evidence against him, then his silence was in the nature of an admission of guilt. 'Misrepresentations, contradictions, or silence of defendant when accusing statements are made usually will have the same effect as a confession or admission as corroborative of the accomplice.' 16 C. J. 707; *Holt v. State*, 28 Ga. App. 758 (113 S. E. 49); *Ettinger v. Commonwealth*, 98 Pa. 338."

A similar holding was made in *People v. Kelly*, 69 Cal. App. 558, 231 P. 767, where many of the authorities are reviewed, and in *People v. Taylor*, 70 Cal. App. 239, 232 P. 998.

[10] Under the rules established by the foregoing authorities, we think the corroborating evidence must be held sufficient. A detailed statement of it here would unduly prolong this opinion. There was testimony given by others than Pfeiffer, from which the jury might have found participation by appellant in the proceeds of the sale of the casing, his desire to raise money by sale thereof, false statements by him as to his knowledge of the pipe having been taken away, silence when accusatory statements were made to him, apparent knowledge of facts for which no other explanation appeared than his participation in the crime, apparent foreknowledge of the time when the casing would return, testimony by him falsely denying various incriminating facts, and inconsistent statements regarding the matter.

Appellant also requested the following instruction, which was refused:

"The testimony of an accomplice should be viewed with distrust and acted upon with great caution and is never of itself sufficient in law to establish a crime. If the evidence introduced for the purpose of corroborating an accomplice merely raises a suspicion of the guilt of the defendant, this is not sufficient to constitute corroboration, and in such event it is the duty of the jury to find the defendant not guilty."

[11, 12] The statement that the testimony of an accomplice should be viewed with distrust and acted upon with great caution is a charge upon a matter of fact and was properly refused. It goes beyond the instruction provided for in subdivision 4 of section 2061 of the Code of Civil Procedure, and the rule is now well established that even that instruction is an instruction on a matter of fact and should not be given, the Code provision referred to being in violation of article 6, § 19, of the Constitution. *Hirshfeld v. Dana*, 193 Cal. 142, 160, 223 P. 451; *People v. Blanchard*, 71 Cal. App. 402, 235 P. 467; *People v. Hendricks*, 71 Cal. App. 730, 734, 236 P. 214. The second sentence of the requested instruction appears to be correct, but a case will not be reversed for the refusal of an instruction unless it was the duty of the trial court to give the instruction exactly as requested. *People v. Davis*, 64 Cal. 440, 1 P. 889; *People v. Brown*, 62 Cal. App. 96, 104, 216 P. 411.

Appellant makes some other points as to instructions given and refused, but after careful consideration we find no merit in them, and do not regard them as of sufficient importance to justify a detailed discussion here.

[13] Another point made by appellant is that the court erred in refusing to allow him to testify as to the amount of money he had on deposit in a certain bank at El Segundo on the date when the casing was sold. There are authorities holding both ways as to the admissibility of such testimony, but the question need not now be determined. Authorities cited in favor of its admission declare that it is proper because relevant to the question of fraudulent intent. Conceding for the purpose of this discussion that the evidence was admissible for this reason, we think its rejection was not prejudicial under the circumstances. The accomplice, Pfeiffer, had testified to a state of facts which, if true, left no doubt as to appellant's fraudulent intent. Appellant's contrary showing, as made by his testimony, was that he did not take the property and had no connection with its taking by Pfeiffer. If the jury had believed this testimony, they must have acquitted him; but if they believed that of Pfeiffer—and their verdict shows that they did—no amount of evidence as to defendant's means or resources could have raised any doubt as to his fraudulent intent in taking the property. Moreover, appellant testified, without objection, that at the time the casing was sold he had sufficient money to pay all bills upon the lease on deposit in his bank accounts at El Segundo and San Diego; that about the time the shortage was discovered he had plenty of money in his account; that during his operations on the lease he had plenty of money or could get it to pay the men; and that between June 26 and July 12 he had \$3,000 in his account and spent \$1,650 for expenses. It does not appear that he could have made any better showing, had he

been allowed to answer the question under consideration.

[14] Another point made is that the court erred in admitting evidence of the dishonor of three checks which appellant gave Pfeiffer on a bank in Texas. Evidence was offered by the prosecution and received showing that on the day after the sale of the casing appellant filled out three checks, aggregating about \$68, on the account in which Pfeiffer had deposited the proceeds of the sale, and at appellant's request Pfeiffer signed them. These checks were drawn in favor of workmen upon the lease, and were delivered to them in payment of wages due them from appellant. To negative the inference that he had knowingly received a part of the proceeds of the embezzlement, which might be drawn from this evidence, appellant testified that he had previously paid out \$92 in behalf of Pfeiffer to release the latter's automobile from attachment, and that the above-mentioned checks for \$68 were in partial satisfaction of this advance. Thereupon, the prosecution was allowed to prove that shortly before this \$92 payment, and before the sale of the casing, appellant had given Pfeiffer three checks on a bank in Texas for the aggregate amount of \$605, which were deposited by Pfeiffer in an account he had in the Norwalk bank, but not the same account in which the proceeds of the sale of the casing were later deposited; that Pfeiffer then gave appellant a check for \$150 on this account, on which appellant got the cash; and that these Texas checks later came back dishonored. Pfeiffer testified that appellant gave him a check to cover these checks, and his statement could be construed to refer to this \$92 payment. We see no error in this ruling. It was proper for the prosecution to show that appellant received part of the proceeds of the embezzlement, as tending to connect him with the commission of the offense; and in response to his testimony that the \$68 checks produced by the prosecution for that purpose were a payment on indebtedness of Pfeiffer to appellant, it was competent for the prosecution to show that in fact the indebtedness was the other way, and such was the tendency of the evidence complained of.

Appellant's final point is that the court erred in refusing him leave to apply for probation, his claim being that such leave was refused for the sole reason that he had pleaded not guilty and had been convicted by a jury, instead of pleading guilty. The record sustains his claim as to the reason for which his request was refused. After a motion for a new trial had been argued, and the court had indicated its intention to deny it, appellant's counsel said:

"I would like permission to present an application for probation to the court, and present this man's past life for some 30 years; * * * I feel that I can make a very satisfactory show-

ing to your honor as to what sort of life this man has led prior to this time."

Thereupon the court denied the motion for a new trial, and appellant's counsel further said:

"I request permission of the court to present officially to the court through its regular probation officer the facts and circumstances which I believe will warrant the court in granting leniency to this man."

To which the court replied:

"Well, the court will not allow you to do that, Mr. Thompson. I feel that he has had a fair and impartial trial. He has submitted the issues in this case to a jury of his own selection, and he will have to abide by the judgment of that jury from the facts in the case. When a defendant walks into my court and pleads guilty and submits the facts to me, why, then, it is time to determine whether he shall have probation or have punishment in prison, but in a case of this kind I feel, the jury having given its judgment, that the court should not take any time to review those facts or to investigate further, or to take into consideration anything at all in the matter. I believe that that should not be done."

To this appellant's counsel said:

"I am only making this request, not with the idea of your honor reviewing the facts before you now, but assuming that the verdict of the jury is correct."

And after further discussion between him and the court, he said:

"However, your honor must bear in mind that the probation law is for the guilty."

To this the court replied:

"Yes; primarily it is for those who admit their guilt; not, in my judgment, for those who say they are not guilty. I think the whole theory of the probation law is to grant its benefit to those who admit their guilt and who offer mitigating circumstances, and not for those who still say, 'I am innocent.' I think for the man who is innocent, after a conviction and judgment of the court, his appeal is to be made to the Governor and not to the judge under the probation law. I think it would rather tend to stultify the system. I think it is too dangerous a proposition and would involve the courts in too much labor, to give a man two trials. For these reasons that I have averted to, I will not permit an application for probation to be filed."

[15] A reading of the probation law (Pen. Code, § 1203) at once discloses that it does not support the view thus announced by the trial court as to its scope. The opening provision of section 1203 is, omitting words immaterial here:

"After the conviction by plea or verdict of guilty of a public offense, * * * the court * * * before judgment and sentence * * * may upon oral suggestion of either party or of its own motion when it appears that there are circumstances which may properly be taken into view either in aggravation or mitigation of the

punishment, may in its discretion refer the same to the probation officer directing said probation officer to investigate and to report, recommending either for or against release upon probation at a specified time, and the court shall hear the same summarily at that specified time and upon such notice to the adverse party as it may direct."

This section further provides in subdivision (e) that when a defendant has fulfilled the conditions of his probation or has been discharged from probation "if he has been convicted after a plea of not guilty, the court shall set aside the verdict of guilty." Words could scarcely be used which would express more clearly the intention of the Legislature to extend the benefits of the probation law to defendants who deny their guilt and upon trial are convicted. In the exercise of its discretion the court passing on applications for probation is expected to select only the deserving cases for the bestowal of clemency, but this cannot be done if the court arbitrarily refuses to hear or consider their applications. In the present case, the court entirely departed from the letter and the spirit of the probation law in refusing to entertain appellant's application merely because he had not pleaded guilty.

[16, 17] Is the court's error in this respect reviewable on appeal? Appellant has given notice of an appeal from the order denying his motion for permission to file an application for probation. This order was made before judgment and is not an appealable order. Pen. Code, § 1237. The attempted appeal from it must therefore be dismissed. But section 1259 of the Penal Code provides:

"Upon an appeal taken by the defendant in open court the appellate court may, without exception having been taken in the trial court, review any question of law involved in any ruling, order, instruction, or thing whatsoever said or done at the trial or prior to or after judgment, which thing was said or done after objection made in and considered by the lower court, and which affected the substantial rights of the defendant. The appellate court may also review any instruction given, refused or modified, even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby."

Under this provision, five conditions must be complied with in order that the appellate court may review a ruling of the trial court: (1) An appeal taken in open court; (2) a question of law involved in the ruling; (3) a ruling at the trial or prior to or after judgment (not including orders which are directly appealable); (4) objection made in and considered by the lower court before the ruling (except in case of an instruction); (5) a ruling or order which affected the substantial rights of the defendant. In this case, the record clearly shows that conditions 1, 3, and 4 have been met.

[18] We think there is also a question of

law involved, under the circumstances of this case. It is true, section 1203 provides that the court may "in its discretion" refer the matter to the probation officer for a report and thereafter "in its discretion" place the defendant on probation, and no doubt, in the ordinary case, the exercise of this discretion would not be reviewed on appeal. But we are satisfied that the same general rule applies to the discretion conferred by this section as to the numerous other cases of discretionary power conferred upon the courts, concerning which the Supreme Court said in an early case:

"The discretion intended, however, is not a capricious or arbitrary discretion, but an impartial discretion, guided and controlled in its exercise by fixed legal principles. It is not a mental discretion, to be exercised *ex gratia*, but a legal discretion, to be exercised in conformity with the spirit of the law, and in a manner to subserve and not to impede or defeat the ends of substantial justice." *Bailey v. Taaffe*, 29 Cal. 423, 424.

Citations might be multiplied almost without number showing that the rule stated in *Bailey v. Taaffe* has been followed and applied to the discretion conferred upon the court in a great variety of cases. With an exception to be noticed presently, we think this rule is applicable to the discretion exercised by the court in passing on an application for probation. Suppose the court should in response to a defendant's application for probation say to him:

"I do not like the color of your hair, or you are of the black race, and for that reason I will not hear your application."

Would the defendant be obliged to submit to such conduct without remedy? Such a ruling would clearly be an abuse of discretion because not guided or controlled by principles established by law therefor, but made with reference to some criterion not provided for or countenanced by law. The same is true of the ruling here complained of. It is based on a ground flatly contrary to the provisions of the Code. Such action cannot be regarded as other than an abuse of discretion, under any accepted definition of that term. When such an abuse of discretion occurs a question of law is presented. In order to review the action of the trial court here this court needs but to answer the question, "Was the order based on any ground which the law sanctions?" and, the answer being "No," a reversal of that action is not an interference with any discretion vested by law in the trial court.

[19-21] Herein the case differs from the ordinary one where the court has considered a defendant's application for probation on its merits and either refused to entertain the application or refused to grant it when heard, and this brings us to the point above referred to, in which we think the rule declared in

Bailey v. Taaffe is not fully applicable to the discretion of the court in probation matters. When the court gives consideration to the merits of the application and from them determines that probation ought not to be granted—which it may do either at the preliminary stage where defendant suggests that there are matters in mitigation of punishment and requests a reference to the probation officer; i. e., in the language customarily used but not found in the Code, asks permission to file an application for probation, or later at a summary hearing on the probation officer's report—the discretion of the court is not and cannot be controlled by any fixed legal rules. It must be guided by considerations pertaining to psychology, sociology, and penology, or, in the words of the Code, to "the ends of justice"; by general rules of policy which have not been and in the nature of the case should not be crystallized into positive or definite rules of law. Since action based on a consideration of such matters does not involve any question of law, to this extent, the rule of *Bailey v. Taaffe* cannot be applied to the discretion vested in the court in probation matters, and its exercise of that discretion cannot be reviewed on appeal. If the record is silent as to the grounds of the ruling, the presumption would be, under the general rule as to presumptions on appeal, that it was founded upon a consideration of the merits of defendant's application, but here there is an affirmative showing to the contrary. When the court undertakes to deal with the question whether a particular case or a particular defendant is within the scope of the probation law, then it is dealing with fixed legal principles, and a departure from those principles is an abuse of discretion and raises a question of law which may be reviewed on appeal.

[22] There remains for consideration the question whether the order complained of affected the substantial rights of the appellant. We have no doubt that it did. Had the court considered his application on its merits, it might, of course, have found that he was not a proper subject for the benefits of the probation law and, as we have just said, we could not review such a finding, whether expressly appearing or presumed from the silence of the record, but the court might also conceivably have found to the contrary and have determined to place him on probation. On reaching the latter conclusion, it might have suspended either the imposing or the execution of the sentence; and in either case, on appellant's complying with the terms of his probation for the entire period thereof, the court must have set aside the verdict of guilty and dismissed the information, and appellant would have been thereafter released from all penalties and disabilities resulting from the offense. Pen. Code, § 1203, subds. (a) and (e). A ruling which deprives a party of the opportunity to apply for and perchance to obtain

such benefits unquestionably affects his substantial rights.

For the reasons stated, we think the order complained of may be reviewed on appeal from the judgment. We are not unmindful of the fact that in *People v. Dunlop*, 27 Cal. App. 460, 470, 150 P. 389, and *People v. Laborwits*, 74 Cal. App. 401, 240 P. 802, a contrary rule was declared. Apparently neither of those cases presented such a situation as we have before us. In the *Dunlop* Case the court said:

"The action of the court in refusing to entertain an application by the defendant for probation after his conviction or of taking testimony or the report of the probation officer of the court with a view to admitting the accused to probation cannot be reviewed. The matter of admitting a person convicted of crime to probation rests entirely in the discretion of the trial court, as does likewise the question whether any proceedings shall be entertained by the court to that end. Pen. Code, § 1203. Indeed, as we understand said section, the only question which may arise thereunder can never be as to the action of the court in refusing to admit a convicted person to probation, but must always be, if any reviewable question may arise thereunder at all, whether the court abused its discretion in granting probation."

The case seems to have been one where the action of the lower court was based on a consideration of the merits of the defendant's proposed application. In such a case we agree to the doctrine that the discretion of the court cannot be reviewed on appeal, but for the reasons already stated we think the reason given for the decision is too broad and should be so limited as not to apply to a case like that now before us. Such a case the court manifestly did not have in mind when writing the opinion in the *Dunlop* Case. In the *Laborwits* Case, which was decided by this court on the authority of the *Dunlop* Case, no brief was filed, there was no reporter's transcript in the record, and the record disclosed nothing as to the reason for the action of the trial court. Under such circumstances, manifestly its action could not be reviewed on appeal, but we think the doctrine of the case should be limited as already stated.

[23] Our conclusion on this point necessitates a reversal of the judgment, by reason of the fact that an application for probation can be considered only before judgment. *Beggs v. Superior Court*, 179 Cal. 130, 175 P. 642. However, as we find no error affecting the verdict of conviction, no new trial is necessary, but the case may be simply remanded for further proceedings on the conviction. The situation is similar to that existing in *People v. Johnson*, 71 Cal. 384, 388, 12 P. 261, *People v. Mendosa*, 178 Cal. 509, 173 P. 998, and *People v. Gonzales*, 36 Cal. App. 782, 173 P. 407, where orders of that character were made.

The appeal from the order denying defendant's motion for permission to file an appli-

cation for probation is dismissed, the order denying a new trial is affirmed, and the judgment is reversed, with directions to the trial court to arraign the defendant again for judgment and thereupon to hear and determine on its merits the defendant's motion for permission to file an application for probation and thereafter to proceed with the matter of judgment in such manner as may be in accordance with law and in conformity to its decision on the matter of probation.

We concur: CONREY, P. J.; HOUSER, J.

87 Cal. App. 601

PEOPLE v. BROCK. (Cr. No. 1004.)★

District Court of Appeal, Third District, California. Dec. 15, 1927.

Rehearing Denied With Modifications Jan. 14, 1928.

1. Criminal law § 576(2)—Under circumstances of disqualification of district attorney and the sending of judge to other counties, held, there was good cause shown for not bringing defendant to second trial within 60 days after remittitur went down (Const. art. 1, § 13; Pen. Code, § 1382).

Even if, in view of Const. art. 1, § 13, guaranteeing to every defendant a speedy trial, Pen. Code, § 1382, requiring the court, unless good cause to the contrary is shown, to order the prosecution to be dismissed, if without application by defendant for postponement he is not brought to trial within 60 days "after the finding of indictment or filing of information," applies to a second trial, after reversal, and, in absence of showing of good cause to the contrary, limits time for bringing defendant to such trial to 60 days after the going down of the remittitur, held, that it could not be said there was an abuse of discretion in holding that good cause had been shown for the delay of 5 days after expiration of the 60-day period in bringing defendant to trial, in view of the county attorney being disqualified, and time being necessary to obtain an attorney to act as special prosecutor, and in view of the judge of the county being sent during such period to hold court in other counties, and judges of other counties being sent to such county for a limited period to attend to routine matters.

2. Robbery § 24(1)—Evidence held sufficient to warrant conviction of defendant as one of participants in a robbery.

Evidence consisting of circumstances and admissions held sufficient to warrant conviction of defendant as one of the five persons engaged in the perpetration of a robbery.

3. Criminal law § 1186(4)—Any error in admission of evidence of defendant's statement that he would plead guilty of burglary, but not of robbery, held harmless, in view of other evidence (Const. art. 6, § 4½).

Admission of evidence that defendant said he would plead guilty of burglary, but not of robbery, in view of evidence of participa-

tion in robbery, held harmless, and so to be disregarded, under Const. art. 6, § 4½.

4. Criminal law § 721(5)—Counsel's statement that facts were undenied held not a comment on defendant's failure to take witness stand.

Statement of prosecuting attorney in argument that facts enumerated were undenied is not within the prohibition of the statute that the fact that a defendant does not take the witness stand shall not be considered a circumstance against him; it not being a comment on defendant's failure to take the witness stand.

5. Criminal law § 564(1)—Venue in robbery case held sufficiently proven.

Evidence in prosecution for robbery committed in a certain house held to sufficiently prove venue.

Appeal from Superior Court, Yolo County; W. A. Anderson, Judge.

Edward Brock was convicted of burglary and robbery, and was denied a new trial, and he appeals. Affirmed.

Arthur C. Huston, Jr., and Percy Napton, both of Woodland, for appellant.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

PLUMMER, J. The defendant was tried and convicted upon an information charging, in one count, that on or about the 28th day of February, 1926, the said defendant did burglariously, etc., enter a certain dwelling house belonging to and occupied by one W. A. Lillard, in the county of Yolo, state of California; and in a second count, charging that the defendant, at the same time and place and in the same residence, in the immediate presence of W. A. Lillard and others, did commit the crime of robbery, in that the said defendant did unlawfully, forcibly, etc., take from the person, possession, and immediate presence of the said W. A. Lillard and others, certain personal property consisting of lawful money of the United States, firearms, and jewelry, all of the value of about \$100, lawful money of the United States. The information was sufficient in form and substance to charge the defendant with the crime of burglary and also with the crime of robbery. The defendant's motion for a new trial being denied, an appeal is prosecuted therefrom, and from the judgment of conviction entered upon the verdict of the jury.

This is the second trial of the defendant upon the information referred to; both trials resulting in conviction. The first trial resulted in a reversal upon appeal because this defendant and other parties charged with the same offense in a separate and distinct information were tried at the same time. See *People v. O'Connor, et al.* (Cal. App.) 254 P. 630. Upon reversal of the cause as just referred to, the remittitur therein went down

from this court and was filed in the office of the clerk of the trial court in Yolo county on the 2d day of May, 1927. The trial which resulted in the second conviction of the defendant and on account of which this appeal is prosecuted took place on the 6th day of July, 1927. Three principal reasons are urged as counts for reversal, to wit: That the defendant's motion to dismiss for want of prosecution within 60 days should have been granted; second, that the evidence did not warrant the conviction of the defendant; and, third, that the court erred in the admission of testimony. Two minor reasons for reversal are also set forth: That the court erred in its instructions to the jury; and that the attorney for the people was guilty of prejudicial misconduct in his argument to the jury.

[1] Section 13 of article 1 of the Constitution of the state of California, guaranteeing to every defendant a speedy trial, and section 1382 of the Penal Code, defining the time within which a trial must be had after the finding of an indictment or the filing of an information, are relied upon as necessitating a reversal of the judgment and the dismissal of the defendant. Section 1382 of the Penal Code, so far as involved herein, reads:

"The court, unless good cause to the contrary is shown, must order the prosecution to be dismissed in the following cases: * * * If a defendant, whose trial has not been postponed upon his application, is not brought to trial within sixty days after the finding of the indictment, or filing of the information."

In support of the ruling of the trial court denying the motion of the defendant for dismissal because the action was not tried within 60 days after the filing of the remittitur, it is urged by the people, first, that the section applies only as to the time within which a trial must be had after the finding of an indictment or the filing of an information, and has no relevancy to cases being brought to trial within 60 days after the going down of a remittitur; that the section not referring to a trial where reversal has been had upon appeal by a defendant, and not mentioning the filing of a remittitur or the time within which a trial must be had after the filing of a remittitur, there should not be imported into the section language which the Legislature has not incorporated therein; and, second, that good cause has been shown in this case for not bringing the defendant to trial within 60 days after the filing of a remittitur. Section 13 of article 1 of the Constitution entitles the defendant to a speedy trial, and section 1382 of the Penal Code, in furtherance of the constitutional provision, explicitly provides for the time within which a trial is to be had after the finding of an indictment or the filing of an information. Section 1382 of the Penal Code, however, contains another provision which controls the application of subdivisions 1 and 2 of the section, and particularly

subdivision 2, which is involved herein. If good cause for the delay is shown, 60 days is held not to be the limit of the period of time within which a speedy trial may be had. In other words, the term "speedy trial" is to be read and interpreted in the light of all the circumstances. In the case at bar, if good cause has been shown why the defendant was not brought to trial until the 6th day of July, 1927, which was 5 days after the expiration of the 60-day period, then it becomes wholly immaterial whether section 1382 of the Penal Code refers only to indictments or informations, or whether the constitutional provision to which we have referred and the section of the Code should be read together and the term 60 days accepted as the limit of the period within which a defendant may be brought to trial after the remittitur has been filed in the event of a reversal of the cause upon appeal. With this in view, we have carefully examined the transcript in this case and find that it discloses the following:

Upon the first trial of this cause, wherein the defendant was tried with others and charged with the same offense, one Neal Chalmers appeared as one of the attorneys for this defendant and the other defendants tried with him in the trial just referred to and conducted the defense in the trial court and successfully prosecuted the defendant's appeal in this court. The trial just referred to was had on or about the 2d day of June, 1926. Later, in the year 1926, to wit, at the general election held in November, 1926, the said Neal Chalmers was elected district attorney of the county of Yolo, and assumed his duties as such on or about the first Monday of January, 1927, and therefore was disqualified to act as the prosecuting officer in this case during the entire period of time from the 2d day of May, 1927, to and including the 6th day of July, 1927. That after the going down and filing of the remittitur in this cause, the said Neal Chalmers communicated with Hon. U. S. Webb, the Attorney General of the state, setting forth his disqualification by reason of his having been counsel for the defendant upon his first trial, and asking that some other counsel be designated by him according to the provisions of section 472 of the Political Code. Several letters passed between the Attorney General and Mr. Chalmers relative to the latter's disqualification, and this was followed by inquiry as to some suitable attorney, member of the bar of Yolo county, whose services might be obtained to act as special counsel for the people by reason of the disqualification of the district attorney of said county. After some inquiry and correspondence, the Attorney General secured the services of Arthur B. Eddy, an attorney at law and member of the bar of the county of Yolo and a resident of Woodland, in that county, to act as special prosecutor and represent the people in this cause.

It appears that one of the letters addressed by the Attorney General to Mr. Arthur B. Eddy at his office in Woodland remained unanswered for the period of about 8 days, due to the fact that Mr. Eddy was away from his office and the city of Woodland during that period of time. After Mr. Eddy had received the request from the Attorney General that he act as special counsel in this case, Mr. Eddy took a few days within which to inquire into the case and acquaint himself somewhat with the duties to be performed in order to properly represent the people therein. After making such investigation, Mr. Eddy accepted the appointment as special counsel to represent the people in this cause, and took upon himself such duties. The record likewise shows that Hon. W. A. Anderson, the duly qualified and acting judge of the superior court of Yolo county, was, by order of the Chief Justice of the state of California and chairman of the judicial council of the state of California, designated and appointed to preside in the superior court of the counties of San Diego and Los Angeles in one of the departments thereof, from the period of time beginning on the 3d day of May, 1927, to and including the 18th day of June, 1927. Thus during said period of time the trial judge of said county and the one elected to preside in the superior court of said county was necessarily absent therefrom for a period of at least 48 days, assuming that it required one day to reach Los Angeles from the city of Woodland and one day to return therefrom, which probably is somewhat less than the actual time required.

The record also shows that Hon. Ernest Weyand, judge of the superior court of the county of Colusa, was, by the same authority, designated and appointed to hold court in the county of Yolo from the 9th day of May to and including the 11th day of June, 1927. The record further shows that for a short period of time, to wit, on May 23, 1927, Hon. Malcolm Glenn, a judge of the superior court of Sacramento county, was designated and appointed to hold court in the county of Yolo. The record likewise shows that Hon. W. A. Anderson was, by the same authority, designated and required to hold court in the superior court of the county of Sacramento for the period beginning on the 28th day of June and ending on the 30th day of June, 1927. The time which Hon. W. A. Anderson was required to hold court in the county of Los Angeles was set forth and prescribed in several orders which we have considered and given as including the whole time. The record further shows that the former district attorney of Yolo county, Mr. Kern, who appeared as prosecutor upon the first trial of the defendant, declined the request of the Attorney General to appear and prosecute this action as special counsel. The record further shows that it was not until the 28th day

of June, 1927, that Arthur B. Eddy finished his investigation of the facts and circumstances connected with this action and accepted the appointment from the Attorney General as special counsel to appear in behalf of the people upon the trial of this cause. It thus appears that within 8 days after the people, through the Attorney General of the state, had secured qualified counsel to represent them in this action, the trial of this defendant was begun.

An examination of the record in this cause discloses that some 88 pages of the transcript are required simply to schedule the various court proceedings which were had in the county of Yolo between the 2d day of May, 1927, and the 6th day of July, 1927. A cursory calculation leads to the conclusion that there were between 340 and 350 different proceedings, including motions, demurrers, probate proceedings, naturalization hearings, and trials. This record shows that the judges who came from the counties of Colusa and Sacramento to preside in the superior court of Yolo county were reasonably busy during said period of time, and this conclusion is further strengthened by the fact that the judges referred to had their own duties to perform in their local courts. The record shows that there were several days intervening between some of the proceedings conducted by Hon. Ernest Weyand, sitting as judge of the trial court in the county of Yolo, but at the same time it is made clear that the people had no one to represent them in this action until the 28th day of June, 1927, which was after Judge Weyand had ceased to act as presiding judge of the superior court of Yolo county. The record shows that the defendant, when this action was called and set for trial for July 6, 1927, interposed an objection thereto on the ground that it was being set at a period more than 60 days after the filing of the remittitur herein, and upon defendant's motion to dismiss, which was heard on the 6th day of July, 1927, all of the facts which we have hereinbefore set forth were submitted to the trial court for it to determine whether good cause was or was not shown for not bringing the defendant to trial until 5 days after the expiration of the 60-day period. Under these circumstances, as stated in the case of *People v. Farrington*, 140 Cal. 656, 74 P. 288, the trial court was called upon to exercise its discretion as to whether good cause had or had not been shown for the delay of 5 days after the 60-day period had expired, in bringing the defendant to trial, and, as stated in the case just cited, some discretion must be given to the trial court in its decision relative to the motion to dismiss. This discretion, however, cannot be exercised arbitrarily, but is to be based upon all the circumstances and facts presented to the court to account for the few days' delay. In the recent case of *Ex parte Alpine* (Cal. App.)

259 P. 457, the cause of delay was through lack of knowledge on the part of the district attorney that the remittitur from the District Court of Appeal had been sent down and filed. The court there said:

"In the case at bar so far as appears, the failure to bring the action before the court to be set for trial until 3 days later than the expiration of 60 days from the filing of the remittitur may have been nothing more than the result of inadvertence in not immediately discovering that the remittitur had been filed."

It is also stated in the opinion that, in the absence of any showing of notice to the district attorney that the appeal had been terminated, it would be unreasonable to permit a defendant to take advantage of mere inadvertence and so escape prosecution upon a criminal charge. In the case of *Murphy v. Superior Court*, 53 Cal. App. 6, 200 P. 483, it was held that a defendant is not entitled to have a criminal action dismissed on the ground that he was not brought to trial within 60 days after the finding of an indictment, where the court was engaged practically all of such 60-day period in the trial of other cases. In that case, as here, the record disclosed the number of proceedings in the superior court during the 60-day period, and established the fact that the court was engaged during practically all of such period. Likewise, in the case of *People v. Benc*, 130 Cal. 159, 62 P. 404, it is held that good cause is shown where it appears that the court was engaged in the trial of other cases. In 8 Cal. Jur. p. 204, § 278, we find the following, which we think a correct statement of the rule that should be applied:

"What is good cause for delay, within the meaning of section 1382 of the Penal Code, may be difficult to define with precision, since it must, in a great measure, be determined by reference to the particular circumstances appearing in each case. The matter rests largely in the discretion of the trial court. However, this discretion is not arbitrary, but should proceed upon such knowledge or information as will enable the court to determine for itself whether public justice requires further detention of the prisoner, notwithstanding delay on the part of the prosecution."

Examples are then given of what has been held to show good cause for the delay.

In the case at bar, under the recent constitutional amendment and the acts of the Legislature passed in pursuance thereof, the Chief Justice of the Supreme Court, as chairman of the judicial council, is vested with a large discretion in directing trial judges to leave their own counties and proceed to some other county, and there hold court, where the calendars are more congested.

The record in this case shows that the trial judge, under this constitutional provision, was taken from the county of Yolo and sent to the counties of San Diego and Los Angeles,

there to hold court for such a period of time as to practically take him away from his own county and courtroom for the period of approximately 50 days during the 60-day period immediately following the filing of the remittitur in this cause; that during said period of time trial judges were sent to the county of Yolo from adjoining counties for a limited period of time to attend to the routine business of the court that required immediate consideration; and the transcript shows that said judges not only attended to routine matters, but also tried several cases. The transcript further shows that there was no district attorney of the county of Yolo qualified to represent the people in the trial of the defendant in this action between the 2d day of May, 1927, and the 6th day of July, 1927; that it was necessary for the Attorney General to secure the services of some attorney at law, sufficiently able and willing to undertake the prosecution of this action; that such attorney was not secured until on or about the 28th day of June, 1927.

The record further shows that a delay of only 5 days occurred after the expiration of the 60-day period before the trial of this defendant was begun. In view of all of these facts, if good cause is not shown for the delay, we do not really see how those words in the statute would ever find application. And in view of the fact that it has been found necessary for the chairman of the judicial council of this state to direct judges of smaller counties to go to larger counties and there assist in the clearing of the court calendars, it would be unreasonable to hold that if, in so doing, a delay of 5 days has been occasioned over the 60-day period, necessitates the discharge of a defendant in a criminal action. Especially would this be true in view of all the circumstances disclosed by the record in this cause. We think that the circumstances of this case disclose that an appellate court should not hold that the discretion of the trial court in denying the defendant's motion to dismiss has been either improperly or arbitrarily exercised.

[2] That there is little merit in the defendant's contention that there was insufficient testimony to warrant conviction will appear from a brief recital of the facts set forth in the record. It appears in the evidence that on the 28th day of February, 1926, five men were seen in and about the dwelling house occupied by W. A. Lillard in the county of Yolo. The residence of W. A. Lillard is situate on what is known as the Davis highway in said county. At about midnight on the 28th day of February, 1926, according to the testimony of one witness, four men entered the residence of said Lillard and proceeded to ransack the house. Another witness who was in a different room in said residence saw only three in the house. Of the three, one wore a mask or bandage over his face. The other

two had no covering over their faces. These two were observed and identified by two witnesses. There were at the time in the Lillard house, and as a part of the Lillard family, W. A. Lillard, Mrs. Laura E. Lillard, and Tom Lillard. The men who entered the Lillard house were armed and the Lillards were commanded to keep quiet. The record sets forth fully how the Lillards were intimidated by the threatening attitude of the armed men, which need not be set forth herein, further than to say that the men secured a number of articles such as money, jewelry, revolvers, pearl beads, and the like from the Lillard home. While the robbery was being perpetrated, a man by the name of J. A. Nunes, an employee of the Lillards, and who resided in a small house in the Lillard ranch not far from the Lillard residence, had returned by automobile from Capay Valley. The testimony of Nunes is to the effect that he returned to the Lillard ranch shortly before 12 o'clock; that as he turned off the highway toward the house which he occupied on the Lillard ranch he noticed a "Hudson" open car standing alongside the Davis highway, which we have heretofore mentioned (which, by the way, is an improved state highway), and that at that time one man was sitting behind the steering wheel of the automobile, parked, as just stated, and a second man was walking around or standing in front of the automobile; that on his way to the Lillard ranch he passed this automobile, and as he passed the parked "Hudson" automobile the persons referred to were in the positions which we have just stated. Mr. Nunes testified further that after he had put his car in the garage he noticed a light in the Lillard residence; that just after he had gone into his own house to go to bed he was called by Tom Lillard; that he got up and went to the Lillard house, and there he found that the premises had been robbed; that the Lillards had been tied up, etc.

The record further shows that immediately after the robbery the persons engaged therein drove away from the Lillard residence on the Davis highway in a westerly direction; that at a place about $3\frac{1}{2}$ miles from the Lillard residence the "Hudson" automobile was overturned and five persons who had been riding therein were discovered a few minutes thereafter, one of whom was dead, killed by the overturning of the "Hudson" automobile, and the others more or less injured; that the defendant, Brock, was seriously injured. One of the persons engaged in the robbery named John Franks, pleaded guilty; three of the persons alleged to have been engaged in the robbery, to wit, Herbert Fitzgibbons, James O'Connor, and this defendant, Edward Brock, were tried and found guilty, as heretofore stated, and secured a reversal upon appeal to this court. The record shows that many of the articles taken from the Lillard home

were found scattered about the wrecked automobile. The watch taken from the Lillard home was found on the person of the man who was killed. The pearl beads were taken off the person of the defendant, Brock. The testimony in this particular shows that the defendant, Brock, who was seriously wounded, was taken to the Woodland Sanitarium, and the testimony as to the pearl beads is as follows:

"Q. Here are some pearl beads; do you know anything about these? A. Yes; those were taken off Mr. Brock in the sanitarium at the Woodland Sanitarium—out of his pocket."

The testimony of the witness Howard is to the effect that at about 12:30 o'clock on the night of February 28, 1927, he was driving along the Davis highway, and at a turn therein, about $3\frac{1}{2}$ miles from the Lillard home, he discovered the wrecked automobile and the wounded man to whom we have just referred; that the automobile was turned over; was bottom side up; that the lights were still burning; that he noticed a number of persons there, and that the defendant, Brock, was pinned under the car under the back seat; that he assisted in taking the wounded men to a place where they could be cared for.

The record further discloses that the defendant, Brock, stated to the witness Grove and other persons that he was riding in the back seat of the automobile. As before stated, the testimony shows that among the articles taken from the Lillard home was a string of pearl beads. This recital may be summarized as follows: Three men entered one room of the Lillard residence. According to another witness, four men entered another room. Two of the men referred to were identified while they were in the Lillard house. Two men were seen at the "Hudson" automobile, one sitting behind the wheel, the other in front of the machine. We know by common experience that such persons are called "lookouts." The robbery occurred a few minutes after 12 o'clock. At 12:30 that same night the automobile in which the five men were riding was found wrecked $3\frac{1}{2}$ miles from the Lillard residence, the defendant, one of the number, stating that he had been riding with other of the defendants, whom he named, in the rear seat of the automobile; that after the defendant was taken to the sanitarium a string of pearl beads, like those taken from the Lillard home, was found in his pockets. It also appears from the record that the defendant stated he was willing to plead guilty of burglary, but not of robbery. With these facts in the record we do not see how it can be seriously contended that there was not sufficient evidence to submit this cause to the jury and warrant the jury finding the defendant guilty as charged. It is true that no one identified the defendant, Brock, at the Lillard residence; that no one

saw him enter the residence; nor does it appear that the witness Nunes identified the two persons whom he saw with the "Hudson" automobile; but the circumstances and admissions which we have set forth lead inevitably to the conclusion that the defendant was one of the five persons engaged in the robbery.

The objection to the admission of the testimony relating to the robbery, the articles taken from the Lillard home, the articles found at the scene of the wrecked car, and where the different articles were found, is so utterly without merit that we will take no time in the discussion thereof, further than to say that the finding of the wrecked automobile, the parties who were riding therein, and the taking from the persons of the different defendants, including the pearls taken from the person of the defendant, all tended to show who were engaged in the perpetration of the robbery.

[3] It is further objected that the court erred in admitting testimony to the effect that the defendant stated to Dr. Stanley and the witness Grove that he would plead guilty to the crime of burglary, but not to robbery. This statement of the defendant appears to have been made in response to a statement made to him by Dr. Stanley, and also by the witness Grove, that, if he would come through and plead guilty and go to San Quentin, he would receive better medical care than they were able to give him at the Woodland Sanitarium. It does not appear that any promise was made to the defendant, or that any hope of a lighter penalty would be imposed by reason of anything which was said to him by either Dr. Stanley or the witness Grove, and nothing that the defendant said could be held to be a confession. But whether the court erred in this particular or not, we think that, under the facts which we have set forth, no prejudicial error was committed, and that section 4½ of article 6 of the Constitution applies.

[4] The alleged misconduct of the special prosecutor for the people refers to what was said by counsel during the argument of the cause to the jury. In setting forth all the facts and circumstances pertaining to the case, counsel stated frequently that such facts were undenied. The point is made that, as the defendant did not take the witness stand or make any denial, such argument came within the prohibition of the statute where it is provided that the fact that a defendant does not take the witness stand shall not be considered as a circumstance against him. However, there is no merit in this objection. See 8 Cal. Jur. p. 269, § 330, where it is said:

"It is not improper, however, for a district attorney to state that certain evidence of the prosecution is uncontradicted, or to point out

that incriminating circumstances have not been explained by any sworn testimony."

This is not commenting upon the failure of the defendant to take the witness stand, but a simple statement of the fact that the evidence against the defendant stands uncontradicted by any testimony. The text above quoted is amply supported. We do not need to cite authorities that a conspiracy to commit a crime may be established by proofs of acts and conduct; that it was not necessary to show an express agreement between the parties; that, if all the facts and circumstances taken together show that certain persons took part in the carrying out or perpetration of any crime, such as acting as lookouts, standing guard at an automobile, or sitting in an automobile ready to drive away at a moment's notice, while other persons enter a nearby residence and there perpetrate the robbery; that all the persons thereafter make their escape from the scene of the robbery and are found a few minutes later in the wrecked car, including all the circumstances which we have detailed in this opinion, the conclusion that all the persons referred to were conspirators is unescapable. No other testimony is needed.

It is finally urged that the court erred in instructing the jury in relation to the inferences to be drawn from the unexplained possession of stolen property shortly after the time of the robbery. This objection is based upon the erroneous allegation that none of the stolen property was found upon the person of the defendant, Brock. The incident of the pearl beads appears to have been entirely forgotten. The instructions on the subject of possession of stolen property given by the court are but a repetition of instructions which have been approved times without number, and do not need to be set forth herein.

[5] The objection that the venue was not proven is likewise without merit. The testimony of the witness W. H. Lillard is to the effect that on the 28th day of February, 1926, he was living at what is known as the Lillard residence; that he resided in Yolo county; that the residence was in Yolo county between Davis and Winters. The testimony of Thomas W. Lillard is to the same effect. The residence referred to was then described as the residence robbed on the night of February 28, 1926, as hereinbefore set forth in this opinion. That this sufficiently shows the venue, we need only cite one case, *People v. McGregor*, 88 Cal. 144, 26 P. 97.

The verdict of the jury and the judgment of the court in this case being just, and we think amply supported by the law and the evidence, the order and judgment of the trial court are affirmed.

We concur: FINCH, P. J.; HART, J.

87 Cal. App. 435

MANCINI v. PATRIZI. (Civ. 5716.)★

District Court of Appeal, First District, Division 1, California. Dec. 10, 1927.

Rehearing Denied Jan. 9, 1928.

1. Corporations ⇨182—"Capital stock," which statute prohibits directors from paying to stockholders, means assets with which corporation carries on business (Civ. Code, § 309, as amended by St. 1905, p. 558, § 4, and St. 1917, p. 657).

Under Civ. Code, § 309, as amended by St. 1905, p. 558, § 4, and St. 1917, p. 657, prohibiting directors from dividing, withdrawing, or paying to stockholders any of corporation's "capital stock," except that remaining after payment of all its debts on dissolution or expiration of its term of existence "capital stock" means assets with which corporation carries on its corporate business.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Capital Stock.]

2. Corporations ⇨182—Statutory inhibition against payment of capital stock to stockholders runs against them as well as directors (Civ. Code, § 309, as amended by St. 1905, p. 558, § 4, and St. 1917, p. 657).

Inhibition in Civ. Code, § 309, as amended by St. 1905, p. 558, § 4, and St. 1917, p. 657, against payment of capital stock by corporation directors to stockholders except as provided therein, runs against stockholders as well as directors.

3. Corporations ⇨376—Corporation cannot purchase its own stock, except as provided by statute, unless necessary to save itself from loss (Civ. Code, § 309, as amended by St. 1905, p. 558, § 4, and St. 1917, p. 657).

In California, a corporation is not authorized to purchase its own stock, except as provided by Civ. Code, § 309, as amended by St. 1905, p. 558, § 4, and St. 1917, p. 657, unless necessary to save itself from loss, as by taking such stock in satisfaction of loan, since result would be illegally to withdraw and pay to shareholder a part of such stock.

4. Corporations ⇨133—Failure to first offer stock for sale to corporation, as required by by-law, held no defense to action for liquidated damages for refusal to transfer shares to purchaser on books (Civ. Code, § 324; § 309, as amended by St. 1905, p. 558, § 4, and St. 1917, p. 657).

In absence of pleading or evidence that purchaser of corporate stock was unfriendly to corporation and its officers or a business rival, failure to first offer stock for sale to corporation, as required by by-law, was no defense to purchaser's action under Civ. Code, § 324, for liquidated damages for refusal to transfer shares on corporation's books, as effect of purchase thereof by corporation would have been to pay stockholder part of corporation's assets or capital stock, in violation of section 309, as amended by St. 1905, p. 558, § 4, and St. 1917, p. 657, without being necessary to save corporation from loss.

5. Corporations ⇨55—Corporation's by-laws must not be unreasonable in practical application (Civ. Code, § 354, subd. 6).

The power of a corporation under Civ. Code, § 354, subd. 6, to make by-laws, is subject to condition that they must not be unreasonable in their practical application.

6. Corporations ⇨113—By-law requiring offer by holder to sell stock to corporation before transfer thereof on its books is unreasonable and invalid (Civ. Code, § 309, as amended by St. 1905, p. 558, § 4, and St. 1917, p. 657).

As law neither does nor requires idle acts, a by-law prescribing as condition to right to transfer stock on corporation's books that holder first offer shares for sale to corporation, which is forbidden to accept such offer by Civ. Code, § 309, as amended by St. 1905, p. 558, § 4, and St. 1917, p. 657, is unreasonable, and hence invalid.

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Action by Gaetano Mancini against Ettore Patrizi. Judgment for plaintiff, and defendant appeals. Affirmed.

Devoto, Richardson & Devoto, of San Francisco, for appellant.

J. J. Dunne, of San Francisco, for respondent.

CASHIN, J. An appeal from a judgment entered against defendant in an action for the recovery of liquidated damages as provided by section 324 of the Civil Code.

The facts shown by the record are that on February 11, 1925, the defendant was the president of L'Italia Press Company, a corporation organized and existing under the laws of California, with a capital stock of \$100,000 divided into 4,000 shares of the par value of \$25 each; that on or about August 1, 1908, Emilio Chirone was the holder and owner of 8 shares of the capital stock of the corporation, which stock was represented by certificate No. 19; that thereafter Chirone sold the stock and indorsed the certificate to Buffalo Brewing Company, a corporation; that the shares were sold by the latter and the certificate indorsed to one Savio, who in the year 1912 sold the same and by indorsement transferred the certificate to the plaintiff, who has ever since been the owner and holder thereof.

The plaintiff, on or about February 11, 1925, presented the certificate to the defendant as president of L'Italia Press Company, and demanded that the shares represented thereby be transferred on the books of the corporation and a certificate therefore be issued to the plaintiff, which demand was refused.

It is claimed by the defendant that the refusal to make the transfer was excused by

the failure to comply with a certain by-law adopted by the corporation on October 14, 1909, which reads as follows:

"No share of stock of this corporation is transferable without the holder thereof first presenting the same to the office of the corporation and offering the same for sale to said corporation."

The defendant offered to prove that the by-law was adopted with the knowledge and consent of Chirone, and that the corporation was ready, willing, and able to purchase the stock at its par value. Plaintiff admits that no offer to sell the stock to the corporation was made by Chirone or by any one of those to whom the certificate was indorsed, but contends that the indorsees were not charged with notice of the by-law, and further that the same was invalid.

As contended by the plaintiff, similar by-laws have been sustained in other jurisdictions as being reasonably necessary for the protection of the corporation and its stockholders against rivals in business or others who might purchase its shares for the purpose of acquiring information which might thereafter be used against the interests of the company; and, as provided by section 354 of the Civil Code:

"Every corporation as such has power: * * * (6) to make by-laws, not inconsistent with any existing law, for the management of its property, the regulation of its affairs, and for the transfer of its stock."

[1-3] At the time the by-law was adopted the directors of corporations were prohibited by statute except as specially provided from dividing, withdrawing or paying to the stockholders or any of them any part of the capital stock of the corporation except such part as remained after payment of all its debts upon its dissolution or the expiration of its term of existence (Civ. Code, § 309; Stats. 1905, p. 558); and by the amendment to the section adopted in 1917 (Stats. 1917, p. 657) the inhibition was continued unless permission should be first obtained from the commissioner of corporations. Under this section capital stock means the assets with which the corporation carries on its corporate business (*Tapscott v. Mexican-Colorado, etc., Co.*, 153 Cal. 667, 96 P. 271; *Burne v. Lee*, 156 Cal. 222, 104 P. 438), and the inhibition contained therein runs not only against the directors but against the stockholders as well (*Kohl v. Lilienthal*, 81 Cal. 387, 20 P. 401, 22 P. 689, 6 L. R. A. 520; *Vercoutere v. Golden State Land Co.*, 116 Cal. 410, 48 P. 375). It is the rule in California that a corporation is not authorized to purchase its own stock except as provided by statute unless the transaction be necessary to save itself from loss as by taking the same in satisfaction of a loan (*Ralston v. Bank of California*, 112 Cal. 208, 44 P. 476), since the result would be to illegally withdraw and

pay to a shareholder a part of the capital stock (*Bank v. Wickersham*, 99 Cal. 655, 34 P. 444; *Schulte v. Boulevard, etc., Land Co.*, 164 Cal. 464, 129 P. 582, 44 L. R. A. (N. S.) 156, Ann. Cas. 1914B, 1013; *Poultry Producers, etc., v. Barlow*, 189 Cal. 278, 208 P. 93). It has also been held that a by-law assuming to give a stockholder the right upon notice to withdraw from a corporation and receive upon the surrender of his stock the amount paid is invalid for the same reason (*Vercoutere v. Golden State Land Co.*, supra); and also that a clause in a subscription agreement purporting to give a corporation the right at its option to purchase its shares from its stockholders, is illegal (*Poultry Producers, etc., v. Barlow*, supra). Likewise, in *Chilberg v. Cross Land Co.*, 55 Cal. App. 678, 204 P. 28, an agreement by a corporation to refund to a stockholder the amount paid for shares of its capital stock from moneys to be received from the sale of corporate assets was held to be void under the section mentioned.

It was held in *Stewart et al. v. Stewart Hotel Co.*, 33 Cal. App. 167, 164 P. 620, that, under the circumstances there shown, a transfer to a corporation of the shares therein held by certain of its stockholders, instead of diminishing, had the effect of increasing to the extent of the value of the shares the assets or capital stock of the corporation. The court in its opinion referred to the general rule above and to the exception thereto found in *Ralston v. Bank of California* and *Schulte v. Boulevard, etc., Gardens Co.*, supra, as follows:

"We feel authorized to assume that the court meant to say that circumstances might arise other than such as appear in those two cases where the corporation would be justified in taking over the shares of one of its stockholders, and that each case must be governed by its own peculiar facts; that the general rule, though well settled in this state, is not inflexible and unyielding."

[4] It is urged by defendant that the plaintiff was unfriendly to the corporation and its officers, and that the present case is therefore within the exception. It does not appear, however, from the pleadings, the offer of proof nor from any evidence in the case that such was the fact, nor is it contended that the plaintiff was a rival in business whose ownership of the stock might prove detrimental to the interests of the company.

It is manifest that the effect of the purchase by the corporation would have been to divide, withdraw and pay to the holder of the certificate a part of the assets or capital stock of the corporation, and that such purchase was not necessary within the rule stated in the above decisions, in order to save the corporation from loss.

[5, 6] The cases cited clearly show that, except under well-defined conditions, such purchases are not authorized, and that a by-law

which requires or purports to authorize the officers of a corporation to make purchases of its own capital stock except under those conditions is inconsistent with the provisions of the statute and void. Moreover, the power to make by-laws is subject to the condition that they must not be unreasonable in their practical application; and, as the law neither does nor requires idle acts, a by-law which prescribes, as a condition to the right to transfer stock, that an offer be made the acceptance of which is forbidden is manifestly unreasonable and consequently invalid.

In view of the foregoing, it will be unnecessary to consider the further questions whether the indorsees of a certificate would be charged with notice of a by-law, adopted after the certificate was issued, restricting the right to transfer the stock on the books of the company.

The judgment is affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

GREEN et ux. v. GENERAL PETROLEUM CORPORATION. (Civ. 5946.) ★

District Court of Appeal, First District, Division 2, California. Dec. 8, 1927. As Modified Jan. 4, 1928.

Hearing Granted by Supreme Court Feb. 6, 1928.

Adjoining landowners ☞— Property owner held not entitled to recover for having oil and mud thrown on premises by explosion of oil well, in absence of negligence.

Where oil well was drilled with proper precautions to prevent explosion of gas and without negligence in any other respect, neighboring property owner was not entitled to recover for having mud and oil thrown on premises by explosion in nature of accident.

Appeal from Superior Court, Los Angeles County; Leslie R. Hewitt, Judge.

Action by Horace W. Green and wife against the General Petroleum Corporation. From a judgment for plaintiffs, defendant appeals. Reversed with directions.

A. L. Weil and Forrest A. Cobb, both of San Francisco (Harris F. Shaw, of San Francisco, of counsel), for appellant.

Swaffield & Swaffield, of Long Beach, for respondents.

KOFORD, P. J. Defendant drilled an oil well upon land adjacent to the plaintiffs' residence. After the hole had reached a certain depth, the well suddenly and violently erupted, showering plaintiff's home and garden, as well as the surrounding neighborhood, with mud and oil. The judgment appealed from gave damages for the injury caused plaintiffs thereby.

The district in which the well was drilled

is now known as the Signal Hill Oil Field. In 1920 it was a residence district. Oil was discovered in the neighborhood in June, 1921. Plaintiffs, their neighbors, and the owners of the surrounding area leased or agreed to lease their lots to various oil companies for oil development. The blow-out occurred January 21, 1922. Although wells in the vicinity had previously blown out at greater depth and with less pressure, the gas pressure in this well was encountered not only sooner than expected, but was of unprecedented strength and violence, lifting a 1700-foot column of mud and breaking a heavy iron Oklahoma valve installed for the purpose of checking gas pressure. It is said that no such violent pressure had been encountered in this district previously, nor since.

This complaint contained two distinct causes of action. One was based upon the theory of negligence, and the other upon the theory of liability without fault, or, at least, liability without negligence. The trial court very distinctly found that the defendant had in no way been guilty of negligence, but upon the other cause of action awarded damages to the plaintiff, notwithstanding the absence of negligence on the part of defendant. Because of the court's finding of no negligence it is unnecessary to recite in detail the care exercised and the precautions taken by the defendant to guard against the blow-out which occurred.

Respondents defend the judgment given on the second count upon the authority of Fletcher v. Rylands, L. R. 1 Ex. 265, 3 Eng. & Ir. App. 330, insist that the doctrine of that case has been adopted in this state, and rely upon Colton v. Onderdonk, 69 Cal. 155, 10 P. 395, 58 Am. Rep. 556; Parker v. Larsen, 86 Cal. 236, 24 P. 989, 21 Am. St. Rep. 30; Galbreath v. Hopkins, 159 Cal. 297, 113 P. 174; Kall v. Carruthers, 59 Cal. App. 555, 211 P. 43; Stoops v. Pistachio, 70 Cal. App. 772, 234 P. 423. Appellant asserts that the doctrine of Fletcher v. Rylands, in so far as it may be said to declare for liability without fault, has never been adopted in California.

Counsel for appellant has reviewed all of the California authorities cited by respondent and also a great many others, both from this and from other jurisdictions. So far as the California cases sustain liability under comparable facts, they appear to rest upon one or more of three reasons, to wit: (1) The act complained of naturally and proximately tended to inflict the damage, and, therefore, was a direct and positive wrong like a deliberate and intentional assault or trespass. (2) The act complained of amounted to a nuisance and was, therefore, a continuous wrongful invasion of another's property rights. (3) The act complained of, though otherwise lawful, was done in a negligent manner. This is substantially the classification of responsibility for tortious acts made

by Professor John J. Wigmore, 7 Harvard Law Review, p. 455. Without attempting to confine all liability of this nature to any rigid classification, it is at least true that the California cases relied upon by respondent fall into one or more of the divisions so classified and are for that reason distinguishable from the instant case.

It is not our province to enter into a philosophical discussion of the doctrine or doctrines of *Fletcher v. Rylands*. Discussion of the doctrine's origin, development, and the difficulties of defining the limits of its application belong more properly to the research of law reviews. See University of Pa. Law Review, 59 American Law Register, pp. 298 and 423, Prof. Francis H. Bohlen. It will suffice for this opinion to state that the case, in so far as it may be said to sanction liability without fault, has never been approved in this state. On the contrary, our Supreme Court has refused to follow that doctrine in *Sutcliffe v. Sweetwater Water Co.*, 182 Cal. 34, 186 P. 766, and in *Kleebauer v. Western Fuse Co.*, 138 Cal. 497, 71 P. 617, 60 L. R. A. 377, 94 Am. St. Rep. 62. In *Sutcliffe v. Sweetwater Water Co.*, supra, the *Fletcher v. Rylands* Case is stated to be no authority for liability for escaping water in the absence of negligence. The opinion points out that liability in cases of escaping water in this state has been based either upon negligence or upon the proposition that the water or reservoir, in the very manner of its maintenance, was an invasion of the plaintiff's property. The commissioner's opinion in *Kleebauer v. Western Fuse Co.*, 6 Cal. Unrep. 933, 69 P. 246, 60 L. R. A. 377, held the storage of gunpowder to be a nuisance per se and held the defendant liable for damage as an insurer under the authority of *Fletcher v. Rylands*. The Supreme Court's opinion in bank, however, held the defendant not liable because the keeping of gunpowder in the place and under the circumstances was held not to constitute a nuisance. If the defendant, Western Fuse Company, was liable for all perils upon the theory as literally expressed in *Fletcher v. Rylands* in the excerpt from that case quoted in *Sutcliffe v. Sweetwater*, then the defendant would have been liable regardless of whether the stored powder was a nuisance or not. The English precedent has not met with favor in the United States; has often been directly repudiated; and where it has been cited and apparently followed, it has usually been upon the assumption that it did not uphold the theory of liability without fault.

A large part of respondents' argument is summarized in this excerpt from their brief:

"When a person meddles with the forces of nature which are hidden away and securely locked below the surface of the earth, especially when he knows they may be there but cannot know their intensity or violence, he does so at his own risk and ought not to be heard to say that he committed no act of negligence, and therefore should escape liability. Nature put the gas under safe lock. * * * Had this gas been left where it had been placed, no mischief would have occurred to any one, but when disturbed, it ran amuck."

In carrying on many useful industries man constantly "meddles with the forces of nature." The same argument could be made against many activities which are lawful and beneficial. The use of fire is one such, of electricity another, steam another, explosives, chemicals, and numberless other forces. The lawful use of many forces of nature is attended with some risk. The amount of risk may determine the degree of care required, but there is no more reason for declaring that one may not interfere with the forces of nature except at his risk and peril as an insurer, than there is for making one liable for any other act, however innocent, which might happen to be a link in a chain of causation causing harm to another.

Respondents upon oral argument defend the judgment upon the claim that the blow-out must be considered the direct, proximate, natural, and foreseeable result of defendant's drilling through the solid strata of earth by which nature had safely imprisoned the violent gases below. This might be true if the contemplated method of mining was first to allow the oil to shoot into the air and then to recapture it as it returned to the ground. It might also be true if the violent blow-out was surely bound to occur upon the discovery of the gas and oil under pressure. But here the mining was done in the usual customary method and in a careful cautious manner, which, under ordinary circumstances, portended no harm to the plaintiffs.

The drilling of the oil well here was a lawful use of defendant's property. It was not a nuisance in that neighborhood. It was not a direct invasion of plaintiffs' property rights. Considering the unforeseeable and unprecedented violence of the blow-out, it was in the nature of an accident. Under such circumstances there is no liability without negligence.

The judgment is reversed. The trial court is directed to enter judgment in favor of the defendants.

We concur: STURTEVANT, J.; NOURSE, J.

87 Cal. App. 681

(262 P.)

ANWAY v. LOMBARDI BROS. et al.
(Civ. 5915.)

District Court of Appeal, First District, Division 1, California. Dec. 20, 1927.

Highways  184(2)—Evidence held to make prima facie case of compliance with Motor Vehicle Act by hearse driver in signaling intent to make left turn (St. 1923, p. 517, as amended by St. 1925, p. 398).

Where driver of plaintiff's hearse illustrated to court manner in which he gave signal of intent to turn to left into cemetery driveway, and there was evidence that driver of defendant's truck approaching from opposite direction admitted immediately after collision with hearse that he saw signal, plaintiff made out prima facie case of compliance with Motor Vehicle Act (St. 1923, p. 517, as amended by St. 1925, p. 398) as against objection that evidence showed that signal was given with hand only, instead of hand and arm.

Appeal from Superior Court, San Mateo County; George H. Buck, Judge.

Action by W. J. Anway against Lombardi Bros. and others. From a judgment for plaintiff, and an order denying a new trial, defendants appeal. Affirmed.

F. N. Foley, of San Francisco, and C. J. Cregan, of San Mateo, for appellants.

Louis Oneal and S. F. Holstein, both of San Jose, for respondent.

TYLER, P. J. Action for damages for the negligent operation of an automobile.

The complaint alleges, in substance, that on or about the 21st day of May, 1926, plaintiff, through his agent, was driving a funeral hearse in a northerly direction on the public highway known as the San Francisco highway, in the county of San Mateo, and was driving and operating said hearse across the highway and entering into the driveway of the Masonic Cemetery on the west side of said highway; that at the same time and place defendants were driving their automobile truck in a southerly direction; and the same was operated in such a careless, negligent, and reckless manner as to cause it to collide with the automobile hearse of plaintiff, thereby damaging and injuring the hearse in the sum of \$343.95; that by reason of such negligence plaintiff was compelled to place said hearse in a shop for repair and was deprived of the use of the same for 28 days, to his further damage in the sum of \$92.50. Judgment was prayed for in these amounts. Defendant denied the allegations of the complaint and for a second defense pleaded contributory negligence on the part of plaintiff's driver. The case went to trial on these pleadings without a jury. The trial court found in favor of plaintiff and against the defendants upon both issues and gave judgment in favor of plaintiff for the sum of \$436.35 princi-

pal and \$27.50 costs. From this judgment and from an order denying a new trial this appeal is taken.

In support thereof defendants raise two questions, viz.: (1) That the evidence is insufficient to justify the decision of the court, and (2) that the decision is against law. There is no merit in either contention. In conformity with the evidence the trial court found that on the day in question plaintiff's hearse was being driven in a northerly direction on the right side of the highway and when at a point near the entrance to the Masonic Cemetery, located on the west side of said highway, plaintiff's driver gave a signal with his left hand, indicating that he intended to turn, which signal was according to law and was plainly visible to the drivers of other vehicles upon said highway; that after said signal was given, the hearse driver in a careful and prudent manner turned the said hearse to the left and drove the same across the highway and commenced to enter into the driveway of the cemetery; that defendant at that time and place was operating an automobile truck, belonging to defendants, in a southerly direction on said highway at a point where plaintiff's hearse was commencing to enter the driveway of the cemetery on the west side of the highway; that defendants so carelessly, negligently, and recklessly drove their automobile as to cause the same to collide with the hearse belonging to plaintiff to his damage as alleged; and that as a result thereof plaintiff was compelled to place the same in a shop for repairs, where it remained for a period of 6 weeks, causing damage to plaintiff in the further sum of \$92.50 by reason of the deprivation of its use. It further found against defendants upon their separate defense of contributory negligence.

Upon the claim of the insufficiency of the evidence to justify the judgment appellants argue that plaintiff failed to make out a prima facie case in that he failed to show affirmatively that his driver had complied with certain requirements of the Motor Vehicle Act (St. 1923, p. 517, as amended by St. 1925, p. 398), and particularly with the requirement as to how and in what manner a signal should be given. It is insisted that the evidence shows that the signal was given by the driver of the hearse with his *hand* and not with his *hand and arm* as provided for in the act. This objection is hypercritical. There is abundance of evidence in the record to show that plaintiff's driver gave the requisite signal. It is true that the testimony shows that his signal was given with his hand, but the record also shows that the manner in which it was given was illustrated by the driver to the court, and it was found that the signal as given was according to law. Moreover, there is testimony to show that defendants' driver admitted immediately after the

collision that he had seen the signal. Under these circumstances it is manifest there is no merit in this objection. This conclusion renders unnecessary a discussion of the further objection that plaintiff's driver did not maintain his signal for a sufficient distance. Further discussion of the evidence would answer no useful purpose. It is amply sufficient to support the findings of the trial court that defendants' driver negligently operated his truck, and supports plaintiff's theory that the collision was caused by defendants' driver attempting to cut in ahead of the hearse when it had commenced to enter the cemetery.

The judgment and order are affirmed.

We concur: KNIGHT, J.; CASHIN, J.

87 Cal. App. 440

**BEERS v. CALIFORNIA STATE LIFE
INS. CO. (Civ. 3250.)★**

District Court of Appeal, Third District, California. Dec. 10, 1927.

Hearing Denied by Supreme Court Feb. 6, 1928.

1. Appeal and error ⇨1002—Whether insured took poison by mistake, or deliberately, held on conflicting evidence for jury, not appellate court, in action on life policy.

Whether insured took poison by mistake, or with deliberate design to commit suicide, held for jury, not appellate court, on conflicting evidence in action on life policy limiting recovery in case of suicide.

2. Insurance ⇨646(7)—Insurer had burden of overthrowing presumption that insured was sane, and did not commit suicide (Code Civ. Proc. § 1963, subd. 28).

In action on life insurance policy limiting recovery in case of suicide, burden was on defendant, under Code Civ. Proc. § 1963, subd. 28, to overthrow presumption that deceased was sane, and died from natural cause, or to support affirmative defense of suicide by preponderance of clear and satisfactory evidence, direct or circumstantial.

3. Appeal and error ⇨996—Appellate court cannot interfere with jury's conclusion that presumption against insured's suicide was not overcome, unless no other inference may reasonably be drawn from evidence.

Appellate court cannot interfere with jury's conclusion that insurer failed to introduce sufficient satisfactory proof to overcome presumption against, or sustain defense of, suicide, in action on life policy limiting recovery in such case, unless evidence on its face is obviously such as to compel court to hold that no other inference than suicide may reasonably be drawn.

4. Insurance ⇨659(2)—Presence or absence of motive is relevant to issue of insured's suicide, though proof of motive is not indispensable.

While proof of motive is not indispensable to establish defense of suicide, in action on life insurance policy, presence or absence of

motive is a circumstance going to question of quality of act under inquiry.

5. Evidence ⇨53—Disputable presumptions are evidence, which will stand until overcome by clear and satisfactory evidence (Code Civ. Proc. §§ 1957-1961, and § 2061, subd. 2).

Under Code Civ. Proc. §§ 1957-1961, and section 2061, subd. 2, disputable presumptions, while weakest and least satisfactory of evidence, and of no weight as against proved or admitted facts, are evidence, which will stand for facts represented until overcome or dispelled in jury's minds by clear and satisfactory evidence.

6. Insurance ⇨646(7)—Suicide is affirmative defense, which must be supported by preponderance of evidence to overcome presumption that insured took poison by mistake or accident.

Defense of suicide, in action on life insurance policy, is an affirmative one, which must be supported by preponderance of evidence to destroy evidentiary force of presumption that insured's death occurred according to ordinary course of nature, or, if caused by poison, that it was taken by mistake or accident.

7. Witnesses ⇨380(5)—Refusal to permit counsel to refresh witness' memory from transcript of his testimony at coroner's inquest as attempt to impeach defendant's own witness held erroneous.

Refusal to permit counsel for defendant, in action on life insurance policy, to refresh witness' memory from transcript of his testimony at coroner's inquest into cause of insured's death, on ground that such examination involved attempt to impeach defendant's own witness, held erroneous.

8. Witnesses ⇨255(9)—Witness may refresh memory from memorandum of his previous testimony.

A witness may, for purpose of refreshing his memory, resort to memorandum of testimony, previously given by him regarding particular matter under inquiry, in subsequent proceeding or trial involving same issue.

9. Appeal and error ⇨1048(4)—Refusal to permit counsel to refresh witness' memory from transcript of his testimony at coroner's inquest held harmless error.

In action on life insurance policy limiting recovery in case of suicide, refusal to permit defendant's counsel to refresh witness' memory from transcript of his testimony at coroner's inquest into cause of insured's death held harmless error, where counsel for both parties went into same matters with marked detail in questioning such witness, and defendant's counsel, on several other occasions, refreshed witness' memory from such transcript.

10. Trial ⇨260(1)—Refusal of instruction that each juror was entitled to make up his own mind, without regard to other jurors' opinions, held not error, in view of instruction given.

Refusal of instruction that each juror was entitled to make up his own mind, without re-

gard to opinion of other jurors, and could not conscientiously compromise or surrender his conviction to reach a verdict or please other jurors, *held* not error, in view of instruction that each juror had right to form his own opinion or verdict, though qualified by statement that they should try to get together on verdict, and that any juror, persuaded by other jurors' arguments that he was wrong, had a right to, and should, change his verdict.

11. Trial ⚡234(7)—Evidence as to suicide or accidental death of insured held to warrant instruction that jury could decide in conformity with presumption.

Evidence, on question of suicidal or accidental death, in action on life insurance policy, *held* to warrant instruction that jury had right to decide in conformity with presumption, if convinced that it outweighed and overcame other positive testimony against it.

12. Evidence ⚡53—"Presumption" is legal deduction from particular facts.

A "presumption" is a deduction, which the law expressly directs to be made from particular facts.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Presumption.]

13. Evidence ⚡84—There is disputable legal presumption that things have happened according to ordinary course of nature and habits of life.

There is a presumption of law that things have happened according to ordinary course of nature and ordinary habits of life, which is disputable, and may be controverted by other evidence, direct or circumstantial.

14. Insurance ⚡665(6)—Every other reasonable hypothesis should be excluded before concluding that insured's death was suicidal.

In action on life insurance policy limiting recovery in case of suicide, every reasonable hypothesis for accounting for death, other than suicide, should be excluded before concluding that it was suicide, and then only from evidence warranting such conclusion.

15. Insurance ⚡669(11)—Evidence held to warrant instructions that things are presumed to have happened in ordinary course of nature, and that every other reasonable hypothesis should be excluded before concluding that insured's death was suicidal.

In action on life insurance policy, evidence on issue whether insured's death was suicidal or accidental *held* to warrant instructions that presumption is legal deduction from particular facts, that there is disputable presumption that things happened according to ordinary course of nature and habits of life, and that every reasonable hypothesis other than suicide should be excluded before concluding that death was suicidal.

Appeal from Superior Court, Butte County; H. D. Gregory, Judge.

Action by Lillie B. Beers against the California State Life Insurance Company.

Judgment for plaintiff, and defendant appeals. Affirmed.

Hearing denied by Supreme Court; all concur except PRESTON, J., disqualified.

O. E. McLaughlin and McLaughlin & McLaughlin, all of Sacramento, and Jerome D. Peters, of Chico, for appellant.

Ware & Ware, of Chico, for respondent.

HART, Acting P. J. This action was instituted by the plaintiff to recover on a life insurance policy for \$1,000, issued by defendant to Nellie L. Beers, daughter of the plaintiff, and in which policy the latter was the named beneficiary.

The cause was tried before a jury, and a verdict returned in favor of plaintiff. Judgment was entered accordingly, from which the defendant prosecutes this appeal in conformity with the provisions of section 953a of the Code of Civil Procedure.

While complaint is made of certain rulings, involving the question whether certain evidence was or was not admissible, and also the legal integrity of the action of the court in allowing and disallowing certain proffered instructions to the jury is challenged, the point the most vigorously urged is that for the verdict and the judgment no claim can justly be made that they derive substantial support from the evidence.

It appears that on the 3d day of November, 1925, the defendant issued a policy of insurance on the life of Nellie L. Beers in and for the sum of \$1,000 to run for a period of 20 years, in consideration of the annual payment by said Nellie L. Beers (to be referred to hereinafter as Miss Beers or "the deceased") of a premium of \$46.66; that, upon the issuance of said policy, Miss Beers paid to the defendant said sum; that, as above stated, Miss Beers was the daughter of plaintiff, and the latter was made by her (Miss Beers) the beneficiary of said policy, to be paid upon the death of the insured within the term during which the policy was to run; that on the 5th day of March, 1926, and "while said policy of life insurance was in full force and effect," said Miss Beers died, at Chico, Butte county; that, thereafter, and prior to the commencement of this action, the plaintiff duly provided the defendant with proofs of the death of her said daughter, but the defendant, for reasons to be later explained, refused to pay the plaintiff the said sum of \$1,000. These facts are, in appropriate language, alleged in the complaint.

The answer, by way of a plea of confession and avoidance, admits the salient averments of the complaint, and then alleges:

"That the said policy of life insurance No. 45285, executed and delivered by defendant to Nellie L. Beers as set forth in the complaint herein, contained a clause reading as follows:

"In case of suicide of the holder, committed while sane or insane, within one year from

the date hereof, the limit of recovery hereunder shall be the total amount of the deposit paid,' and defendant further alleges that said policy of life insurance was executed and delivered by defendant to said Nellie L. Beers on the 3rd day of November, 1925, and that on the 5th day of March, 1926, at Chico, Butte county, Cal., the said Nellie L. Beers ended her life by taking and swallowing strychnine, with the intent and purpose then and there to commit, and she did then and there commit suicide. That defendant hereby, in accordance with the terms of said policy of life insurance, offers to pay, and tenders to plaintiff, the sum of \$46.66, in full satisfaction of the obligation of defendant, under the terms of said life insurance policy."

The foregoing involves a statement of the ground upon which the defendant resists payment to the plaintiff of the sum which the policy issued to the deceased provided for, and constitutes the important point of this controversy.

It is admitted that the policy of insurance contains the provision that the self-inflicted death of the deceased within one year from the date of the issuance of the policy, whether committed while the insured was sane or insane, would operate to vitiate the force of the policy.

It is further admitted that, after the due proof of the death of insured had been submitted to, and filed with, the defendant by the plaintiff, and demand by the latter was made upon the former for payment of the policy, the defendant tendered to plaintiff a check for \$46.66, representing the amount of the premium paid to the defendant by the deceased upon the issuance and delivery by it of the policy to her, but that plaintiff refused to accept the check.

[1] The testimony affords no reasonable ground for doubting that the deceased died from the effects of strychnine poisoning. Indeed, there was not at the trial any controversy upon that proposition. The single question submitted to the jury for decision was whether the poison was self-administered, with a suicidal intent, and, the jury having arrived at and returned a verdict negating the suicide theory, the question as to that issue which is submitted for decision here is whether this court is required to hold, as a matter of law, that the result thus reached by the jury is devoid of sufficient support in the evidence. The evidence upon that question consists entirely of circumstances, certain of which, it must in frankness be conceded, with more or less directness lend color to the defendant's theory of suicide, and yet, when those same circumstances are viewed in the light of certain other evidentiary considerations, disclosed by the evidence, it becomes, from the standpoint of a reviewing court, a problem, not free from difficulty, to account for the fact of the death of the deceased upon the

theory that it was purposely self-imposed. The situation so presented, therefore, seems to lead to the conclusion that the case, as to the evidence, is one in which a court of review is required to accept the conclusion arrived at by the jury. To be more explicit, upon the question whether Miss Beers took the poison by mistake or with the deliberate purpose of destroying her life, the evidence, taken as a whole, is of a character, as to its evidentiary significance and effect, that renders the deductions to be drawn therefrom necessarily, peculiarly, and entirely subject to the interpretative function and discretion of the jury.

The general facts may and will be narratively stated herein; specific reference being given to such portions of the testimony as are deemed of special importance in their effect upon the conclusion herein arrived at.

At the time of her death Nellie L. Beers was between 19 and 20 years of age. Her mother resided about two miles from the city of Chico. The deceased, however, had been for some time prior to her death residing at 434 Olive street, Chico, with Mr. and Mrs. Ed Miller, the latter being her sister. Although devoid of preliminary educational training, she conceived an ambition to become a stenographer, and concluded to attend part-time school at the Chico high school, taking special training in stenography, and took up her residence with her brother-in-law and sister, above named, because it was more convenient to the school. It appears that the Millers had been residing for some time in a rented house, but had in process of construction a home of their own at 1230 South Broadway, Chico. It further appears that the contractors engaged in constructing the house were slow in completing it, and it was not ready for occupancy for some time after the date on which the Millers contemplated removing thereto. On the 27th day of February, 1926, the deceased called at the drug store at which she and the Millers had been accustomed to making purchases, and purchased a bottle containing one-half ounce of strychnine sulphates. She directed the druggist to charge the strychnine to her personal account. It appears that she was at liberty to buy such articles as she might want and as are found in a drug store, and charge the same to her brother-in-law and sister, although the druggist stated that occasionally she would have some of her purchases charged to herself personally. She signed her own name to the written order required as a prerequisite to sales of poison. She stated to the druggist, when purchasing the poison that she wanted it for the purpose of destroying rats with which, she stated, the basement of the house in which they were then residing was infested. Neither Mr. nor Mrs. Miller knew of this purchase.

A few days thereafter, although the new house of the Millers was not completed, the latter nevertheless, removed thereto. The deceased at the time of the removal was not at home, and, although she expected that the removal might take place at any time, she was not aware of the fact that it had taken place until she returned from school in the afternoon. At this juncture it is well to say that several weeks prior to the death of Miss Beers she and her sister, Mrs. Miller, went to San Francisco and purchased furniture to be installed in the new home of the Millers. The deceased bought a bedroom set for herself, and also purchased a typewriter. On the evening of March 4, 1926, the deceased, accompanied by Joe Magill, David Boyd, and a Mrs. Charlotte Hill, attended a moving picture show in Chico. It seems that there was also to take place that evening at the home of some friends of the Millers a social gathering of friends. The Millers and a Miss Opal Faulkner, who was temporarily stopping with the deceased at the Millers, decided to attend the party, while the deceased expressed a preference to attend the theater party above mentioned. The deceased left her home for the theater about 8 o'clock p. m. After leaving the theater, the party went to a tamale parlor to partake of refreshments. Each of the party, excepting Magill, among other things, ate an enchilada. While there they joined in singing several songs, one of which is entitled, "You Will Be Sorry Because You Cheated on Me," and another, in the singing of which they all joined, is entitled "A Bicycle Built for Two." During the evening Magill and Boyd spoke of engagements which would take them away from Chico; Boyd saying that some employment at Redding would take him away. The deceased thereupon said that she, too, intended going some place that the rest of the party "did not know." The witnesses Boyd and Magill testified that while the talk was going on about "going away" the deceased was "jolly" and good natured. Magill positively testified that no intoxicating liquors were used by any of the party at the tamale parlor, and further that, not only on that occasion he saw no intoxicating liquor, but on no other occasion when he was with the deceased did he ever see intoxicating liquor around, or see the deceased use intoxicating liquor of any character or in any form. Leaving the tamale parlor, they drove about town for a short period in the automobile of Boyd, who did the driving. Between 11:30 and 12 o'clock they reached the home of the Millers. Magill got out of the automobile, assisted the deceased out, and accompanied her to the door, and bade her "good night," and the deceased thereupon entered the house. Magill returned to the auto, and was driven to his home, and Boyd and Mrs. Hill left for their respective places

of residence. Between the hours of 12 and 1 o'clock of the morning of the 5th day of March, the Millers and Miss Faulkner returned from the party above spoken of, and entered the house. It appears that the interior of the house not then being entirely completed, the Millers and the deceased and Miss Faulkner occupied the same room; there being two beds therein. On going into the room they found the deceased in bed. They engaged in a general conversation, in the course of which the deceased asked the Millers and Miss Faulkner some questions regarding the party which they had attended, and also whether or not they had had an enjoyable time. In turn, the deceased was asked by the Millers and Miss Faulkner whether or not she had had a pleasant evening, to which the deceased replied that she "had a wonderful time." It was shown that on the right-hand side of, and very near, the bed occupied by the deceased and Miss Faulkner, there was a table upon which Miss Faulkner noticed a glass containing water. The glass was almost full. The deceased slept on the right-hand side of the bed, and near and convenient to the table and the water. A short time after they had all retired, the deceased exclaimed in a loud voice, addressing her sister, Mrs. Miller, "Teddy, dear," and Mrs. Miller, being aroused, asked her what she wanted. The deceased said, "I am awful sick." And Mrs. Miller continued to testify:

"I asked her what was the matter, and she did not answer me. She hesitated, and I said, 'What is the matter, Nellie,' and she didn't answer me, and I jumped out of bed, and Ed (her husband) jumped out of bed, and we all jumped out of bed, and I grabbed her, and I think she had gone into a convulsion. I said, 'What is the matter, Nellie,' and she said, 'I am awful sick; I can't live very long'; and I said, 'What is the matter with you,' and she said, 'I don't know.' I said, 'What makes you feel that way,' and she said 'I don't know—I just feel like I am not going to live very long.' I asked her if she had taken any laxative or anything, because that is all I had in the house to take; I had no medicine there, except hair tonics. She said, 'No.' I said, 'Have you eaten anything,' and she said, 'No, only an enchilada.' And I told her, I said, 'You are just nervous, Nellie,' and she said, 'Well, I feel awful bad. * * * I feel like I am not going to live very long.' She said to send for mother and Joe."

Dr. Burke, a physician in Chico, was immediately sent for, and soon arrived at the house, it then being about 2:25 a. m. When he entered the room, he noticed that the deceased was in a convulsive condition; she was lying on her abdomen, and her head was thrown back in a spasm. The doctor immediately administered ether to the deceased for the purpose, as he declared, of stopping the convulsions. "Finally," testified the doctor, "that ceased, and she ceased breathing

then, and I administered artificial respiration, and as soon as I did that, she started in with another convulsion, and she became quite cyanotic or blue." She had three convulsions while the doctor was with her, and died within ten minutes after his arrival at the Miller home. Dr. Burke stated that the symptoms indicated that strychnine poison was the cause of the young woman's death. At the post mortem examination Dr. Burke conducted an autoptical examination of the body of the deceased. He removed the stomach, and forwarded it to Dr. Ernest Victors, of San Francisco, a specialist in "medical diagnosis and laboratory analysis," which specialty, the doctor stated, embraces the "examination of the contents of the human stomach." Dr. Burke, at the autopsy, made a careful examination of the genitals of the deceased, and found, as he testified, that they were perfectly intact or normal. In other words, his examination of her procreative or generative organs established to his satisfaction that the young woman had been sexually pure or undefiled; that his examination disclosed that she had been "very healthy"—that is, "she was (physically) a robust young girl." Dr. Victors received the stomach, with specific instruction to subject it to a diagnostic analysis with the view of discovering whether it contained strychnine therein. His report was, in substance, that he found "partially purified strychnine" in the stomach, and that his opinion was, from the quantity which he subjected to an analysis, that there was taken into the stomach between one and two grains. He further stated that the stomach "was almost empty. It contained," he continued, "two or three ounces of emulsion"; that it contained no solid matter. The doctor further stated that it "would be (or is) very common" for a person taking strychnine poison without knowing it to say (as deceased said), upon the effect of such poison being felt for the first time by such person, and "before the first spasm": "I feel sick. I feel that I am not going to last very long." In other words, Dr. Victors said that the sensation produced in the system of one taking such poison, even where he did not know that he had taken it, will naturally cause the person to feel as if he was going to die, and so to express himself. Dr. Victors was unable to state definitely, in the absence of a full history of the case, of which he was not in possession, his opinion as to the length of time which probably intervened between the time at which the poison was taken and the time at which death occurred.

Miss Faulkner testified that, on hearing the deceased make the request that her mother and "Joe" be sent for, at the same time saying she "was going to die," she (witness) immediately telephoned to Joe Magill, telling him of the serious condition of Miss Beers. About the same instant of time, Ed Miller,

in his automobile, departed in haste for the home of the mother of the deceased for the purpose of conveying her to the bedside of her stricken daughter. Within a few minutes after thus being informed of the serious illness of Miss Beers, Magill appeared at the Miller home, and was followed shortly by the return of Miller with deceased's mother. The witness testified that she and the deceased worked together as waitresses at Richardson's Springs during the preceding fall; that they became fast friends, and, on leaving the springs, she, with deceased, went to the Miller home, where they resided until the death of Miss Beers. She stated that the deceased was a robust, healthy person; that she never knew of her being sick or heard her complain of being sick prior to the time of the illness causing her death; that she and the deceased became and were confidential with each other; that the deceased was, apparently, always happy, and (witness in effect stated) acted like one having no serious or troublesome cares; that deceased was an attractive girl, and was popular with her acquaintances, old and young; that she never, in witness' presence, exhibited by her actions, conduct, or words any evidence of carrying concealed sorrows or disappointments, nor, said the witness, did she ever hear of the deceased having confided to others that she was troubled from any cause, or betrayed in the presence of others heart sorrows or disappointments or discontentment of any nature. Miss Faulkner also testified that, some days prior to the death of the deceased, she (the witness) and Miss Beers had planned to visit, and, in fact, had settled upon visiting, the following week for a brief period some friends of the witness residing at the "Engel Mine"; that deceased seemed to be very happy in contemplating the prospective visit, and with cheerful expectancy spoke of it the day or evening preceding her death.

Joe Magill testified that he became acquainted with the deceased some five or six weeks only prior to her death, and that during that period he had frequently been in her company; that they were not "sweethearts," but merely "good friends." He stated that he had never had any trouble or angry words with the deceased; that there was no quarrel or any exhibition of jealousy by any of the members of the party at the theater or at the tamale parlor. While they (Boyd, Mrs. Hill, the deceased, and the witness) were taking a ride about the city after leaving the tamale parlor, Miss Beers said that she desired to go home, because she had her lessons to study for the following school day. As he was leaving the Miller house, on escorting deceased to the door on the night in question, Magill said he asked deceased whether "we will go to the dance Saturday night?" to which question, in as pleasant a manner as she had always acted, replied: "You better

come down tomorrow night." The witness stated, that, after he arrived at the Miller home the morning of the death of Miss Beers, he heard some one in the room suggest that possibly the enchilada she had eaten at the tamale parlor was the cause of her illness; that, acting on that suggestion, and subsequent to the passing of Miss Beers, knowing that Boyd and Mrs. Hill had also eaten enchiladas, he called at their respective homes to ascertain whether they, too, were suffering from an attack similar to that which resulted in the death of Miss Beers, but that he found that they were "all right." It will be remembered that Magill himself did not partake of an enchilada on the occasion referred to.

Mrs. Edna Miller testified that deceased was her favorite sister; that deceased had lived at her (witness') home for about five or six months prior to her death, and during that period was taking a course in stenography. "She was perfectly welcome at our home," said Mrs. Miller (as Mrs. Miller's husband also testified). The deceased had never spoken to the witness about purchasing poison, nor did witness know that the deceased had ever purchased poison. Mrs. Miller stated, however, that the deceased had always been "morbidly afraid of rats," and that she never would go into the rat-infested basement of the house, where their linen and clothes were customarily washed and laundered, to attend to the washing of her own clothes; that, as a result, whenever deceased desired to do any of her own washing, Mr. Miller was required to remove, for the temporary purposes of the deceased, the wash-tub to the kitchen or the floor on which were maintained the living rooms. Mrs. Miller further said that the deceased earned money and saved it; that she was always well provided with clothes; that she was, as to all her activities, social as well as the more serious angles of life which she caused to be of particular concern to her, singularly optimistic and contented—in short, the deceased was, declared Mrs. Miller, always cheerful and happy in all her undertakings; that the deceased attended school "of her own free will"; and that whenever she referred to her school work she expressed herself as being satisfied with the progress she was making in her studies. Proceeding, Mrs. Miller said that the deceased had been tendered two different opportunities to marry young men, both of whom were persons of ample financial means, and that in each of those cases she was offered an opportunity, upon her marriage, to make a tour of Europe; that the young men referred to were members of families of high standing, and were themselves of high personal character; that the deceased refused those matrimonial prospects. "She always said," testified Mrs. Mil-

ler, "that she was not ready to marry." The witness further stated:

"It did not occur to me that night (the night or morning of Miss Beers' death) that she might be poisoned. In fact, I thought it was ridiculous when I heard them speaking of poison."

Ed Miller, who, as seen, was the brother-in-law of Miss Beers, corroborated in all substantial particulars his wife's testimony regarding the life and personal characteristics of the deceased. He supported the statement of Mrs. Miller that the deceased was afraid of rats, and that she (deceased) would never, for that reason, go into the basement of the house in which formerly they (the Millers) had resided, and also supported the testimony of Mrs. Miller as to the circumstances occurring the day and evening before and on the morning of her death. He testified that he knew nothing of the purchase of poison by the deceased until after her death. First explaining that he had a farm a short distance from Chico which he himself personally managed, and that it was his custom to arise early every morning and leave his home in the city to go to his farm, he testified that on the evening of the 4th of March, 1927, as he, with his wife and Miss Faulkner, was about to depart for the party which they intended to, and did, attend, the deceased requested him to awaken her before he left for his farm the following morning (the 5th), as she was required to do some studying before going to school. Miller stated that, three or four days before her death, deceased said to him, or in his presence, that, as soon as school was out for the term, she intended, with Miss Faulkner, to visit friends at the Engle Mine, and thence go to Susanville. "In fact," said Miller, "my wife intended to go with them."

George B. Whitney, a brother-in-law of deceased, testified that deceased was an attractive young woman, always popular with her acquaintances, and was of a "sunny, cheerful disposition," and apparently was always happy. Witness knew of no reason why she should not have been happy.

Mrs. James Kelly, of the faculty of the Chico high school, and as such director of part-time education, testified: That she had under her supervision students under compulsory attendance and also special students, over the age of 18 years, engaged in special work; that deceased came within the latter class, and was under her (witness') supervision. She said that she knew deceased; that she first called on the witness, and stated "she felt quite beyond the age of compulsory attendance, but that she was very anxious to become a stenographer." The witness said that, after questioning her regarding any previous general school training she might have had, she (witness) planned a program for Miss Beers which would "fit her for

her life's work as a stenographer. She was," continued Mrs. Kelly, "doing very creditable work, excepting in English, and she was making an extra effort to overcome that. * * * Her view of life was very optimistic. She was very happy. I talked to her the day preceding her death. That very day * * * I had sent for her, as I do my students once a week, being allowed two hours to interview different pupils, and I asked how she was getting along in her work, and she said she was getting along fast. I asked her if she was happy, and she said: 'Mrs. Kelly, I never was so happy in my life and I feel I am just getting what I wanted. * * *' That was the last day she was in school. Those are the exact words, because I recalled them the next day. * * * She was very natural (referring to the day preceding her death), and always a happy girl, and always smiling, and a great favorite with her teachers because of her optimistic views and cheerfulness; and she was always ready to meet their requests."

Two young ladies attending the school—Miss Longmire and Miss Mims—testified that they knew deceased, having first met her at school, and that on the day preceding that of the death of the deceased the teacher announced in open school that there was to be a picnic for the students the following day, and requested those who could not or did not intend to attend the festivities to "raise their hands," and that among a number thus indicating their intention not to attend the picnic was the deceased. Miss Longmire said that, although she never had talked to the deceased, from her observations of the latter's mannerisms, she concluded that she (deceased) was very quiet and "distant" in disposition. "I liked her," said the witness, "but she seemed to want to be by herself. * * * She held herself aloof from the other girls." The witness added, though, that the girls that deceased "sat with (in school) she talked with, and I sat on the other side of the room, and I did not have occasion to talk to her. * * * She was very pretty, and a little bit older than the rest of us girls." Miss Longmire said that attendance by the students at the picnic was not compulsory, nor were those not attending under duty to give any reason therefor.

Douglas B. Miller, teacher of English in the Chico high school, testified that the deceased was in two of the classes conducted by him, and had been for about five or six weeks prior to the date of her death. He testified:

That "on the whole, I should say she (deceased) was rather cheerful, but I noticed long before the time that she passed away that she seemed to be a girl of moods—that is, there were times when she seemed to be cheerful and other times when she seemed to have something on her mind, or acted that way. She did not act as cheerful as at other times."

On cross-examination, the witness said:

"It seemed that Nellie had a greater handicap to overcome, due to being out of school, and she had to try harder than the other students, which she did; but I cannot say that her results were as good as the average student."

The witness George B. Whitney, being recalled, testified that on the afternoon of the 5th of March, 1927, upon the request of the chief of police of Chico, he searched the Miller premises (the place where Miss Beers passed away) and, in the backyard of said premises, picked up a bottle containing what on investigation was found and pronounced to be strychnine, "about five or six ordinary steps" from the room in which the deceased died. "The place where I found that bottle," he said, "a person would have to go through the dining room and through the kitchen out the back door." The bottle was standing, "in open sight," in a slightly inclined position against "some little twigs and things that had accumulated under a small tree that was standing there." Whitney also testified that, on the same occasion, he searched the stove in the kitchen of the Miller house, and found therein a piece of blue paper, of the kind commonly used in wrapping small articles.

Floyd S. Bush, pharmacist at the drug store where deceased purchased the strychnine, testified that, on the 27th of February, the deceased visited the store and called for strychnine, saying she desired to use it for killing rats, of which, so she said to the witness, there were many "out to the house." Miss Beers signed (as required by law) a written or the required form of application, whereupon the witness delivered to her in a bottle "one-half ounce strychnine sulphates"; she directing the witness to charge it to her personal account. The bottle bore a label on which were the words, "strychnine sulphates one-eighth ounce," or "strychnine sulphates, sixty grams." The witness issued and delivered a duplicate charge slip to the deceased. This slip the deceased, as she was in the act of leaving the store, rolled and dropped on the floor in front of the wrapping counter. Immediately upon her departure, the witness picked up the slip and threw it into a waste basket. Bush, being shown the piece of blue wrapping paper found by the witness Whitney in the kitchen stove in the Miller house, identified it as the paper with which he wrapped the bottle containing the strychnine powder he sold to the deceased. He stated that the deceased generally directed purchases she made at the store to be made against her brother-in-law, Ed Miller, but that occasionally she directed small purchases to be charged to her personal account. He (the witness) said that the sale of strychnine for the purpose of destroying rats was not an unusual experience in the store or with druggists—that, in fact, the purpose for which such poison was ordinarily purchased

was to destroy rats infesting the premises of the purchasers. He had known Miss Beers, he said, for quite a period of time; that she had been in the store, and made purchases "the last six months" prior to her death of tetter than she had previous to that. He had met her socially, and knew her fairly well. The day on which she procured the poison, he stated:

"She seemed to be very light-hearted and gay and walked out, and there was nothing to indicate any reason for her to buy that outside of for rats, as she said."

There was nothing "embarrassed or strained, or unnatural or unusual, about her manner on that occasion." The witness was shown the bottle assumed to have been the one containing the poison sold by him to the deceased, and, upon an inspection of it, said that at least eight grains of the poison had been removed therefrom.

There has now been incorporated herein an accurate synoptical presentation of all the vital testimony received at the trial. In assembling the facts, as thus they were revealed, the transcript has been critically examined from cover to cover. No line or word of the testimony has been overlooked. The probative significance of no circumstance, favorable or unfavorable to the one side or the other of the controversy, has been passed unheeded; nor have the arguments contained in the briefs of counsel for the respective parties been denied scrupulous examination and consideration. After all this, the case, upon the facts, to our minds, still involves a mystery not satisfactorily solved by the evidence before us. We are still under serious doubt with respect to the question whether Miss Beers took the poison with the purpose or intention of causing her death. What is the duty of a reviewing court in such a situation? The answer must be, as it is in other language given above, that it was for the jury, and not for this or any court of appeal, to solve the mystery enshrouding that issue—that is, to determine the question whether the taking of the poison by Miss Beers was by mistake or with the deliberate design on her part to destroy her life.

[2, 3] It must be borne in mind that the defendant entered the trial charged with the burden of overthrowing the presumption that the deceased was sane, and that her death was not suicidal, but from a natural cause. Code of Civil Procedure, § 1963, subd. 28; *Jenkins v. Pacific Mut. Life Ins. Co.*, 131 Cal. 121, 63 P. 180; *Dennis v. Union Mut. Life Ins. Co.*, 84 Cal. 572, 24 P. 120; 21 Cor. Jur. § 35, p. 95. It rested upon the defendant to overcome said presumption, or, in other words, to support the affirmative defense of suicide "by a preponderance of clear and satisfactory evidence, direct or circumstantial." 37 Cor. Jur. § 443, p. 640, and cases cited in

the footnotes and also the above-named cases. And whether the defendant introduced sufficient satisfactory proof to overcome that presumption or to sustain that defense was a question to be solved by the jury, with whose conclusion we are not privileged, legally, to interfere, unless the evidence of suicide is upon its face obviously such as to compel us to hold that no other inference but that of intentional self-destruction may reasonably be drawn. Undoubtedly the circumstances specially stressed by the defendant as involving conclusive proof of suicide are, as before we have said, indicative of a designed self-administered death, and it is to be conceded, as likewise has been stated, would afford sufficient support to the conclusion, had such been the result of the jury's deliberations, that the deceased committed suicide. But it is not true that those circumstances are wholly inconsistent with the theory of the plaintiff that the taking of the poison was due to a mistake or an accident. In other words, the evidence disclosing those circumstances or the circumstances themselves are not upon their face so conclusive as in proof of the suicide theory that a reviewing court is compelled to accept them as constituting the correct solution of the problem presented here for decision as against other circumstances which tend to sustain the presumption that the death of Miss Beers was not intentionally self-inflicted, and which circumstances the jury presumptively determined did satisfactorily support said presumption, or, in other words, were sufficient in probative force to shatter the attempt of the defendant to overcome the effect thereof. These circumstances or the evidence thereof may here well be recapitulated. The evidence that the basement of the house in which the deceased resided at the time she bought the poison was infested with rats is undisputed. The evidence that she was constantly in a state of fear of the rodents stands undisputed. The testimony of the druggist who waited on her when she purchased the poison, that he had known her quite well for six or seven months prior to the date of that purchase, that when she applied for the purchase of the poison she was apparently the happy and contented young woman that she had always appeared to be and as she was described at the trial by her relatives and intimate acquaintances, and that she betrayed absolutely no inner griefs or sorrows or agitation of mind of any character, also stands in the record without contradiction. The testimony of the same witness that the deceased had, in a number of instances prior to her procurement of the poison, directed small purchases of other articles made by her at the drug store to be charged to her personal account also stands unchallenged and uncontradicted in the record. Undisputed also is the testimony of

Mrs. Miller that the deceased always had sufficient money to pay for any articles she might need or thought she required. If her purpose in buying the poison was self-destruction, it is highly probable, so the jury could well have concluded, and, it may be assumed, did conclude, that she would have paid for the article, and thus have pursued a course which would have aided her materially in warding off knowledge by her sister and brother-in-law of her purchase of the poison.

Again, and more important than any other consideration, taken alone, is the question of motive. The deceased, between the ages of 19 and 20 years, physically in robust health and attractive, morally clean, with no demoralizing habits, her whole being radiant with the sunshine of the ineffable joys of youth, popular among her acquaintances, possessed of an ample supply of wearing apparel, thus gratifying in full measure the vanity pardonably existent in the majority of her sex, the possessor in her own right of some financial means, enthusiastically ambitious to acquire that proficiency in an art or profession which would enhance her earning capacity or ability, and at the same time enlarge the scope of her usefulness in the world's multifarious activities, prior to and up to the very time of her passing, of her own volition and free will, actually prosecuting efforts to accomplish the ends of that ambition, cheerfully buoyant to the day preceding that of her death with optimism and hope regarding the outcome of her efforts to make of herself a stenographer, according to her nearest relatives and intimate acquaintances, those in daily association with her, without any love entanglements or disappointments or jealousies pulling at her heartstrings—in short, a perennially cheerful, healthy, happy, moral, popular, and attractive girl, with many admiring friends and devoted loving relatives, surrounded by a happy home life, and within her grasp material luxuries which even those better circumstanced financially might envy—there can be suggested no substantial or sound reason why Miss Beers should have desired to have terminated her life by her own deliberate act, while, on the other hand, there appears to have been every reason why she should have desired to live. In addition to the foregoing considerations, we have the uncontradicted testimony of Magill that, after the party had partaken of a meal at the tamale parlor, and were riding about the city, the deceased stated that she desired to return to her home and retire for the reason that she was compelled to arise early the following morning for the purpose of studying her lessons before going to school. There is also the testimony of the deceased's brother-in-law, Ed Miller, to the effect that, just before she left the house to attend the theater, Miss Beers requested him to call her the following morning before he

departed for his ranch, to which he was accustomed to going early each morning, as she was required to arise early and devote some time to her school work before going to school, and, further, the testimony of Miss Faulkner and the Millers regarding the contemplated visit, at the end of the school term, by Miss Beers, the witness and Mrs. Miller to the "Engel Mine," and the enthusiastic delight with which the deceased expressed herself the day before her death regarding the prospective visit.

Reverting now to some of the circumstances at least pregnant with suspicion that the death of Miss Beers was suicidal, we may specifically examine a few of them to ascertain whether the jury, in considering them by the light of those circumstances which are indicative of a want of intention to commit suicide, could not reasonably have found, and it may be assumed did find, that they were not inconsistent with the theory that the death of the deceased was the result of an accident or a mistake. The first of these circumstances which may be considered is the fact that the deceased, after calling Mrs. Miller to her bedside, several times declared that she felt that she was going to die. This circumstance is emphasized by defendant as justifying the inference that the deceased knowingly took the poison, and realized that it would produce her death. But the testimony of Dr. Victors, explaining the effect of strychnine poisoning upon the afferent nerve center, and the sensation thus conveyed to the brain, furnished a hypothesis upon which the declaration of deceased that she felt that she was going to die, considered with the other testimony, could as well have been reconciled by the jury with the theory that she did not know or realize that she had taken the deadly drug as with the theory that she knowingly took the poison. The doctor's testimony was: That the effect of strychnine poison upon taking it would be to produce "slight irritability, and, second, an impaired sensitiveness, and frequently an impending feeling that something is going to occur, and then the onset of spasms." Again, he testified that there would be nothing very uncommon under any circumstances for a person whose system had in some way absorbed strychnine, "without knowing that they had strychnine in their system, saying, before the first spasm: 'I feel sick; I feel that I am not going to last very long.'" The fact that deceased, although requesting the immediate presence of her mother and Magill, did not request that a doctor be sent for, is also stressed as a circumstance of potent significance as in support of the theory that she took the poison with suicidal intent. This circumstance, while properly to be considered among those pointing to suicide, the jury could have found reasonably coincided with the presumption that the deceased did not

intentionally destroy her life. Or, it may be more accurate to say, the jury could have regarded that circumstance, when considered with others tending to support the presumption, as not militating against the conclusion that the taking of the poison was accidental or by mistake. We need not speculate as to what the jury's reasoning was with reference to that circumstance when deliberating upon their verdict. It is clear, though, that they could well have concluded, without stretching their imagination beyond a reasonable conception of the situation as presented by the evidence, that in her agony of mind and body, suffering, as she must have suffered, excruciating physical pain and the mental anguish thereby superinduced, intensified by her belief that she could survive but a brief period of time, the persons then uppermost in her mind would be her mother and the young man who the evening before her death had been her companion in social diversion, and with whom, for a few weeks previously, she had been keeping company, and that the last person who, under the circumstances, she would ask for would be a doctor, from whose professional services, according to her declarations that her death was inevitable, and only a few minutes away, she could not hope to derive medical relief. In this connection we may call to mind the fact that Magill testified that he and the deceased were not, and had not been, "sweethearts," but merely "good friends," and his testimony in that particular was in nowise contradicted.

The fact that she replied in the negative to her sister's question as to whether she had taken a laxative is not inconsistent with the theory that she did not knowingly take the poison. She no doubt told the truth when she made the answer to her sister, but the jury could have consistently believed that, the cause of her illness having been inquired about by the sister she lived with, and when she believed she was going to die, she would have told her that she had taken the poison, if knowingly she had done so.

It is further argued that the fact that, while in the tamale parlor, and after Boyd and Magill each stated that he would be required within a short time to leave Chico for a few days, the deceased remarked that she, too, was going some place that "you know nothing about," or words to that effect, is, in view of the other circumstances tending to show death by suicide, very strongly indicative of the fact that the deceased then contemplated taking her life. This may be granted, and would perhaps be accepted as a reasonable interpretation of the remark had the jury found in favor of the defendant's affirmative defense. But, having found against the defendant on that defense, this court must assume that the jury attached to the remark no such significance, but believed that the de-

ceased then had in mind her prospective visit to the "Engel Mine" within a few days or weeks, and not any thought of self-destruction. Such conclusion by the jury as to the remark referred to is given some support by the testimony of Joe Magill that, when the remarks about leaving Chico were made, all the parties, including the deceased, were in excellent humor, and very happy, and that the entire conversation relative to leaving Chico, as were all their conversations during that evening, was carried on in a jocose manner and cheery spirit.

The foregoing specific consideration of certain facts and circumstances which defendant well argues tend strongly, when considered with certain other facts and circumstances, to sustain its affirmative defense, is not for the purpose of weighing the testimony, but only to confirm the statement in an earlier part of the discussion that some of the facts and circumstances relied upon by the defendant for the proof of the suicide theory are not wholly inconsistent with the theory adopted by the jury that the taking of the poison by the deceased was not with a suicidal intent. These particular facts and circumstances, which are referable to the conduct, the actions and words of the deceased, aside from the circumstance of the taking of the poison, that of the absence of rats from the new house of the Millers, and the fact of the finding of the bottle containing the remaining portion of the poison in the back yard of the Miller premises, were for the jury to interpret, and so ascertain their evidentiary significance—that is, to determine whether, being obviously consistent with the suicide theory, they were, nevertheless, not inconsistent with the position of the plaintiff that the taking of the poison was by a mistake. The finding implied from the verdict that these particular circumstances were not inconsistent with the theory that deceased took the poison by mistake is, as above declared, a logical deduction.

[4] So the case, as it was submitted to the jury, appears to have developed substantial conflicting evidentiary considerations directly affecting the issue which they were called upon to decide, to wit: On the one hand, circumstances tending to sustain the suicidal theory, while on the other, facts and circumstances tending to negative or explode that theory. The two sets of circumstances stand in resistance to each other, and, as the situation thus presented must be viewed by this court, substantially equal in probative force. Of exceptional importance, therefore, in the determination by the jury of the question whether the affirmative defense of suicide has been sustained by the defendant, and even of greater importance in the disposition of this appeal by this court, was and is the fact that there was an entire absence of motive in the deceased for purposely or inten-

tionally taking her life. As is true in its application to the proof of the commission of crimes, particularly in the proof of the crime of murder, the rule is that, while the proof of motive is not indispensable, yet the presence or absence of motive is a circumstance going to the question of the quality of the act under inquiry. 8 Cal. Jur. § 152. Counsel, however, contend that it fairly appears from the testimony of the witness Miller that the deceased became discouraged and despondent over her failure to make satisfactory progress in her work in school. Miller, it will be remembered, said that, while in school and engaged in her studies, Miss Beers appeared to be a person of moods; that, while cheerful on occasion, she appeared at other times to have on her mind something that seriously bothered her. The significance of that circumstance, if any of importance it had in the one direction or the other, was like that of all the other circumstances, for the jury to determine—that is, it was for the jury to interpret the circumstance as best they could, and so ascertain what was the cause of her “moods,” or whether her actions in that respect had any bearing upon the question whether she took the poison knowingly and with the intent thus to end her life. It may be suggested, however, that it would, indeed, be surprising if the young woman had not now and then exhibited seriousness of thought while attempting to acquire, under the disadvantageous circumstances which have been explained, sufficient familiarity with an art, itself difficult for a person of education to master, to enable her to put it to practical use. But it may be taken as true that the verdict implies, among other things, that the deceased was not discouraged or despondent over the slow progress she was making in her studies, or discouraged or despondent for any reason, on the day before the morning of her death, or at any other time prior thereto, and such finding is amply supported by the testimony of her relatives and intimate acquaintances as to her personal characteristics, her disposition, the life she led, etc., and notably by the testimony of her teacher, Mrs. Kelly, to the effect that the young woman always during her school experience displayed a “sunny” disposition, and likewise appeared to be happy, that she was making a creditable showing in her effort to overcome her deficiency in grammar, and that, on the day immediately preceding her death, having been asked by the witness how she thought she was progressing with her studies and whether she was happy, replied that she was getting along “fast” in her school work, and “was never so happy in her life.”

[5] We have now given an extended consideration, in more or less detail, of the facts and circumstances of this case, not with the view of passing judgment upon the weight or

evidentiary value thereof in their bearing upon the single issue involved in the controversy, but solely for the purpose of showing that the situation presented by the record as to the evidence is of a character which forbids an appeal court from justly declaring, as a matter of law, that the defendant succeeded in overcoming the presumption that the death of the deceased was not purposely self-inflicted. In this connection, it may be observed that a presumption is evidence (Code Civ. Proc. §§ 1957–1961), and that, while as against a proved fact, or a fact admitted, a disputable presumption has no weight, yet, where it is sought to prove the fact against the presumption, it still remains with the jury to say whether or not the fact has been proved; and, if they are not satisfied with the proof offered in impeachment of the presumption, they are then at liberty to accept the evidence of the presumption. *People v. Milner*, 122 Cal. 171, 179, 54 P. 833; *Ruth v. Krone*, 10 Cal. App. 770, 103 P. 960; Code Civ. Proc. §§ 1961 and 2061, subd. 2. Although it has been well said that disputable presumptions, “while evidence, are evidence the weakest and least satisfactory” (*Savings & Loan Soc. v. Burnett*, 106 Cal. 514, 529, 39 P. 922, 925), it is nevertheless the rule that such presumptions are evidence which will stand for the facts they represent until, in the minds of the jury, they are overcome or dispelled by clear and satisfactory evidence.

[6] It will also be kept in mind that the defense of suicide in a case of this character is an affirmative one which is set up to destroy the presumption that the death of the party occurred according to the ordinary course of nature, or, as in the present case, was occasioned by the taking of the poison by the deceased under a mistake or by accident, and, as stated, that defense, to destroy the evidentiary force of such presumption, must be supported by a preponderance of the evidence. In the case of *Savings & Loan Soc. v. Burnett*, supra, the evidence both for the plaintiff and the defendant was all one way, and against the presumption—indeed, as the court said in that case, the whole evidence was such as that it amounted to an admission of the fact against which the presumption was attempted to be invoked. The evidence here upon the question whether the death of Miss Beers was suicidal is manifestly conflicting. There was no admission by the deceased that she took the poison with suicidal intent.

[7-9] There are certain exceptions which defendant urges to rulings bearing upon the question of the legal propriety of certain testimony and certain questions propounded to certain witnesses. We have carefully examined those assignments, and thus have assured ourselves that, even if some of the rulings upon which those assignments are founded were erroneous, the defendant suffered no

prejudice therefrom. It may be said, however, that the assignment under the present head particularly stressed by the defendant is that the court refused to allow its counsel to refresh the memory of Joe Magill, when testifying as a witness called by the defendant, from the transcript of his testimony given at the coroner's inquest into the cause of the death of the deceased. In one instance the court did stall an attempt by defendant's counsel to examine the witness Magill in the manner explained, basing its action in that particular upon the theory that such examination involved an attempt on the part of counsel to impeach their own witness. The ground of the ruling was not tenable. It is elementary that a witness may, for the purpose of refreshing his memory, resort to testimony previously given by him regarding a particular matter under inquiry in a subsequent proceeding or trial involving the same issue and of which testimony a memorandum had been made. Greenleaf on Evidence (13th Ed.) § 436. It has been held that the testimony of a witness given at a preliminary examination of an accused in a criminal case may be used by him at the trial of the case to refresh his memory. *People v. Durant*, 116 Cal. 179, 213-214, 48 P. 75. But an examination of the transcript will show, as thus we have learned, that both counsel for defendant and those of the plaintiff, in questioning Magill, with marked detail went into the matters occurring with Magill, Boyd, Mrs. Hill, and deceased, while they were together the evening and night previous to the death of Miss Beers, thus bringing out all that the deceased did and said which could by any possibility throw any light on her attitude of mind or any conduct on her part which might expose, or tend to expose, the specific thoughts then running through or weighing upon her mind, if mentally she was disturbed. Besides, on several occasions other than the one above referred to, counsel for the defendant did refresh Magill's memory from the transcript of his testimony given before the coroner, and thus brought out the important facts as the witness stated them to that officer. As in effect suggested, the other assignments under this head do not merit special notice herein. Assuming that they involved erroneous rulings, the effect thereof was harmless.

[10] Complaint is made that the court erred in its refusal to give instruction No. 6, preferred by the defendant. The instruction, if given, would have told the jury that each juror was entitled to make up his or her own mind, without regard to the judgment or opinion of the other jurors, regarding the weight and effect of the evidence; that, if any juror reached the conviction from a consideration of the evidence that Nellie Beers committed suicide, no such juror "can conscientiously compromise or surrender his or

her conviction in order to reach a verdict or to please other jurors, nor allow that belief to be influenced in the slightest degree by pity or sympathy."

In its charge the court did instruct the jury that each individual juror had the right to form his or her own opinion, or form his or her own verdict. The instruction, it is true, contained the qualification that the jurors should consult "harmoniously together as intelligent men and women, and try to get together upon a verdict; and, if any of you have made up your mind to a verdict, and you are persuaded by the arguments of or consultations with the other jurors that you were wrong, you have a right, and should change, if you can do so without shocking your conscience in regard to it—that is, if you are fully convinced that you are wrong, don't hesitate to change your verdict." It is obvious that the qualification (which was not improper) withdrew no force from the initial part of the instruction declaring that each juror was entitled to "form your own opinion and form his or her own verdict." The instruction at the most states mere commonplaces. Every intelligent man and woman must know that each juror of the panel trying a case is entitled to form his own conclusion regarding the weight and effect of the evidence, and that he or she is not compelled to yield any conviction to which he or she has been persuaded after a full and fair consideration of the evidence merely because other jurors have reached an opposite or contrary conclusion. The part of said instruction italicized herein was given by the court in another instruction.

[11] It is further objected that error was involved in giving the following instruction:

"I instruct you that you are not bound to decide in conformity with the declarations of a witness or any number of witnesses which do not produce conviction in your minds against a less number or any number or against a presumption or other evidence satisfying your minds. A presumption is regarded as evidence, and it is for you to weigh and determine what all the evidence offered is worth and where the truth lies. It is for you to determine, if you believe under the evidence and these instructions a presumption exists in favor or against an issue involved in the case, whether or not such presumption outweighs positive or other testimony or evidence against it, and, if you are convinced that such presumption outweighs and overcomes the other testimony and evidence, you have the right to decide in conformity with such presumption."

The ground of the objection to the above instruction is, not that it does not abstractly state a sound rule of law, but because, as is the claim, there is no conflict in the evidence, that the evidence is all one way, and supports the suicide theory, and that, consequently, the instruction is inapplicable. We have heretofore expressed the view that there

is a conflict in the evidence upon the single question involved in the case. The circumstances and facts tending to support the presumption that deceased's death was not intentionally self-inflicted, and hereinabove given consideration, are in direct conflict with the facts and circumstances tending to show that Miss Beers committed suicide. In fact, the true situation, legally, is that the verdict necessarily implies that the jury did not regard the evidence presented by the defendant to show that Miss Beers committed suicide as being of sufficient force to overthrow the presumption referred to, said presumption, as we have seen, standing for the facts it represents until overcome by clear and satisfactory evidence—that is, clear and satisfactory to the jury.

[12-15] Two other of the given instructions are criticized as not being pertinent to the case as made by the evidence, viz.: (1) "That a presumption is a deduction which the law expressly directs to be made from particular facts," and that "there is a presumption of law that things have happened according to the ordinary course of nature and the ordinary habits of life," which presumption is disputable, "and may be controverted by other evidence, direct or indirect." (2) That "in this class of cases the rule is that every reasonable hypothesis for accounting for death other than by suicide should be excluded from the case before you can conclude that it was suicide, and then only, of course, from evidence warranting that conclusion." These instructions state the law correctly, and were pertinent to the evidentiary features of the case.

There are no other points requiring notice herein.

The judgment is affirmed.

We concur: PLUMMER, J.; WEYAND, Justice pro tem.

87 Cal. App. 559

REUSCHE v. BERLING et ux. (Civ. 6063.)

District Court of Appeal, First District, Division 2, California. Dec. 14, 1927.

I. Limitation of actions § 197(2)—Purchaser suing for fraud in sale of real estate, held under evidence to have had notice of fraud more than three years before suit (Code Civ. Proc. §§ 337, 338).

In action for damages for fraud in sale of real estate where question of acreage of tract sold was involved, and it was asserted that tract contained less than represented, evidence was held sufficient to sustain finding that plaintiff had notice of acreage of tract more than three years before action, and hence, under Code Civ. Proc. §§ 337, 338, action was barred.

2. Notice § 6—Means of knowledge which, if followed, would lead to knowledge, constitute "actual knowledge" of facts.

Means of knowledge are equivalent to knowledge, and, where it appears notice or information of circumstances which would put one on inquiry, which, if followed, would lead to knowledge, or that facts were presumptively within knowledge, he will be deemed to have had "actual knowledge" of these facts.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Actual Knowledge.]

3. Notice § 6—Party knowing facts which would reasonably result in inquiry, is charged with discovery of fraud when inquiry would disclose fraud.

Where party has knowledge of facts which would reasonably put him on inquiry, and such inquiry, if pursued, would have led to fraud or other grounds for rescission, he will be charged with having discovered the fraud or other grounds as of the time that he would have discovered it if he had, with reasonable diligence, pursued inquiry when he should have done so.

Appeal from Superior Court, Contra Costa County; A. B. McKenzie, Judge.

Action by August Reusche, Jr., against Theodore B. Berling and wife for damages for fraud in sale of real property. Judgment for defendants, and plaintiff appeals. Affirmed.

C. H. Patterson, of Oakland, for appellant.

L. R. Weinmann, of Alameda (H. E. Linder-smith, of counsel), for respondents.

NOURSE, J. Plaintiff sued for damages for fraud growing out of the purchase of real property from the defendants. The trial court held that the right of action was barred by the statute of limitations, and gave judgment to the defendants. The plaintiff has appealed on a typewritten transcript.

The sale was made under a written deed of conveyance exercised on June 28, 1919. The deed described the land as containing about 240 acres, which was sold for the lump sum of \$10,000, including some personal property situated on the premises. It afterwards developed that the tract owned by the defendants and conveyed to the plaintiff contained but 173.42 acres, and the claim of fraud is based upon the alleged misrepresentations of the defendants as to the acreage. In an effort to avoid a plea of the statute of limitations, the plaintiff alleged that he did not discover these misrepresentations until August 13, 1924, when he had the lands surveyed as a result of a notice which he received from the county tax collector on April 22, 1924, stating the belief of the tax collector that the tract of 66.58 acres belonged to others.

The defendants answered, denying the al-

legations of misrepresentations, alleging that they had no knowledge of the acreage included in the tract and so informed the plaintiff at the time of the sale; that they had purchased the tract from the former owner through a deed purporting to convey 240 acres, and had paid taxes on that basis for a number of years; that, at the time of the sale, they showed plaintiff the land which they proposed to convey as included within a fence which was pointed out to plaintiff; and that, at the time of the sale, defendants warned plaintiff that the acreage mentioned in the deed was doubtful, that they were conveying what was included within the fence only, and that plaintiff should have the land surveyed to determine the matter of the acreage. It was then alleged that, before the sale was completed, defendants caused an abstract of title to the premises to be delivered to plaintiff and warned him that he should make his own examination of title, that this abstract disclosed the true acreage of the tract conveyed, and that from this and other information plaintiff had knowledge, or the means of knowledge, of the true acreage more than three years prior to the commencement of this action on September 3, 1924. On these facts the defendants then set up the special pleas of the statute of limitations as found in sections 337 and 338, Code of Civil Procedure.

The trial court found that the tract was short in acreage as alleged in the complaint, that there was no actual misrepresentation or fraud committed by the defendants, and that plaintiff knew more than three years prior to the commencement of the action that the 66.58 acres referred to were not owned by defendants, and had the means of knowledge sufficient to put him on inquiry as to the ownership of and title to the land involved. The conclusion of law followed that the cause of action was barred by both sections of the Code pleaded.

[1] The appellant states the issue involved in this appeal to be the question whether the evidence sustains the finding that he knew or should have known, more than three years prior to the commencement of the action, that the land outside the fence line was not included in the sale. The evidence is that the appellant was informed prior to the sale that the respondents had purchased the land from one Wood, who had deeded it to them with the same description used in the deed to appellant; that respondents did not know the true acreage, but had paid taxes on 250; that they had never had the land surveyed, and would not sell on an acreage basis, but would sell the land inclosed by the fence; and that the title could be found in the abstract which was delivered to appellant. The appellant went on the land and satisfied himself without a survey, and continued to live upon the prem-

ises for a period of over five years before his action was commenced. About one year after the sale plaintiff was informed by the former owner (respondents' grantor) that the tract did not contain 240 acres. This information he conveyed to the respondents, who again suggested that he have the land surveyed for this purpose. They did nothing until the summer of 1924, when suit had been instituted against them by the adjoining property owners. The appellant was an experienced farmer and a dealer in farm lands, while the respondents had no experience of this kind, but were engaged in the operation of a moving picture theater.

If the repeated warnings of the respondents, the warning of the former owner, the possession of the abstract, and the personal inspection of the land were not sufficient to put appellant on his inquiry and to satisfy him that the tract did not contain the acreage mentioned in the deed, it is difficult to conceive what means of knowledge should be necessary in a case of this kind. If the difference in acreage were slight, it might have escaped notice, but where, as here, the difference is more than one-quarter of the acreage mentioned in the deed, it must have been apparent to an experienced dealer in farm lands, like the appellant, from a mere inspection of the premises.

[2] The trial court merely followed the general rule stated in *Lady Washington Cons. Co. v. Wood*, 113 Cal. 482, 487, 45 P. 809, 810, that:

"As the means of knowledge are equivalent to knowledge, if it appears that the plaintiff had notice or information of circumstances which would put him on an inquiry which, if followed, would lead to knowledge, or that the facts were presumptively within his knowledge, he will be deemed to have had actual knowledge of these facts."

[3] Another rule, equally applicable to a case of this kind, is that:

"Where a party has knowledge of facts of a character which would reasonably put him upon inquiry, and such inquiry, if pursued, would have led to a discovery of the fraud or other ground for rescission, he will be charged with having discovered the fraud or other ground as of the time he should have discovered it, that is, as of the time when he would have discovered it if he had with reasonable diligence pursued the inquiry when he should have done so." *Bancroft v. Woodward*, 183 Cal. 99, 108, 190 P. 445, 449.

The appellant does not question the application of these rules of law, but argues that the only facts developed here tending to put him on notice are the delivery of the abstract and the statement of the former owner of the property. These, he argues, were insufficient for that purpose because he did not personally examine the abstract and because the statement of Wood was in-

definite. But the appellant engaged another to act as his agent in the examination of the abstract and relied upon the information obtained from him. The respondents are not to be charged with the negligence of this agent. As to Wood's statement, it was sufficient, when taken with the frequent warnings of the respondents, to cause appellant to use reasonable diligence to discover the true facts. The trial court was not, however, limited to a consideration of these facts in making its finding, but it could consider all the facts and circumstances which surrounded the transaction. One circumstance of particular importance was the understanding of the parties at the time of the sale that the property was not being sold according to any specified acreage, but as a whole tract included within a designated fence. It was pointed out to the plaintiff at the time with the express warning by the respondents that they were selling what was bounded by the fence only, and that the true acreage was unknown to them. We are satisfied that all the evidence supports the finding that the means of knowledge were present, and this is sufficient to support the judgment.

Judgment affirmed.

We concur: KOFORD, P. J.; STURTEVANT, J.

87 Cal. App. 333

GEORGIA CASUALTY CO. v. INDUSTRIAL ACCIDENT COMMISSION et al.
(Civ. 5641.)

District Court of Appeal, Second District, Division 1, California. Dec. 7, 1927.

1. Master and servant ⇨374—Incision of employee's thumb severing tendon held cause of death from anæsthetic administered to cause relaxation, notwithstanding condition rendering anæsthetic fatal.

In proceedings for workmen's compensation, incision of employee's left thumb, received in course of employment, severing tendon, *held* continuing operative cause of employee's death resulting from administration of anæsthetic necessary to cause relaxation of tendon, though death occurred on account of persistence of gland in neck, constituting rare condition which made administration of anæsthetic fatal.

2. Master and servant ⇨398—Decision in compensation proceedings should cover whole subject of controversy, including claims of other persons (Workmen's Compensation Insurance and Safety Act of 1917, § 17[a], as amended by St. 1919, p. 918, § 6, and § 60[a]).

When claim for benefits under Workmen's Compensation Insurance and Safety Act 1917 (St. 1917, p. 846) § 17(a), as amended by St. 1919, p. 918, § 6, has reached point where it is expedient to submit matter to decision of Industrial Accident Commission, the whole controversy, including claims of any and all per-

sons, should be submitted, in view of section 60(a), providing for liberal plan of procedure.

3. Master and servant ⇨398—Application for compensation, made in good faith on behalf of deceased's sister, authorized commission's determination of rights of other dependents, notwithstanding sister's claim was disallowed (Workmen's Compensation Insurance and Safety Act of 1917, § 17[a] as amended by St. 1919, p. 918, § 6, and § 60[a]).

Application for compensation, made in good faith in behalf of sister of deceased, under authority of letter in which she stated she hoped applicant "would do all he can to bring about the best result," *held* sufficient to bring before Industrial Accident Commission entire subject-matter of proceeding and to authorize it to consider rights of other dependents in order to make complete determination of matter, under Workmen's Compensation Insurance and Safety Act 1917 (St. 1917, p. 846) § 17(a) as amended by St. 1919, p. 918, § 6, and section 60(a), notwithstanding sister's claim was disallowed.

Proceeding under the Workmen's Compensation Act by Whi Rim Lee and others against the Georgia Casualty Company, insurer, for the death of Yili Soo Lee, employee. To review an award of the Industrial Accident Commission in claimants' favor, the insurer brings certiorari. Affirmed.

Elber H. Tilson and Joe Crider, Jr., both of Los Angeles, for petitioner.

G. C. Faulkner, of San Francisco, for respondent Industrial Accident Commission.

YORK, J. On writ of review of a finding and award by the Industrial Accident Commission, rendered in favor of Whi Rim Lee, Duck Wha Lee, and Chan Hi Lee, applicants, of a death benefit and burial expenses in the total sum of \$1,745.25, on account of the death of an employee named Yili Soo Lee, and dismissing the employer from the proceeding, and discharging him from liability therein.

[1] The first objection of petitioners herein is based upon the fact that the death of the employee Yili Soo Lee was not directly caused by the incision of the left thumb which severed a tendon, which incision was received in the course of employment, but was caused solely by reason of the administration of a general anæsthetic, which the doctors testified was necessarily administered to cause a relaxation of the tendon so that the same might be properly stitched together, the undisputed evidence in the case showing that the death of the employee was caused by such anæsthetic by reason of some persistence of a gland in the neck, a gland which is usually present only in infants; a very rare condition to exist in a person of his age, and which condition could not have been discovered before death, and being such a condition as would make the administration of

the general anæsthetic necessarily fatal. The general anæsthetic used was nitrous oxide gas, considered to be the safest general anæsthetic. The evidence shows further that the employer and employee consulted the Georgia Casualty Company officials at Los Angeles, and were instructed by their agents and employees to have the employee undergo the treatment at the hands of such surgeons and at the time and place of such treatment, which said treatment resulted in his death. There is no evidence that the administration of the anæsthetic could reasonably have been avoided. Under the circumstances as shown, it appears that the original injury was a continuing operative cause of the employee's death, and that the administration of the anæsthetic was not an independent and separately operating cause of his death.

[2, 3] The application for compensation was filed in the names of the four applicants "by their attorney in fact, D. Chung." The petitioner alleges that the commission was without jurisdiction over the matter in controversy, in this, that no application, for compensation was filed "by any party in interest, his attorney, or other representative authorized in writing," as required by section 17 (a) of the Workmen's Compensation Insurance and Safety Act of 1917 (as amended by St. 1919, p. 918). That section provides, in the phraseology last above quoted, for the filing of the application in writing for an award of compensation in the cases covered by the statute. Among other things, it further provides that "there shall be but one cause of action for each transaction coming within the provisions of this act."

"When a claim for any portion of the benefits prescribed by the act has reached the point where it is necessary or expedient to submit the matter to the decision of the Industrial Accident Commission, the whole subject matter of the controversy, including the further claims of the applicant, *or of any and all other persons*, should be thereby submitted to the jurisdiction of the commission for a complete determination, provided, of course, that all claims relating to the transaction be presented within the life of the continuing jurisdiction of the commission." *Great W. P. Co. v. Ind. Acc. Com.*, 196 Cal. 593, 603, 238 P. 662, 666.

Section 60 (a) of the act provides for a very liberal plan of procedure in matters before the commission, and declares that "no informality in any proceeding * * * shall invalidate any order, decision, award * * * made, approved or confirmed by the commission."

The evidence produced before the commission includes a letter written by Mrs. Shin to D. Chung before he filed the application with the commission, in which letter she refers to her deceased brother and to his

dependents apparently including herself, and to the "industrial accident insurance," and states to Chung that she hopes he will do all he can to bring about the best result.

The commission treated this letter as written authority to Chung to file the application on behalf of at least one interested party, namely, the sister of the deceased. Respondent commission contends that the application so made on behalf of the sister was sufficient to bring before the commission the subject-matter of the proceeding, and that under the provisions of the statute it was authorized to consider the rights of the other dependents, inasmuch as it would be necessary to bring them in before a complete determination of the matter could be had. Respondents further contend that, since Mrs. Shin was in good faith claiming to be a dependent of the deceased, the fact that her claim to be such dependent was not allowed does not deprive the commission of the same jurisdiction over the proceeding, with respect to the other claims, that the commission would have had if the claim on behalf of Mrs. Shin that she was a dependent of the deceased had been allowed. We are of the opinion that these contentions of respondent are correct.

The award is affirmed.

We concur: CONREY, P. J.; HOUSER, J.

87 Cal. App. 399

ROSENTHAL v. TAYLOR, Constable, et al.
(Civ. 5879.)

District Court of Appeal, First District, Division 2, California. Dec. 9, 1927.

1. **Fraudulent conveyances** ⚡308(9) — What constitutes delivery and possession, good against creditor of seller, held fact question for trial court.

What constitutes delivery and possession, good against attaching judgment creditor of seller, is fact question, to be determined by trial court, in view of circumstances of each particular case.

2. **Fraudulent conveyances** ⚡147(1) — Removal of bulky articles from seller's land is not always necessary to make transfer of possession good against judgment creditor of seller (Civ. Code, § 3440).

Where goods are of considerable bulk, their removal from land of seller is not always necessary to constitute change of possession, giving buyer title good against attaching judgment creditor of seller, under Civ. Code, § 3440.

3. **Fraudulent Conveyances** ⚡299(9) — Evidence of buyer's assembling pumps and carrying some parts away held to show change of possession, good against constable attaching under levy of execution against seller (Civ. Code, § 3440).

Evidence that buyer of pumps took scattered parts lying on seller's land into posses-

sion, and assembled them, excepting some valves which he took to his own place of business, and then stored assembled parts in shed belonging to seller, held to show bona fide sale and delivery, making change of possession good within Civ. Code, § 3440, as against constable attaching under levy of execution issued on judgment against seller.

Appeal from Superior Court, Alameda County; James G. Quinn, Judge.

Action by Louis Rosenthal, doing business under the name of the National Iron & Metal Company, against Walter J. Taylor, Constable of Oakland Township, and others. Judgment for plaintiff against defendant Taylor alone, who appeals. Affirmed.

Myron Harris and Jesse Nichols, both of Oakland, for appellant.

Glickman & Glickman, of Oakland, for respondent.

NOURSE, J. Plaintiff sued for the conversion of two pumps and one cone tank seized by the defendant Taylor, as Constable, under a writ of execution issuing out of the justices' court. Plaintiff had judgment against the defendant Taylor alone for the return of the two pumps or for their value, fixed at \$425, and for \$100 damages for their conversion. From this judgment this defendant has appealed on a typewritten record.

The pumps were purchased by one Sam Kessler in April, 1925, dismantled, and hauled by truck from Mountain View to the yard of Kessler located in Oakland. They were then sold by Kessler to plaintiff in their dismantled state some time in May of the same year. The purchaser took immediate possession, and, with the aid of two men employed by him, gathered up the parts, which were scattered about Kessler's yard, reassembled the pumps, and stored them in a shed at the rear of the yard for protection against the weather. Some of the valves belonging to the pumps were not assembled, but were taken by the plaintiff to his own place of business, and remained continuously in his possession.

It is the contention of the appellant that findings Nos. 9 and 10, relating to the transfer of possession to, and the continuous exercise of possession by, the respondent, are not supported by the evidence. The appellant argues that the provisions of section 3440 of the Civil Code, which declare that a transfer of personal property shall be conclusively presumed to be fraudulent, unless accompanied by immediate delivery, and followed by a continued change of possession, have not been met, because the respondent left the pumps in the Kessler shed. The respondent answers that the delivery took place when he and his employees actually took into their possession the scattered parts and assembled them into the pumps, and that possession of the assembled articles was not lost by the mere storing of

them in the shed for protection against the weather.

[1, 2] The rules of law involved are well settled. What constitutes delivery and possession is a question of fact to be determined by the trial court, in view of the circumstances of each particular case. *Dubois v. Spinks*, 114 Cal. 289-290, 46 P. 95. All species of property are not capable of the same kind of possession, and, where the goods are of considerable bulk, their removal from the land of the seller is not always necessary. 12 Cal. Jur. 998, 1002. In *Sequeira v. Collins*, 153 Cal. 426, 431, 95 P. 876, 878, the Supreme Court says:

"Where the goods sold or transferred are bulky, or require further labor to fit them for use, it is not essential to a change of possession that they should be removed from the land of the transferer" (citing cases).

[3] Here the evidence is that the respondent purchased the scattered parts, which he actually took in his possession and assembled. The pumps thus assembled, minus some of the valves which he took to his own place of business, were then stored in a shed belonging to the seller. Upon these facts the trial court found that there was a bona fide sale and delivery, and that the storing of the pumps with the seller did not render the sale fraudulent. The evidence supports the findings, and brings the case within the rule of the *Sequeira* Case. Judgment affirmed.

We concur: KOFORD, P. J.; STURTEVANT, J.

87 Cal. App. 406

MILES v. ZADOW. (Civ. 4695.)

District Court of Appeal, Second District, Division 2, California. Dec. 9, 1927.

1. Sales $\S$ 477(1)—Buyer's default, if any, in contract for purchase of restaurant, was cured by seller's agent's agreeing to resell and by sale under agreement.

Buyer's default, if any, in terms of conditional sales agreement under which buyer purchased restaurant, and forfeiture, was cured by seller's agent's new contract with buyer to resell, which contract was not limited as to time, and sale thereunder completed.

2. Brokers $\S$ 71—Broker reselling property for buyer after buyer's attempted rescission, at price less than first agreed on, held entitled to commission under contract.

Where buyer brought suit to rescind contract, and broker accepted buyer's rescission of contract for purchase of restaurant, and buyer gave broker written authority to sell property in question for \$1,750 and agreed to pay commission of \$100 above \$1,000, and later, upon broker's agreement to sell property for \$1,300, turned over key to broker who sold it for \$1,300, broker was entitled to commission of \$100.

3. Evidence ☞588—Trial court had right to believe any portion of testimony which it deemed true.

Trial court had right to believe any or all of witnesses or any portion of testimony which it deemed true.

4. Appeal and error ☞1071(6)—Where, under evidence, court would have been bound to find against appellant on issues in question, failure to find upon them was not prejudicial error.

Where, under evidence, court would have been bound to find against appellant upon issues in question, court's failure to find upon them was not prejudicial error.

5. Brokers ☞7—Seller's agent's agreement with buyer to resell restaurant business after buyer's attempted rescission held based on sufficient consideration.

Seller's agent's agreement with buyer to resell restaurant after claimed default by buyer and after buyer had brought suit to rescind contract held based on sufficient consideration.

Appeal from Superior Court, Los Angeles County; Walton J. Wood, Judge.

Action for money due on sale of personal property by Joseph J. Miles against C. M. Zadow. From a judgment for plaintiff, defendant appeals. Affirmed as modified.

N. B. Nelson, of Los Angeles, for appellant.
Humphrey Marshall, of Los Angeles, for respondent.

PEAIRS, Justice pro tem. This is an appeal by defendant, C. M. Zadow, from a judgment for \$575 and costs rendered against him in the superior court of Los Angeles county.

The facts are as follows: In December, 1920, plaintiff, respondent herein, purchased a restaurant from one Bybee through the defendant, appellant herein, as business chance broker, and in the transaction the plaintiff executed a conditional sales agreement as security for the payment of \$500 to the defendant; said sum being the unpaid balance of the purchase price of said restaurant.

After about one week's business, the respondent attempted to rescind said purchase on the ground of fraudulent misrepresentations, and filed suit against said Bybee and this defendant. The trial court found there was no fraud, but held that appellant, Zadow, accepted the rescission by taking possession of the restaurant from the respondent and selling it, pursuant to an agreement with the respondent made after the suit was filed. An amended and supplemental complaint, setting out this subsequent agreement, was filed after the trial, and respondent had judgment against defendant, Zadow, for \$600. On appeal to this court, the judgment was reversed, for the reason that the facts alleged in the supplemental complaint occurred after the filing of the original complaint and were no

part of the original case. See *Miles v. Bybee et al.*, 59 Cal. App. 613, 211 P. 251. Conforming to the decision in that case, the respondent filed this action, alleging the agreement between respondent and appellant, wherein appellant took possession of the restaurant from respondent, and agreed to sell it for respondent and to pay over the proceeds of the sale to respondent, after deducting said sum of \$500 belonging to appellant, and secured by said conditional sales agreement.

In April, 1921, the appellant sold the restaurant for the sum of \$1,300, but failed to pay anything to respondent. This action was brought to recover the sum of \$800 from the appellant, which sum is the balance of the selling price after deducting said sum of \$500 belonging to appellant. The trial court allowed the appellant said sum of \$500, and also the sum of \$225 for his expenses, paid from the time he took the restaurant to the date of sale, and gave respondent judgment for the remainder of the selling price, to wit, \$575. Appellant's defense to this action is that there was a default in the payment of the monthly installments provided to be paid in said conditional sales agreement for \$500, and that by reason of said default the respondent forfeited all interest in the restaurant, and, when the restaurant was sold, it was wholly the property of appellant, and that respondent had no interest in it; therefore respondent was not entitled to any of the proceeds of the sale.

[1] There are two points in particular to be considered in this case: First, Did appellant agree to sell the property for respondent, which in the light of the evidence of both parties and the two decisions already rendered in connection with this matter, must be answered in the affirmative? and, second, Did the respondent place himself in default or did the purported notice given by appellant put respondent in default or deprive him of his interest?

It is not necessary to discuss the original contract of purchase further than to note that the total balance under the purchase lease was not due for many months after the date of sale of the property in April, 1921, but, if by strict construction it could have been declared due, the default or forfeiture was cured by the new contract to sell, which contract was not limited, and sale thereunder completed.

At the time of the purchase by respondent, on December 13, 1920, he gave the Title Guarantee Sales Company, under which name appellant did business, authority in writing to sell the property here in question for \$1,750, and agreed to pay a commission of \$100 above \$1000, then later, on January 17, 1921, upon promise of appellant to sell the said property for \$1,300, turned over a key to the property to Zadow, appellant herein.

The lease and note given thereunder on December 13, 1920, was filed for record by appellant on ——— date and afterwards recorded on February 4, 1921. On January 28, 1921, appellant sent the following communication to respondent:

"Dear Sir: Your first installment on restaurant at 2116A North Broadway is past due, kindly call and make payment at this office, the amount is \$50.00 and interest, if not paid in 3 days, the whole amount will become due. Yours truly, Title Guarantee Sales Co., By C. M. Zadow."

This so-called three-day notice is not authorized by the purchase lease or note, and further says nothing about termination of the agency of the appellant. Appellant sent another letter to respondent on February 4, 1921, on the day the original lease was recorded, in which it is said:

"Unless you pay the whole amount of \$500.00 dollars and interest within 3 days you will lose your right and title in said restaurant, as I must protect my \$500 dollars I loaned on said restaurant. Respectfully yours, [Signed] C. M. Zadow."

These letters were sent by the appellant to respondent, notwithstanding appellant's promise that the respondent should lose nothing and that he would sell for \$1,300 and give respondent his money back. While the appellant by his written notices of January 28th and February 4th and his testimony, appears to have attempted to vary the contract entered into in January for the taking over of the property and selling the same and saving the respondent harmless, it seems to this court a futile effort, if it is not entitled to censure, as an attempt to do something which should not be countenanced by the courts.

From a consideration of the entire evidence in this case, there is no question but that there was a mutual rescission evidenced by a new contract in which the appellant agreed to sell the property involved herein for \$1,300, and, after having taken possession thereof for that purpose he sold the same in April, 1921, and then failed to pay the balance due to the respondent or any portion thereof.

Counsel for appellant contends that, if the appellant was still the agent at the time the sale of the property in question was made, that all the interest that the respondent had therein was in the equipment of the restaurant; that the new lease which had been negotiated by appellant was his and that it was the main value in the deal; that respondent had failed to pay any further rent or any of the expenses from the time of the taking over of the key by appellant. It seems scarcely necessary for this court to spend a great deal of time in consideration of the discussion and evidence cited by counsel for appellant in this respect. At the time appellant agreed to sell the property and save respondent

Miles free from loss, the appellant knew the value of the equipment of the restaurant and if it had deteriorated to the extent testified it had been only about one month since appellant was the owner. If the equipment had ever been worth \$600 or \$700 and the lease the other \$500 which appellant charged respondent, it was still worth near that amount. The appellant did not put any one in charge after he took the key nor make any attempt to keep the equipment in shape, which indicates that he considered respondent the owner up to the time of the sale in accordance with sales agreement.

Appellant knew that there was no written lease or other than an understanding that the rent was to be \$25 and \$1 for water. The lease stood until the 1st of March, and appellant better than any one else understood just what would have to be done in regard to leasing—the new lease cost appellant nothing. Moreover, there is evidence in the record to the effect that appellant was to pay to respondent the entire proceeds of the sale, less \$500. Appellant also knew the respondent's financial situation and when he took the key it was for the purpose, as stated by appellant himself, of saving the respondent from any loss, knowing that the respondent could not pay rent nor make payments on the \$500 note nor keep the place running. Thus appellant agreed to a rescission and entered into an agreement to sell the whole business or the price would not have been \$1,300, from which appellant was to get his commission of \$100 and save respondent from loss. Rent, cost of cash register, repairs, cleaning, and garbage removal were charged to respondent.

[2] The trial court, hearing the evidence, observing the witnesses, and in the light of all the contracts, writings, and letters, gave judgment for the respondent in the sum of \$575, which amount appears to have been arrived at by allowing the appellant the amount of the balance of purchase note in the sum of \$500, the rental to the amount of \$114, repairs in the sum of \$15, the price of a cash register which had been stolen, \$80, \$11 for cleaning, \$5 for removal of garbage, which amounted in all to \$225; these amounts having been testified to by appellant, leaving a balance to respondent of \$575. The only other amount in dispute was \$100 charged for commission, which the lower court held, under the circumstances, was not a proper charge. We are, however, of the opinion that the sales contract did call for a commission of \$100, and that the judgment as rendered in the lower court is correct except as to said item.

[3] The trial court had a right to believe any or all of the witnesses or any portion of the testimony which it deemed true, and this court will not comment upon the conflicting nature of the testimony of the appellant.

[4] The contention of counsel for appellant

that the decision is against law, in that the court failed to find upon material issues presented by the answer of the appellant seems to be without merit, when the findings are considered in conjunction with the pleadings and the evidence in the case. Under the evidence, the court would have been bound to find against appellant upon the issues in question. Therefore the failure to find upon them is not prejudicial error.

This court will not discuss much of the law cited by counsel, for the reason that it bears upon a view of the case which would hold that there was no agreement on the part of the appellant to sell the property, which agreement for sale the court below found satisfactorily proven, and in which belief this court coincides, after having carefully considered all the evidence before it.

[5] It is contended by the appellant that there was no consideration for the agreement to sell, and in this connection we will quote from the case of *Gallagher v. Equitable Gas & Light Co.*, 141 Cal. 707, 75 P. 331:

"These facts show consideration. There was a mutual exchange of promises—promise for promise—which will support each other unless one or the other is void. *Siddall v. Clark*, 89 Cal. 321 [26 P. 829]."

In the case of *Rogers, etc., Co. v. Southern California Investment Co.*, 159 Cal. 739, 115 P. 935, 35 L. R. A. (N. S.) 543, it is said:

"We may concede that defendant was then in default in its payments and that the plaintiff might have declared the defendant's interest forfeited by reason of such default. Such default and forfeiture could be waived by plaintiff. The execution of the contract to buy the interest of defendant for \$1,500 was a sufficient waiver of the right of plaintiff to declare the forfeiture. There is no merit in the claim that the contract was without consideration. The defendant was in possession of the greater part of the land, holding under the agreements aforesaid. In consequence of this contract of plaintiff to repurchase, defendant gave the possession to plaintiff, and it has ever since retained possession of all the lands. The yielding of possession constituted a sufficient consideration for the contract. Indeed, the mutual stipulations of the parties (that is, the actual conveyance in escrow by one, and the promise by the other to pay the price), both being valid, constituted a sufficient consideration. *Siddall v. Clark*, 89 Cal. 321, 26 P. 829."

From the same opinion we also quote the following words as applying to this case:

"The transaction was, in effect, an agreement to rescind the previously executed agreements of sale and to limit and settle the amount to be restored to the defendant as a consequence of such rescission."

In the case of *Anderson v. Adler*, 42 Cal. App. 779, 184 P. 42, it is said:

"A contract in writing may be altered by a contract in writing, or by an executed oral
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agreement, and not otherwise.' Civ. Code, § 1698. An executed agreement is one the terms of which have been fully performed. *Henehan v. Hart*, 127 Cal. 656, 657, 60 P. 426. When, therefore, the trial court, on sufficient evidence, found the existence of an executed oral contract modifying the terms of the original lease as to the rent, and further found that it had been fully performed, it finally settled the issues of this case."

In *Miles v. Bybee*, 59 Cal. App. 614, 211 P. 251, it is said:

"The case came on for trial in May, 1921. The court made findings that the representations made by defendant Bybee were true, and that the plaintiff was entitled to take nothing from the defendants Bybee or Roddle, but rendered a judgment against Zadow in the sum of \$600. From this judgment Zadow appeals. The result at which the court thus arrived is explained as follows: At the trial it was shown in evidence that the restaurant property was held in possession by defendant Bybee under a lease contract from defendant Zadow, under which, upon the completion of certain payments, Zadow agreed to convey the property to Bybee; that after the plaintiff had given his notice of rescission, to wit, about the 1st of January, which was at least 10 days after the commencement of this action, the plaintiff delivered the key of the restaurant premises to Zadow under an arrangement whereby Zadow was to sell the property and out of the proceeds repay to the plaintiff the money which he had paid for the restaurant; that on or about April 20, 1921, Zadow made a sale, and received from the purchaser the sum of \$600, together with a note for \$700. In view of these facts, the court, at the time of its decision, permitted the plaintiff to file 'an amended and supplemental complaint,' 'to conform to the proof,' in which these subsequent transactions were set forth. Thereupon the court made its findings, in which, after making certain allowances to Zadow, arising out of circumstances which we find it unnecessary to discuss, it determined that the plaintiff was entitled to judgment against Zadow for said sum of \$600. From the foregoing it is manifest that, although the plaintiff was not entitled to recover anything upon his original cause of action, he obtained judgment against Zadow by substituting him as the principal defendant on a new cause of action arising out of a contract made between him and the plaintiff after the commencement of this action. This is a totally different cause of action from that upon which the case went to trial."

The cause of action mentioned in the closing sentence of the above quotation is the cause of action in this case, and it is upon that same cause of action that the trial court herein gave judgment for \$575.

In our opinion the findings of the court below are sufficient to cover the issues upon which any evidence was given, and are warranted by the evidence, except as to the \$100 commission; therefore the findings and judgment below are ordered modified to show an allowance for a commission of \$100, and

judgment therefore entered for \$475 and interest and costs.

Judgment, as modified, affirmed.

We concur: WORKS, P. J.; THOMPSON, J.

87 Cal. App. 414

BRENNEMAN v. LANE et al. (Civ. 4535.)★

District Court of Appeal, Second District, Division 2, California. Dec. 9, 1927.

Rehearing Denied Jan. 6, 1928. Hearing Denied by Supreme Court Feb. 6, 1928.

1. Brokers ⇨42—Unlicensed broker, procuring exchange of property through escrow, who prior to consummation of escrow procured license, was entitled to commission (St. 1919, p. 1259, § 20).

Where broker was to receive commission on consummation of escrow for exchange of real property, and at time of undertaking to further work of principal he was not licensed, as required by St. 1919, p. 1259, § 20, but subsequently, prior to the consummation of the escrow, he received broker's license, *held*, that broker would not be deprived of commission by reason of the statute, since it only requires broker must be licensed at time cause of action arises.

2. Brokers ⇨75—Where broker was to receive commission on exchange of realty on consummation of escrow, mere recording of deeds was not such consummation.

Where broker was to receive commission on consummation of escrow for exchange of real estate, mere recording of deeds passing title was not consummation of escrow, entitling agent to commission.

3. Escrows ⇨5—Escrow holder has reasonable time to disburse money, time not being specified.

Where money is to be paid through escrow, and no time is specified for escrow holder to disburse money, he has reasonable time to do so.

4. Frauds, statute of ⇨144—Where agent procured services of broker and principal accepted services, principal was estopped to assert agent's lack of written authority (Civ. Code, § 1624).

Where principal, through agent, procured services of broker for the real estate transaction for which broker was to receive commission, and principal accepted benefits of broker's services, principal was estopped to assert that under statute of frauds (Civ. Code, § 1624) he had not authorized agent in writing to sign broker's authority.

Appeal from Superior Court, Los Angeles County; Pat R. Parker, Judge.

Action by F. W. Brenneman against C. M. Lane and another. From a judgment for defendants, plaintiff appeals. Reversed.

D. Howard Painter, of Los Angeles, for appellant.

R. W. Richardson, of Los Angeles, for respondents.

VALENTINE, Justice pro tem. This action was brought by the plaintiff to recover the sum of \$3,250 for commissions alleged to be due under a contract by defendants. The evidence shows that in January, 1922, and for some time thereafter, the defendant Lane was the owner of a large apartment house in Hollywood, known as the Hillview Apartments. Through his agent, the defendant Norman, he had contracted an exchange with one J. M. Neeland for orchard property in the Sacramento valley, and for a lot in the Morris Vineyard tract on Hill street, Los Angeles, called the Neeland lot. The transaction between Lane and Neeland was in escrow, but could not be consummated unless Neeland and Lane in some manner raised \$30,000. In January, 1922, in personal interviews had between the plaintiff and the defendants, plaintiff's services were enlisted to attempt in some way to raise that sum of money. After negotiations with defendant Lane, the plaintiff found a man by the name of A. Otis Birch, who was willing to exchange a lot that he owned in Los Angeles city at First and Hill streets, called the Birch lot, for the Neeland lot, and advance in the transaction \$35,000. Plaintiff had many interviews with the defendant parties in interest, and finally Birch's \$35,000 went into escrow, and the transaction was later consummated.

The two questions raised on this appeal are: (1) Whether plaintiff had complied with the requirements of section 20 of the Real Estate Brokers' Act (Statutes of 1919, p. 1252), and whether he was a duly licensed broker at the time his alleged cause of action arose; and (2) whether the defendant Norman was authorized as agent to bind his codefendant Lane, by the agreement which he made with plaintiff for the payment of commissions to the latter.

[1-3] As to the first point, plaintiff was to receive \$3,250 through escrow when certain property described in said escrow "is actually received"—i. e., "deeded to C. M. Lane, his representatives or assigns"—unless said escrow failed "for any other reason" and should "not be consummated." Plaintiff's cause of action did not finally "arise" until all of the above conditions had been met. It is virtually conceded that all the conditional matters occurred except the last; i. e., that the escrow should not "fail" and should be "consummated." The trial court found that the cause of action herein arose June 30, possibly basing this finding upon the evidence that on that date, or on June 29, the deeds were recorded. Non constat but that the escrow might still "fail" and not be "consummated." This finding seems erroneous, as being based on a mere conclusion of the escrow clerk.

The mere passing of title by the recording of the deeds was not the only condition, but the payment of the commission was conditioned upon the escrow being actually consummated, and the amount was to be paid only through escrow. Therefore, if the plaintiff had brought his action on the 30th day of June against the defendants for recovery of the commission, it would have been premature.

Some of the checks for disbursements of money were not written up until July 3, and plaintiff testified that he was then told by the escrow clerk that they were waiting to hear from San Bernardino, where one of the properties was situated, and that the escrow was not then ready to close. Further, the money was only to be paid through escrow, and therefore, since no time was specified as to when the escrow holder should disburse money, the escrow holder had a reasonable time within which to make up his accounts, write his checks, and pay it over. So that, without doubt, plaintiff's alleged cause of action did not arise until after June 30. So far as this plaintiff was concerned, undoubtedly on July 3, after the defendants attempted to repudiate their contract and the escrow holder decided to act upon their instructions not to comply with the order for payment of plaintiff's commissions, and notified plaintiff to that effect, the plaintiff had a cause of action. But it was contingent under the terms of the agreement upon the "consummation" of the escrow. The evidence as to the exact date on which the escrow may be deemed to have been consummated is not clear nor conclusive, but it establishes that it was consummated subsequent to July 3, the date on which the plaintiff received his license, and, further, that the escrow did not "fail," and therefore that at the time plaintiff's cause of action arose he was a licensed broker. The amended complaint was verified on July 26, 1923, at which time plaintiff's cause of action had accrued, and he had received his license. Respondents cite *Houston v. Williams*, 53 Cal. App. 267, 200 P. 55, but, so far as that case applies to the case at bar, it only lays down the doctrine that plaintiff must be a duly licensed broker at the time the alleged cause of action arises.

[4] The other point raised on this appeal is as to defendant Lane's liability under the contract, notwithstanding defendant Norman was not authorized *in writing* to sign it on Lane's behalf. Among other things, this contract provides "for your [plaintiff's] services rendered in this transaction, I hereby agree, for myself and for C. M. Lane, to pay to you

the sum of \$3,250, which is to be your fee in full for your services, said commission to be paid through escrow." The evidence establishes that Norman was the agent of Lane:

"Q. He (Norman) acted for you in this escrow transaction, did he not? A. With my approval.

"Q. You mean you gave approval of the instructions given then? A. No; I didn't say that; it was with my approval that he should act as my agent."

The evidence shows that Lane knew that Norman purported to act as his agent in contracting to pay plaintiff a commission; that Lane permitted Norman to act and to hold himself out as his authorized agent in these transactions, and that he knew that plaintiff, on the supposition and in the belief that he was duly authorized, was exerting himself to bring about the consummation of the transaction, and he (Lane) knew at least of some of the services he was rendering to this end; that Lane knew that plaintiff was relying upon Norman's authority to instruct the escrow holder to pay plaintiff's commission, and also that Lane accepted the benefit of these services rendered by plaintiff, and defendant Lane is estopped to deny his authority. Defendant Lane cannot now maintain the unjust and unwarrantable defense, under the statute of frauds (Civ. Code, § 1624), that he did not in writing authorize Norman, his agent, to sign plaintiff's authority.

Respondents attempt to distinguish *Blood v. La Serena Land & Water Co.*, 134 Cal. 361, 66 P. 317, by pointing out that the estoppel there was based upon fraud, which is not an element in the case at bar. It is true that it was not pleaded in the case at bar, but the court says in the cited case (page 362 [66 P. 317]):

"He [plaintiff] successfully makes out a *prima facie* case, and may, *without pleading it*, use the evidence in estoppel to prevent the corporation from maintaining what, as against its acts, would be an unjust and unwarranted defense."

The court further says (page 367 [66 P. 319]):

"* * * The law does not allow a corporation to retain the benefits which it has received from the contract, and escape liability upon it."

And it cites authorities upon this proposition, which is elementary.

The judgment is reversed.

We concur: WORKS, P. J.; THOMPSON, J.

87 Cal. App. 402

JOHNSON et ux. v. GRANT et al.
(Civ. 6055.)

District Court of Appeal, First District, Division 2, California. Dec. 9, 1927.

1. Mortgages ⚡356—Publication of notice of sale under trust deed in newspaper of general circulation in county held sufficient, where no local paper was shown to exist (Code Civ. Proc. § 692).

Publication of notice of sale under trust deed in newspaper of general circulation in county was sufficient, under Code Civ. Proc. § 692, where no paper of general circulation was shown to be published in city and township where property was situated.

2. Mortgages ⚡369(3)—Sale to trust deed beneficiary on purchaser's default in payments for less than due beneficiary on contract held on good consideration.

Where, on a purchaser's default in payments for land bought under contract, the trustee, holding a deed of security for the vendor, sold the land as the contract authorized, and it was purchased by the beneficiary himself, the original vendor, for a sum less than was due such beneficiary on the contract, *held*, that his purchase was for a good consideration as respects right to set aside trustee's deed.

3. Mortgages ⚡369(7)—That, on trustee's sale on purchaser's default in contract payments, trustor, original vendor, bought through agent, held not evidence of fraud between trustee and trustor.

Where purchaser, under a land contract, defaulted in his payments, and the trustee of such land for the seller, pending completion of payments, sold the land, as provided by contract between vendor and purchaser, the original vendor being the purchaser at such sale, *held*, that the fact that the purchaser at such sale bought through an agent, and was not personally present, was not evidence of fraud between the trustee and the trustor, the original vendor.

4. Appeal and error ⚡173(2)—That trustee's sale was void because outcry not made in seeking bids, held unavailable on review, where not in issue.

That a land trustee's sale, held because of the purchaser's default in payments on his contract, was void because no outcry was made in the trustee's calling for bids at the sale, *held* not available on review, where such matter was not put in issue.

5. Appeal and error ⚡694(1)—Reviewing court need not examine findings attacked as unsupported by evidence, where evidence not shown.

The reviewing court is not required to examine findings attacked as not supported by evidence, where such evidence as there was is not set out.

Appeal from Superior Court, San Mateo County; George H. Buck, Judge.

Action by Charles F. Johnson and wife against Margaret Grant and another. Judgment for defendants, and plaintiffs appeal. Affirmed.

Harry S. Whitthorne, of San Francisco, for appellants.

Alfred J. Hennessy, of San Francisco, for respondents.

NOURSE, J. Plaintiffs sued to quiet title and to set aside a trustee's deed on the grounds of fraud. Defendants had judgment, from which the plaintiffs have appealed upon a typewritten transcript.

On March 11, 1918, plaintiffs purchased from defendant Vanoch a piece of property situated in Daly City San Mateo county, the purchase price of which was fixed at \$3,000; \$100 was paid at the time, and the plaintiffs executed their promissory note, secured by a trust deed for the payment of the balance at the rate of \$25 a month and interest upon the deferred payments. This deed named the defendant Grant as trustee and the defendant Vanoch as beneficiary. It was duly recorded and payments made as called for therein until February 9, 1921, at which time the plaintiffs were in default, in principal and interest, in the sum of \$150. This amount was paid on March 13, 1921, but, on August 28, 1921, the plaintiffs were again in default, owing \$150 on the principal and \$89.50 in interest. At this time the defendant Vanoch caused to be recorded in the office of the county recorder a notice of default and election to sell. Notice of sale was given by publication and posting, and a sale of the property was had at public auction on January 14, 1922, from the steps of the city hall at Daly City, at which time, no bidders appearing, the property was sold to defendant Vanoch for the sum of \$500. On February 4, 1922, said defendant executed and delivered a deed of gift of the property to the defendant Grant. During all this time the plaintiffs lived on the premises, and, after the transfers above noted, they remained upon the premises, paying to defendant Grant the sum of \$25 per month, which she claimed was done in accordance with an arrangement with the plaintiffs that these payments should be accepted as monthly rentals. This arrangement continued until June, 1922, when plaintiffs engaged one Sheehan as their agent for the purpose of making these monthly payments to the defendant Grant, and, in accordance with this arrangement, payments were made by Sheehan monthly from June, 1922, until July, 1923, and in each case receipts were given by Sheehan to plaintiffs acknowledging such payments as rentals and accepted by them without protest. On July 1, 1923, the plaintiffs ceased to make any payments for the use of the premises, and some months thereafter plaintiff Charles F. Johnson took

fourteen of these rent receipts to Sheehan, and had him alter them by striking out the word "rent" and inserting the word "payments."

On this appeal the appellants attack the judgment on the ground that this trustee's sale was void because publication thereof was not made in a newspaper published in the township in which Daly City is located; because the sale although purporting to have been made to the beneficiary for the consideration represented by the indebtedness due her, was in effect made to the trustee herself; and because the trustee did not publicly announce the sale and call for bids. In addition to this, appellants assert that fifteen of the trial court's findings are not sustained by the evidence, but none of the evidence is printed, and no argument is made in support of this claim.

The respondents have met each attack made by the appellants, and have argued that, notwithstanding any claim of irregularities in the proceeding leading up to the sale, the appellants are estopped from attacking the title of the respondent Grant by their action in accepting and acknowledging her as the owner of the property from the 1st day of February, 1922; by agreeing to continue to occupy the premises as tenants; and by paying the respondent Grant monthly rentals therefor. The trial court found that the appellants ratified the sale and attorned to respondent Vanoch on February 1, 1922, and did the same in respect to respondent Grant on March 1, 1922, and continued to pay rent either personally or through their agent to respondent Grant until July 1, 1923.

[1] The notice of sale was published in the Redwood City Democrat, a newspaper which the trial court found to be one of general circulation in the county of San Mateo. This was sufficient under section 692, Code of Civil Procedure, unless a newspaper of general circulation was printed and published in the city and township in which the property was situated. There was no showing that any paper was printed or published in that city or township, and the finding of due publication is, therefore, not open to attack.

[2, 3] The trial court found upon competent evidence that the sale was made to the beneficiary for the consideration of \$500. As this sum, and much more, was due her under the deed of trust, a good consideration passed, and the fact that the beneficiary was not personally present at the time and place of sale, but was represented by an agent, is not evidence of either fraud or collusion between the trustee and the beneficiary.

[4] Appellants argue that the trustee's sale was void because she did not make public outcry in announcing the sale and calling for bids. This is a matter which was not put in issue; the only claim of invalidity pleaded

being the want of proper publication and posting of the notice of sale. Upon the issues raised, the recitals in the deed that the trustee exposed the property for sale at public auction to the highest bidder are sufficient to support the finding that the sale was fairly and legally conducted.

[5] We are not required to examine any of the fifteen findings which are attacked merely by the statement that they are not supported by the evidence. *McGee v. Hoffman*, 46 Cal. App. 508, 189 P. 298.

We should say, however, that the finding that the appellants ratified the sale and acknowledged respondents' title by accepting them as landlords, and paying them rent for the premises over a period of about two years, is supported by competent evidence, as is the conclusion that the appellants, by their own fraud, practiced upon the court and upon the respondents, are not in equity with clean hands.

Judgment affirmed.

We concur: KOFORD, P. J.; STURTEVANT, J.

87 Cal. App. 344

SHELLEY v. BOARD OF TRADE OF SAN FRANCISCO et al. (Civ. 6005.)

District Court of Appeal, First District, Division 1, California. Dec. 8, 1927.

1. Payment ~~§~~82(2)—Payment made under improper demand, without invoking legal remedies, is a "voluntary payment," and cannot be recovered (Civ. Code, § 1040).

One who knowingly submits to a demand by paying that which is demanded instead of invoking legal remedies makes "voluntary payment," and cannot recover money so paid, even though demand may have been improper, under Civ. Code, § 1040.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Voluntary Payment.]

2. Payment ~~§~~87(5)—Payment made under protest to recover property unlawfully taken may be recovered, if legal process to recover property would cause loss.

Where person making unlawful demand obtains possession of another's property, payment made by owner under protest to recover property will be held compulsory, and may be recovered back, notwithstanding general rules as to voluntary payments not being recoverable.

3. Payment ~~§~~82(3)—Partners' delivery to adjustment board of money to cover board's expenses in adjustment of creditors' accounts, held "voluntary payment" and not recoverable, notwithstanding agreement to bear expenses was without valid consideration (Civ. Code, § 1040).

Though it was originally agreed between partners in financial difficulties and their cred-

itors that expenses of adjustment of accounts were to be borne by creditors, partners' delivery to adjustment board of sum of money realized on sale of assets to be distributed to creditors and "to be applied by you in payment of your expenses," under another agreement by which expenses were to be paid by partners, constituted voluntary payment under Civ. Code, § 1040, which partners were not entitled to recover back, notwithstanding their agreement to pay expenses of adjustment was unsupported by valid consideration.

4. Appeal and error ⚡1071(5)—**Judgment will not be reversed for findings outside issues if findings within issues support judgment.**

If findings of fact within issues presented by the pleadings are sufficient to support the judgment, judgment will not be set aside because there are also findings made outside of issues, and such finding will be disregarded as immaterial.

5. Partnership ⚡216(2), 217(3)—**In action to recover deposit for expenses, findings that partners had proceeds of sale paid to adjustment board on basis of statement of creditors' accounts held sustained by evidence and within issues.**

In action to recover moneys paid Board of Trade for its expenses in settling accounts of partnership's creditors, findings that Board of Trade made full and complete statement as to amount of claims of creditors and expenses incurred by it, and that payment of moneys realized on transfer of partners' assets was made to Board of Trade with knowledge of situation, *held* supported by evidence and within scope of issues.

6. Trial ⚡396(1)—**Facts found outside issues logically deduced from other facts in issue are authorized.**

Facts found by court which are outside of issues framed are nevertheless authorized, where they are deductions from other facts found which are directly in issue.

7. Appeal and error ⚡1071(1)—**Inconsistent findings do not warrant reversal unless irreconcilable and material.**

Court will not reverse judgment on ground that findings are contradictory or inconsistent, unless it appears that findings cannot be reconciled and that they are so material that it cannot be determined upon which finding court relied for judgment.

8. Partnership ⚡218(4)—**Findings as to different agreements for adjustment of creditors' accounts held not irreconcilable, where intermediate finding showed agreement had been modified.**

Finding that agreement was made for creditors' payment of expenses for adjustment of partners' accounts *held* not to conflict with subsequent finding that different agreement was made whereby expenses were to be borne by partners, in view of intermediate finding that first mentioned agreement had been modified.

9. Partnership ⚡218(4)—**Finding that partners were to turn over money to creditors held not inconsistent with finding that such deposits covered expenses of adjustment of accounts.**

Finding that money received from operation of stores was to be turned over to Board of Trade to pay partnership's creditors 50 per cent. of gross receipts, the remainder to be used for operating expenses and replenishing stock, *held* not to conflict with finding that all expenses should be paid out of moneys so received, in partners' action to recover moneys paid to Board of Trade for expenses in adjusting accounts of creditors.

10. Trial ⚡398—**Trial court's findings should be liberally construed to avoid irreconcilable conflict.**

Findings of fact of trial court are to be liberally construed in support of judgment and read and considered together, and, if possible, should be reconciled so as to prevent any conflict on material points.

11. Appeal and error ⚡1071(6)—**Absence of finding on material issue warrants reversal only where judgment cannot otherwise be supported or where such finding would require different judgment.**

Failure to find on material issues warrants reversal only if judgment cannot be supported without such a finding or such finding if made would be favorable to appellant and require a different judgment.

12. Trial ⚡397(5)—**Finding is rendered immaterial, where logical conclusions from other findings determine issue.**

Finding which may seem material may be rendered immaterial by other findings which cover the issue by reciting ultimate or probative facts whose logical conclusions determine particular issue involved.

13. Trial ⚡397(5)—**Omitted finding on issue as to assignment of claim for recovery of money paid was immaterial, where court found assignee had no claim and that no overpayment had been made.**

Omission of finding that partner transferred to associate all claims and demands to recover moneys paid for expenses of adjusting firm accounts was rendered immaterial by finding that plaintiff, to whom assignment was made, had no claim or demand against defendants, that no money was turned over in excess of amount owed, and that defendants did not withdraw or retain any moneys.

14. Trial ⚡397(5)—**Omission to find that defendants had not paid moneys owed to plaintiff held immaterial under finding that no money was ever due.**

Court's omission to find on issue raised in action to recover money paid as to whether defendants had previously paid plaintiff all amounts owed was rendered immaterial by finding that no money was ever due.

15. Trial ☞397(5)—Finding that partners failed to turn over excess amount on adjustment of partnership debts held to sufficiently cover issue of overpayment under modified agreement to pay expenses.

In action to recover money paid, finding that partners did not turn over to Board of Trade, sued as defendants, any sum in excess of amount owing defendants and creditors, sufficiently covered issue raised that excess payment had been made, where original agreement of plaintiff and copartner for adjustment of accounts by which creditors were to bear expenses was subsequently modified under agreement calling for payment of expenses by debtors.

16. Pleading ☞126—Denial defendants received any sum to use of partners or either of them held not admission that defendants received money from both partners.

In action to recover money paid by partnership on adjustment of firm debts, denial in answer that defendants received sum named "or any other sum or amount" to the use of plaintiff or his partner "or either of them" held not to involve admission that defendants received money from both partners for the use and benefit of defendants.

17. Pleading ☞433(3)—If answer involved negative pregnant as to defendants' receipt of overpayment, defect was cured by finding that defendants were not overpaid.

If defendants' denial in action to recover moneys received for plaintiff's use constituted negative pregnant admitting receipt of money, such objection was removed by finding that no sum in excess of amount due was paid to defendants.

18. Partnership ☞217(3)—Evidence held to sustain finding that plaintiff had no claim against adjustment board for overpayment of money on adjustment of partnership debts.

In action to recover alleged overpayment on adjustment of partnership debts, evidence held to sustain finding that plaintiff was not the owner or holder of any claim or demand against adjustment board.

19. Appeal and error ☞1071(3)—That finding is unsustained by evidence is immaterial, where remaining findings are sustained and support judgment.

Fact that finding is not sustained by evidence is immaterial, where remaining findings are sustained by evidence and are sufficient to support the judgment.

20. Partnership ☞178—Contract for adjustment of partnership debts held fully executed by payment of creditors, reimbursement of adjusting agency and creditors' dismissal of attachment suits, notwithstanding partners failed to receive canceled notes or receipts (Civ. Code, § 1661).

Where agreement to transfer proceeds of sale of business for payment of firm creditors was carried out by payment of proceeds for creditors and reimbursement of adjustment agency and by dismissal of attachment suits, contract was fully executed under Civ. Code, § 1661, and fact that partners had not received

canceled notes or receipts was immaterial, especially where notes and canceled checks were not demanded.

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Action by Joseph Shelley against the Board of Trade of San Francisco, a co-operative association, and another. Judgment for defendants, and plaintiff appeals. Affirmed.

Cooley, Crowley & Gallagher, of San Francisco, for appellant.

Max Mayer, Joseph Kirk and Jefferson E. Peyser, all of San Francisco, for respondents.

CAMPBELL, Justice pro tem. In February, 1922, the appellant, Joseph Shelley, and his brother, Sam Shelley, were copartners and were engaged in operating "army stores" in San Francisco, Fresno, Eureka, Pittsburg, and Stockton, Cal., and at Reno, Nev. They owed large sums of money, and were in financial difficulties, and their creditors were uneasy. Joseph Shelley and his brother, Sam Shelley, feared they would be pressed by their creditors. Accordingly, they conferred with Mr. Elkus, a member of the Board of Trade of San Francisco, about the situation, and Mr. Elkus arranged a meeting of the Board of Trade, which was called for February 18, 1922, and at which time Mr. Elkus submitted a signed statement which he obtained from the Shelleys, showing their assets and liabilities. At a subsequent meeting of the Board of Trade on February 24, 1922, the committee of investigation having reported, it was agreed that an extension of time be granted for the payment of the Shelleys' obligation, payments to be made at the rate of \$15,000 per month, the Shelleys to execute interest-bearing notes to the creditors, and it was then agreed that the creditors were to stand all the expenses, and on March 8, 1922, the fact that the creditors were to stand the expenses was stated in a letter written by respondent G. W. Brainard, secretary of the Board of Trade, to the creditors, stating: "The expenses of the adjustment are to be borne by creditors." It was also agreed that all moneys received by the Shelleys in the conduct of their business were to be turned over to the Board of Trade for distribution to the creditors, except that 50 per cent. of the gross receipts should be used for operating expenses and replenishment of the stocks of merchandise, if necessary. It was subsequently learned by written confessions from the managers of the stores on Mission street, San Francisco, and at Stockton, which were given to Adjuster Adelstein of the Board of Trade, that Joseph Shelley had not kept faith with the committee of the Board of Trade and had withheld sums probably amounting to several thousand dollars. At the meeting of

the Board of Trade on April 10, 1922, this matter was reported, and a demand was made of Joseph Shelley and Sam Shelley to effect a transfer of all of their assets for the benefit of the creditors or an attachment would be levied. This being refused, an attachment was levied on April 12, 1922, on the San Francisco and Reno stores. Thereafter Sam Shelley, acting for and on behalf of the copartnership, at a meeting of the Board of Trade on April 17, 1922, stated that he had been able to obtain money from one J. Gollober with which to pay the creditors. This was agreeable to the committee, provided all the expenses incurred by the Board of Trade in the administration of the settlement of this matter be paid by the Shelleys. Objection was made by Sam Shelley to standing the expense, but, after discussion, it was agreed between all parties that the regular Board of Trade charges, amounting to 2 per cent., should be borne by the creditors, but that all other expenses should be borne by the Shelleys. Both the Shelley brothers and the creditors proceeded to act upon this agreement, and subsequently, on April 20, 1922, a full written statement of account owing the creditors and containing the expenses referred to and all other matters (Defendants' Exhibit 2) was delivered by the Board of Trade to the attorneys representing and acting for the Shelleys and J. Gollober, to whom the Shelleys were to execute a bill of sale in consideration of his paying the outstanding obligations. After the Shelleys had examined the statement and agreed to its contents on April 24, 1922, Mr. Jaffa, one of the attorneys representing and acting for the Shelleys and Mr. Gollober sent the money advanced by Mr. Gollober to the Board of Trade by letter, stating that the money was to be distributed to the creditors and for expenses as per statement of April 20, 1922, which included the items of expense here in dispute. The letter from Attorney Jaffa, addressed to the Board of Trade, which was admitted in evidence, is as follows:

"I hand you herewith the sum of thirty-six thousand four hundred seventy 85/100 dollars, to hold in escrow upon the following terms and conditions:

"1. No disposition whatever of said sum shall be made nor shall any steps in this transaction be taken until Tuesday, the 25th day of April, 1922, and then only if no creditors of said Joseph Shelley and Samuel Shelley shall appear and contest the sale from said Joseph Shelley and Samuel Shelley to Julius Gollober. Should said contest be made, the said sum is to be returned to the undersigned.

"2. The attachment in the action in the second judicial district court of Nevada, in and for the county of Washoe, entitled G. W. Brainard v. Joseph Shelley and Samuel Shelley, and numbered therein 18110, and the attachment in the action in the superior court of the state of California, in and for the city and county of San Francisco, entitled G. W. Brainard v. Shelley

Bros. et al., and numbered therein 124984, and each of them, shall be released, and the said actions and each of them shall be dismissed and the said promissory notes upon which the said actions were based shall be marked 'Canceled' and delivered to the said Joseph and Samuel Shelley.

"3. Upon the completion of said acts and each of them, the said sum handed you herewith is to be distributed by you to those creditors listed on your statement of April 19, 1922, and the balance of said sum is to be applied by you in payment of your expenses incurred in connection with the Shelley brothers as indicated on your statement of April 20, 1922, and you are to furnish said Shelley brothers with receipts in full from the said creditors and each of them. Any balance remaining is to be returned to the undersigned."

The third condition in the letter is that:

"Said sum handed you herewith is to be distributed by you to those creditors listed on your statement of April 19, 1922, and the balance of said sum is to be applied by you in payment of your expenses incurred in connection with the Shelley brothers as indicated in your statement of April 20, 1922, and you are to furnish said Shelley brothers with receipts in full from said creditors and each of them. Any balance is to be returned to the undersigned."

Subsequently all of the material conditions set forth in the letter were complied with by the Board of Trade.

This action was brought to recover the sums listed in the statement of April 20, 1922, as costs; it being alleged that \$2,977.38 in excess of the amount distributed to the creditors was paid by the Board of Trade. Judgment went for defendants, and from this judgment plaintiff has appealed.

Appellant urges the following points on this appeal: (1) The agreement made by Sam Shelley on April 17, 1922, was void because based on past and gratuitous consideration; (2) findings were made outside the issues; (3) findings were made which are contradictory or inconsistent; (4) failure of the court to find on material issues; (5) findings do not support the judgment; and (6) the evidence does not support the findings.

Appellant in his opening brief has cited cases to support his first contention that the agreement to pay the creditors and the expenses of the Board of Trade, which he admits was in fact executed, was void because based on a past and gratuitous consideration. These cases merely support the point that the promise to pay for past services where the obligation did not previously exist is nudum pactum, and therefore unenforceable. While unquestionably this is sound law, it has no application here. This is not a suit in which the Board of Trade is attempting to enforce a promise on the part of the Shelley brothers to pay for the services rendered or the expenses laid out. The promise to pay in this case is already executed, and the ques-

tion therefore is: Can plaintiff now recover back the money so paid?

[1-3] The payment made in pursuance of the agreement covering the expenses in question was a voluntary payment, and under the law cannot be recovered. The principle is elementary that, if a person knowingly submits to a demand, however improper, by paying that which is demanded instead of invoking the remedy which the law affords him against such demand, such payment is voluntary, and the recovery thereof cannot be had. *McTigue v. Arctic Ice Cream Supply Co.*, 20 Cal. App. 708, 130 P. 165. The money covering the expenses was not paid under protest, nor are there any circumstances which take the present case out of the general rule stated. The amount in question was paid without any mistake on the part of Shelley brothers, who were fully cognizant of every fact and circumstance preceding the making of the payment, and such payment was freely and voluntarily made and duly authorized by Shelley brothers, being made by their attorney. "A voluntary transfer is an executed contract, subject to all rules of law concerning contracts in general; except that a consideration is not necessary to its validity." Civil Code, § 1040. Here the money was not paid under duress, but willingly and without protest. The general rule that recovery cannot be had of a voluntary payment is of course "subject to the qualification that, in cases where the person making the demand obtains possession of the property of another, without first having had resort to judicial proceedings to test the validity of his demand, payment under protest will be considered compulsory, and the money so paid can be recovered back, if the demand be unlawful; and the delay necessarily incident to the recovery of the property by legal process would result in serious loss to the owner of the property." *McTigue v. Arctic Ice Cream Supply Co.*, supra. In *De Graff v. County of Ramsey*, 46 Minn. 319, 48 N. W. 1135, in a probate proceeding where the court advised an executor upon filing an inventory and appraisal that under a certain statute it was necessary, before proceeding further in the administration, he should pay into the county treasury \$1,000 and file in the probate court a receipt therefor, and thereupon without objection the executor made such payment, the court says:

"The court below held that, as the plaintiff paid the money voluntarily, and without objection, he cannot recover. * * * It may be stated as a general rule that, where an unfounded or illegal demand is made upon a person, and the law furnishes him adequate protection against it, or gives him an adequate remedy, in the premises, if he pay what is demanded, instead of taking the protection the law gives him, or the remedy it furnishes, he is to be deemed to have made the payment voluntarily, and he must abide by it. * * * In the *Mearkle Case*,

which is more nearly like this than any other cited, the circumstances and condition of the estate were such that the court could see great and irreparable injury would accrue to it while the executor was seeking his legal remedy, and the payment was made under protest, so that not only the payor, but the payee also, understood that the former claimed the payment to be involuntary. We do not mean to say that in a clear case of coercion or duress a protest is necessary, or that it would be sufficient without circumstances of coercion; but, if there be doubt, under the circumstances, that the payment is voluntary, it may be taken into account in determining the question that the payor declared as a part of his act that he paid involuntarily."

Here, as has been said, there was no duress. The attachment suits started were upon claims admittedly due, and because of fear that unless the creditors enforced their claims the assets of Shelley brothers might become depleted. The money was paid without protest, being willingly tendered under certain conditions contained in the letter in which the remittance was inclosed, and was, we think, a voluntary payment.

The cases cited by appellant in his reply brief on this question are not in point, as the facts are not analogous to the facts here. In *Treat v. Craig*, 135 Cal. 91, 67 P. 7, a party secondarily liable sought to recover a sum paid under a judgment from the party primarily liable. This presents a case of subrogation, which is not involved in the present case. In *Kaiser v. Barron*, 153 Cal. 474, 95 P. 879, the question involved the refusal of the court to recall an execution issued for costs irregularly included in the judgment, and *Rowland v. Watson*, 4 Cal. App. 476, 88 P. 495, is a case where money was exacted under circumstances which savored of duress, and furthermore the payment was made under protest.

[4-6] In regard to the second point urged, that "findings were made outside the issues," it may be said:

"If the findings of fact that are within the issues presented by the pleadings are sufficient to uphold the judgment, it will not be set aside because there are also findings outside of these issues. These latter findings are to be disregarded as immaterial." *Firebaugh v. Burbank*, 121 Cal. 186, 188, 53 P. 560.

In *Crescent Lumber Co. v. Larson*, 166 Cal. 168, 171, 135 P. 502, 503, the court says:

"The rule just stated [referring to the fact that a finding outside the issue must be disregarded] is subject to the qualification that a finding may be considered where the issue, though not formally raised by the pleadings, was tried in the court below without objection."

See, also, *McDougald v. Hulet*, 132 Cal. 154, 64 P. 278; and in *Semple v. Cook*, 50 Cal. 26, 29, the court uses this language:

"It is useless to come here to seek a reversal of a judgment upon the findings alone, unless

they actually negative all the other facts involved by the pleadings and which *might* exist consistently with those found, or unless it distinctly and affirmatively appears that the facts as found constitute *all* the facts found in the case."

Under the authorities cited, findings numbered 13 and 14 and the latter half of finding No. 10, complained of as made outside the issues, are proper findings. Finding 13 is a finding that subsequent to April 17, 1922, and prior to May 24, 1922, a full and complete statement of all moneys received, expenses paid, and disbursements made by the Board of Trade was delivered to J. Gollober and the plaintiff; that, after the receipt of this complete statement and after the transfer to J. Gollober by the Shelley brothers, there was due and owing to the Board of Trade and the creditors \$36,470.85, which sum included \$1,574.20 expenses incurred by the Board of Trade in the matter. Finding 14 finds that the moneys paid to the Board of Trade were paid by J. Gollober with knowledge of Joseph Shelley and in his presence and after a full and complete statement from the Board of Trade, which included said expenses, and the latter half of finding 10 finds that subsequent to April 17, 1922, Joseph Shelley and Sam Shelley transferred their interest in said business and the property of Shelley brothers and all moneys to which they were entitled from the Board of Trade to J. Gollober.

There is ample evidence in the record received without objection to support these findings. The plaintiff testified that at the time he wrote the letter he had seen a list of the creditors whose claims were filed with the Board of Trade; that he had to have this list to talk to Mr. Gollober; that he had received a statement of the amount of money that the Board of Trade had on hand; that the statement in evidence, Exhibit 2 (statement of account owing creditors and containing expenses), is a statement which was in his possession at the time he made the deal with Mr. Gollober; and that in figuring up with Mr. Gollober and Mr. Jaffa as to the amount of money that would be required to clean up this matter the list of creditors (Exhibit 2) was the basis upon which he acted.

Edward M. Jaffa testified, without objection, that Joseph Shelley and Sam Shelley were at his office on April 24, 1922, at the time this transaction between Shelley brothers, Julius Gollober, and the Board of Trade was completed; that he prepared the necessary documents at that time, including the letter to the Board of Trade, and including a bill of sale and including the letter of April 24, 1922. All of these documents were shown to both Joseph and Samuel Shelley. They both signed the bill of sale. The figure of \$36,460.85 was the amount claimed by the Board of Trade. The witness further testi-

fied that he told the Shelleys the amount of this figure, and they said, in substance, that Julius Gollober could advance that sum of money upon the terms and conditions mentioned in his (Jaffa's) letter to the Board of Trade. Sam Shelley said that "Julius Gollober could and should advance \$36,470.85 to the Board of Trade of San Francisco in accordance with their agreement and in accordance with that letter."

The finding that the Shelleys transferred all their interest in the business and all moneys to Gollober finds support in the bill of sale from Joseph Shelley and Sam Shelley to Gollober (Defendants' Exhibit 4), which recites that, in consideration of \$36,345, Joseph Shelley and Samuel Shelley sell, assign, and transfer all of their interest in those certain stores (naming all the stores owned by them) and in and to all moneys which might become due to them from the Board of Trade to Julius Gollober.

The foregoing is sufficient to support the findings complained of as being outside the issues; furthermore, the facts found, if outside the issues framed, are but logical conclusions from other facts found and which were directly in issue and therefore authorized. *Hunt v. Davis*, 135 Cal. 31, 35, 66 P. 957.

[7-10] There is no merit in the third point that findings were made which are contradictory or inconsistent, for, before the court will reverse a judgment on this ground, it must appear that the findings are absolutely contradictory and cannot be reconciled and that they are so material that it cannot be determined upon which finding the court relied for judgment. In the cases cited by appellant, the findings were absolutely contradictory, inconsistent, and irreconcilable, and further this condition existed with respect to findings which were material to support a judgment.

Appellant contends that findings numbered 4 and 8 are inconsistent, in that finding No. 4 finds that it is true that the agreement set forth in the second cause of action of the complaint was made, but that finding No. 8 finds a different agreement was made. Finding No. 5 finds that the agreement referred to in finding No. 4 was modified, and that it was then agreed by the Shelley brothers that the Board of Trade should retain and be paid all of the expenses of the Board of Trade incurred, and finding No. 8, being subsequent to the findings which found the original agreement and that the original agreement was modified, relates to that second or modified agreement. We do not agree with appellant that there is an irreconcilable conflict between findings numbered 8 and 9. It is clear that finding No. 8 finds that from all money received from the stores there was to be turned over to the Board of Trade, for the purpose of paying off the creditors, at least 50 per cent. of the gross receipts, the remainder to be used for operating expenses and re-

plenishment of the stock, if necessary, while finding No. 9 finds that it was agreed that all expenses incurred and paid in connection with said matter should be paid out of the moneys received by defendants.

In considering the claim that the findings are inconsistent, we adopt the following language from *Haight v. Haight*, 151 Cal. 90, 92, 90 P. 197, 198:

"We must continually bear in mind the well-settled rule that the findings are to be liberally construed in support of a judgment; that all of the findings are to be read and considered together, and, if possible, are to be reconciled so as to prevent any conflict on the material points; and that, unless the conflict is clear and the findings incapable of being harmoniously construed, a judgment will not be reversed on the ground of a conflict in the findings. See *Ames v. City of San Diego*, 101 Cal. 390, 395, 35 P. 1005; *Murray v. Tulare Irr. Co.*, 120 Cal. 311, 315, 49 P. 563, 52 P. 586; *People's Home Sav. Bank v. Rickard*, 139 Cal. 285, 291, 73 P. 858; *Mitchell v. Hutchinson*, 142 Cal. 404, 409, 76 P. 55; *Heaton [Heaton-Hobson Associated Law Offices] v. Arper*, 145 Cal. 282, 285, 78 P. 721."

Appellant next contends that the court failed to find on material issues raised by the pleadings, viz.: That Sam Shelley assigned and transferred to plaintiff his claims and demands against defendants; that defendants have not paid said sum of \$2,977.38 or any part thereof; that prior to the commencement of this suit the Board of Trade paid to plaintiff Joseph Shelley and his brother Sam Shelley all moneys owing them; and that the Shelley brothers turned over to defendants \$2,977.38 in excess of the amount distributed by defendants to the creditors.

[11, 12] The failure to find on material issues is only ground for a reversal, if the judgment cannot be supported without such a finding, or, if such a finding were made, it would be favorable to the appellant and require a different judgment. It is also the rule that a finding which may seem material may be rendered immaterial by other findings which cover the issue, either by recital of an ultimate fact or a finding of probative matter, the logical conclusion of which would be the particular issue claimed to be material. *Blochman v. Spreckels*, 135 Cal. 662, 664, 67 P. 1061, 57 L. R. A. 213; *Patterson v. Rubenstein*, 6 Cal. App. 440, 92 P. 401; *Johnson v. Perry*, 53 Cal. 351, 354; *Robinson v. Placer-ville & S. R. Co.*, 65 Cal. 263, 266, 3 P. 878; *Merrill v. Merrill*, 102 Cal. 317, 319, 36 P. 675; *Sewell v. Price*, 164 Cal. 265, 271, 128 P. 407.

The issues upon which appellant contends there were no findings and which were material issues are immaterial, in view of the other findings made, and further that they are of such a nature that, conceding that, had findings been made in favor of appellant, it would in no way have affected the judg-

ment, and therefore is not ground for reversal.

[13] As to the first material issue upon which no finding was made that Sam Shelley assigned and transferred to plaintiff all his claims or demands against defendants, it may be said that, had a finding been made and assuming it had been made in favor of appellant, it would not have affected the judgment. However, finding No. 3 covers this issue by finding the ultimate fact that it is not true that the plaintiff, ever since the 4th day of June, 1923, was or is the sole owner or holder of any claim or demand against the defendants or either of them, either in the sum of \$2,977.38 or any sum or amount. The ultimate fact is not the assignment but the ownership, the finding as to which was made. Finding No. 6, "that it is not true that the plaintiff and his brother turned over to the defendants the sum of \$2,977.38 or any other sum or amount in excess of the amount owing to the said creditors and the defendants," and finding No. 12, "that the said defendants did not, nor did either of them, withdraw or retain any moneys," eliminate the necessity for any such finding contended for by appellant, for, if there was nothing withheld by defendants belonging to plaintiff, it follows there was no obligation for payment on their part, and such finding contended for by appellant therefore falls within the category of the cases cited, in which the issue becomes immaterial because of other findings.

[14] As to the complaint that the court omitted to find on the issue raised in paragraph IV of the answer, that the Board of Trade, "prior to the commencement of the suit, paid to the said plaintiff Joseph Shelley and his brother Sam Shelley all moneys owing to them," it may be said that the allegation did not stop with the quotation given by appellant, but continues: "That they did fully account to said plaintiff and his said brother, Sam Shelley, of and concerning all moneys received." There is sufficient evidence to show an accounting was made both as to expenses and receipts and all matters pertaining to the transaction, and finding No. 13 is to the effect that no money was ever due and therefore it was unnecessary to pay anything, and the allegation that all moneys owing them were paid is merely a general allegation that "if anything were due," which in this case there did not happen to be.

[15] Appellant finally complains under this assignment that the court failed to find on the allegation of the second cause of action that:

"Settlement in full of said accounts was thereafter and in the month of April, 1922, made with said creditors; that plaintiff and his said brother duly performed all the conditions of said agreement on their part and turned over to defendants the sum of \$2,977.38 in excess of the amount distributed by defendants to said creditors."

Finding No. 6 is to the effect that it is not true that the plaintiff and his brother turned over to the defendants the sum of \$2,977.38 or any other sum or amount in excess of the amount owing to the creditors and the defendants. Appellant contends that finding No. 6 is not a finding on this point, because the agreement set forth in the second cause of action and found by the court to have been made provided only that the money was to be turned over for distribution to the creditors until their accounts were paid. The fact that this agreement was found to have been made does not modify the effect of the second agreement, which was a modification of this first agreement, and which the court found to have been made. It is clear what finding No. 6 means. However, in view of the evidence and the other findings, appellant's contention, if correct, would in no way affect the general judgment.

[16, 17] There is no merit in appellant's assertion that the findings do not support the judgment. Appellant complains under this heading that finding No. 2, based upon the denial to paragraph II of the first cause of action of the complaint, is tantamount to an admission that the defendants received money from both brothers for the use and benefit of both of them. An analysis of this denial seems to negative such contention. The denial reads:

"Denies that the defendants received from the plaintiff or his brother, Sam Shelley, or either of them, the sum of \$1,574.20 or any other sum or amount to or for the use of plaintiff or his said brother, Sam Shelley, or either of them."

Certainly such denial is not, as claimed, a negative pregnant and is a good denial, for, if the defendants did not receive \$1,574.20 from the plaintiff or his brother, or either of them, or any sum or amount from the plaintiff or his brother, or either of them, it is inconceivable how it was possible to receive any amount from both of them. However, if there be any merit in this contention, it is disposed of by finding No. 6, finding:

"That it is not true that the plaintiff and his brother turned over to the defendants the sum of \$2,977.38 or any other sum or amount in excess of the amount owing to the said creditors and the defendants."

[18] Lastly, appellant urges that "the evidence does not support the findings," and directs our attention to several findings, complaining first of finding No. 3, that the plaintiff is not the "owner or holder of any claim or demand against the defendants or either of them." The evidence at the trial was to the effect that the Board of Trade has not retained nor has the plaintiff any claim or demand against the defendants or either of them, and finding No. 6 finds such to be the fact. And, if the fact be true as found, that neither the plaintiff nor his brother turned

over to defendants the sum of \$2,977.38, or any other sum or amount in excess of the amount owing to the said creditors and the defendants, the finding that the plaintiff is not the owner or holder of any claim or demand against the defendants or either of them would also be true and supported by the evidence.

Next appellant claims that finding No. 5 is not supported by the evidence because the agreement is void for lack of consideration. This objection has been given consideration and determined adversely to appellant's contention.

[19] As to the other findings complained of under this heading and also finding No. 3 just considered, it may be said that, even assuming such findings to be erroneous, it would in no way affect the judgment or be ground for reversal, for the fact that a finding is unsustained by the evidence is immaterial, where the remaining findings are sustained and are sufficient to support the judgment. As was said in *Moore v. Copp*, 119 Cal. 429, 436, 51 P. 630, 633:

"It is not necessary to consider whether the objections to these findings are well taken or not, for, however erroneous, the judgment cannot be set aside inasmuch as it may rest upon finding 'F.'"

See, also, *Ehat v. Scheidt*, 17 Cal. App. 430, 438, 120 P. 49; *Lovell v. Frost*, 44 Cal. 471, 475.

[20] On the question of the performance of the conditions required, it is sufficient to say that the Board of Trade applied the money received to pay off the creditors and reimburse itself for the expenses it laid out. So far as the application of the money is concerned, it was applied in accordance with the terms of the letter of April 24, 1922. There is not a word of evidence in the record that Shelley brothers at any time demanded of the Board of Trade the canceled notes, nor the receipts from the creditors. This is not a case where Shelley brothers are endeavoring to recover money for the breach of the terms of an escrow nor for the return of any documents. Unquestionably, had Shelley brothers considered the matter of any importance, they would have requested the return of the canceled notes and the delivery to them of the receipts. The delivery of the canceled notes to Shelley brothers and furnishing them with receipts were very inconsequential elements in the adjustment. As provided by section 1661 of the Civil Code, an executed agreement is one, the object of which is fully performed. The main object of the entire arrangement here was to pay off the creditors, dismiss the attachment suits, avoid any contest on the part of the creditors to the sale of the assets of Shelley brothers to J. Gollober, who was to advance the money, and the reimbursement to the Board of Trade for the expenses it had incurred. All of these objects were

fully performed and the contract was therefore an executed one. Furthermore, the contract was performed by Shelley brothers and J. Gollober in that they actually paid over the money to the Board of Trade, and the Board of Trade dismissed the attachment suits and paid off the creditors and reimbursed itself for its expenses. If appellant is entitled to the return of the amount paid to the Board of Trade for expenses because of its failure to return the canceled notes and the creditors' receipts, he would for the same reason be entitled to the return of the entire sum of \$36,470.85 paid, because if the contract was not executed and each and all of its terms and conditions, important and unimportant, were not complied with, appellant would be entitled to recover the entire fund transmitted, although in the meantime the attachment suits have been dismissed, the stocks of goods in the several stores transferred by bill of sale to J. Gollober, and the creditors' claims outlawed. This appellant is not contending for.

We would not have further lengthened this opinion by noticing this point were it not for the seriousness with which it is urged. We may dispose of it, however, by saying that in our opinion appellant's contention is more serious than sound.

The findings cover all of the material issues in the case, are supported by the evidence, and are sufficient to support the judgment.

We find no error in the record calling for a reversal of the judgment. The judgment is therefore affirmed.

We concur: TYLER, P. J.; CASHIN, J.

87 Cal. App. 324

**SINGLAUB v. INDUSTRIAL ACCIDENT
COMMISSION OF CALIFORNIA**
et al. (Civ. 5749.)

District Court of Appeal, Second District, Division 1, California. Dec. 7, 1927.

1. Master and servant ⚡376(2)—Where death is caused by overexertion during employment, accelerating pre-existing disease, employer is liable.

Where death of employee may be traced to two causes, first, to that of primary disease, and, secondly, to overexertion in work in behalf of his employer in which employee is engaged at time of his death, employer or his insurer is liable.

2. Master and servant ⚡373—Where death is caused solely by disease, though occurring in course of employment, employer is not liable.

Where, notwithstanding fact that in course of his employment death may occur to employee, it appears that it was caused solely by disease with which employee was afflicted, injury sustained by dependents on account of death of employee is not compensable.

3. Master and servant ⚡417(7)—Finding on substantial evidence in workmen's compensation case is conclusive on appeal.

A finding by tribunal having jurisdiction based upon substantial evidence, in workmen's compensation case, is final and conclusive on appeal.

4. Master and servant ⚡403—Applicant for compensation has burden of showing causal connection between death of employee and work.

Applicant for adjustment of compensation has burden of showing causal connection between death of employee and work performed by him.

5. Master and servant ⚡405(4)—Compensation claimant must prove by preponderance of competent evidence that injury arose out of and in course of employment.

Before a claimant can recover compensation, he must prove by preponderance of competent evidence that injury arose out of and in course of employment.

6. Master and servant ⚡417(7)—Commission's finding that death from cerebral hemorrhage was not caused by injury arising out of employment, being sustained by evidence, was conclusive.

Industrial Accident Commission's finding that death of foreman in fish hatchery from cerebral hemorrhage, shortly after he had carried iron key weighing about 21 pounds approximately 300 yards, was not proximately caused by injury arising out of employment, being sustained by evidence, was conclusive.

Proceeding under the Workmen's Compensation Act by Adda N. Singlaub for the death of John J. Singlaub, claimant, opposed by the State Fish and Game Commission, employer. The Industrial Accident Commission refused to award compensation, and claimant brings certiorari. Affirmed.

Frank C. Scherrer, of Los Angeles, for petitioner.

G. C. Faulkner, of San Francisco, for respondent Industrial Accident Commission.

Frank J. Creede and Henry G. Sanford, both of San Francisco, for respondent Fish and Game Commission.

HOUSER, J. From the evidence submitted to the respondent commission on the hearing of an application before it for adjustment of a claim for compensation arising from the death of an employee named John J. Singlaub, the general finding was made that "the evidence does not establish that the employee's death was proximately caused by an injury arising out of the employment." Based upon such finding, it was ordered that the applicant "take nothing from defendants. * * *

On the ground that in making such finding and award the respondent commission acted without and in excess of its powers, petition-

er prays that such finding and award be annulled by this court.

It appears that Mr. Singlaub was employed as a working foreman in a fish hatchery. He died from a cerebral hemorrhage or what is commonly known as a stroke of apoplexy. According to the testimony of the applicant, who was the widow of the employee, at about 3 o'clock p. m. of November 11, 1926, she went to the hatchery where her husband was employed and found that the water used therein was not running properly. Shortly thereafter her husband, "dripping with perspiration and breathing very hard," came into the hatchery. Within a short time following the appearance of Mr. Singlaub at the hatchery, he seemed to be "all right." Prior to that time, with the exception of a cold which he contracted in January or February of the same year, the employee was in a most healthy condition.

The superintendent of the hatchery testified that in the afternoon of November 11, 1926, the employee was engaged in cleaning dams and intake lines which supplied water for the hatchery. In order to do such work properly, the employee should have turned off the hatchery water supply and turned the domestic water supply into the hatchery supply lines. About an hour before the employee had the fatal seizure, he made a mistake in connection with the turning of a valve, with the result that the domestic water supply was also turned off. On noticing that the water supply was cut off, the superintendent sent a man to get a valve key from the employee so that the water might again be turned into the hatchery. At that time the employee was working at a place approximately 250 to 300 yards from the hatchery. The key was about 3½ or 4 feet in length, made of iron, and weighed about 21 pounds. On being informed that the key was wanted at the hatchery, the employee returned thereto, "walking pretty fast." He carried the key with him. Under ordinary circumstances, in returning to the hatchery, instead of walking, he would have driven thereto in an automobile truck which was available to him at the time. On arriving at the hatchery, the employee "appeared to be normal and about the same as usual." The superintendent showed him where he had made the mistake in turning the valve and then turned the water in properly, after which the man who had been sent to get the valve key, the superintendent, and the employee went into the hatchery, watched the water come in, and "stayed there talking perhaps ten minutes," at which time the superintendent noticed that the water "was running a little muddy," and thereupon inquired of the employee the cause thereof, who informed the superintendent that "they had turned it in from the line and had not finished cleaning it up there"; whereupon the superintendent told the employee that

"he had better shut the water off." The employee then returned to the intake, carrying the valve key with him. Probably half an hour later the men with whom the employee was working brought him in an automobile back to the hatchery. At that time he sat in the automobile with "a blank stare in his eyes and a kind of grin-like on his face; he said nothing. * * * He had his pipe hanging loose in his mouth, but he did not appear to be making any motion or movement at all."

A doctor testified: That cerebral hemorrhage was the cause of the death of the employee. That a few months prior to his decease the witness had examined him and had found that "the radial arteries were palpable at that time. * * * That not more than 20 or 25 per cent. of the cases of cerebral hemorrhage occur following exertion. Many of these accidents occur during sleep and when the subject is absolutely at rest, so physical exertion is only a factor in the production of these things, caused by disease of the radial arteries. * * * If there had been a bullet fired through this man's brain, you would know it had been the direct cause of his death, but in this case it is impossible to know what was or would have been under other circumstances inside of this man's skull. * * * That he believed that the cerebral hemorrhage suffered by the employee "was caused from the fact that he overexerted himself at that time," however, that "it would only be a guess" whether the cerebral hemorrhage was caused by overexertion, or by anger, or from overeating, or by any one of other numerous causes. That, although if there had been a rupture of a small artery in the brain, the resulting hemorrhage might continue for several hours before the blood clot from the hemorrhage would become large enough to cause a collapse. Because of the fact that the employee died soon after the seizure, the indications were that the rupture was in a fair-sized vessel." That, after the rupture of the artery in the brain and before the collapse would occur, the pressure would have some tendency to render the subject "muddled" or confused.

Another witness testified, in substance, that, after the employee had returned from the hatchery to the intake, he noticed the employee "staggering a little bit, and he staggered there a little while, and he kept getting worse, and he started to fall," but was then supported and cared for by the witness and another man until he was taken by them in an automobile back to the hatchery.

[1] It is unquestioned law that, where the death of an employee may be traced to two causes, first, to that of a primary disease and, secondly, to overexertion in the work in behalf of his employer in which the employee is engaged, at the time of his death,

the employer or his insurer is liable. In other words, notwithstanding the previous diseased condition of the employee and in the natural consequence of which the inevitable death of the employee will ensue, if satisfactorily established that the demise of the employee, though primarily caused by his idiopathic condition, nevertheless was superinduced by overexertion of the employee arising out of his employment, the liability of the employer is fixed. As is said in *Eastman Co. v. Industrial Accident Commission*, 186 Cal. 587, 594, 200 P. 17, 20:

"If the disability, although arising from a chronic heart trouble, was brought on by any strain or excitement incident to the employment, the industrial liability still exists. Acceleration or aggravation of a pre-existing disease is an injury in the occupation causing such acceleration [citing cases]."

In the case of *Knock v. Industrial Accident Commission* (Cal. Sup.) 253 P. 712, the case of *Patrick v. Ham Co.*, 111 A. 912, is cited with approval. In the latter case it is held that, although, as in the instant case, the employee may have been predisposed to cerebral hemorrhages, and that he might have died therefrom "within a week or a year," nevertheless if the seizure which caused his death occurred while the employee was directly engaged in an overexertion which was required by his employment, the industrial liability of his employer extended.

In the *Knock Case* (Cal. Sup.) 253 P. 712, the employer was held liable for the death of an employee primarily caused by directing the employee to work at an altitude higher than that to which he had been accustomed in his regular employment.

[2] On the other hand, the principle seems to be firmly established that, notwithstanding the fact that in the course of his employment death may occur to the employee, if it appear that it was caused solely from a disease with which the employee was afflicted, the injury sustained by his dependents on account of the death of the employee is not compensable. In that connection, the language appearing in the case of *Eastman Co. v. Industrial Accident Commission*, 186 Cal. 587, 594, 200 P. 17, 20, is pertinent. It is as follows:

"Where, however, the proximate and immediate cause of the injury is from disability arising solely from an idiopathic or subjective condition, the weight of authority, including the decisions of this state, are against recovery, though the injury clearly occurs in the course of employment [citing cases]."

The law, then, appears to be well settled. The difficulty encountered in the correct determination of a given case depends primarily upon the facts as determined by the tribunal before which the proceeding is heard. In the instant case, with reference to the

cause of death, the finding by the respondent commission was that the evidence does not establish that the employee's death was proximately caused by an injury arising out of the employment. As a somewhat reduced statement of the salient facts adduced on the hearing before the respondent commission, it appears that the only possible "overexertion" of the employee in connection with his work consisted in the walking "pretty fast" and the carrying by him of a 21-pound iron key for a distance of from 250 to 300 yards. That whatever immediate effect was produced by such possibly unusual physical exertion was of no material consequence is manifested by the fact, as testified to by the widow of deceased, that shortly thereafter he appeared to be "all right"; also by the superintendent that, on arriving at the hatchery, the employee "appeared to be normal and about the same as usual." The additional facts that for a space of ten minutes following the incident in question he remained within the hatchery, during which time he watched the operation of the water which had been turned into the hatchery and conversed generally with the superintendent and one of his fellow employees, and, upon being requested to do so by the superintendent, the employee walked the 250 or 300 yards back to his work and there resumed his usual and ordinary labor before any manifestation of the fatal attack was noticeable, would tend to establish the correctness of the conclusion reached by the respondent commission, which is the subject of the petitioner's attack. With the exception of the hardened arteries of the employee, the evidence is replete with testimony of his good health, his former powers of endurance, and his general physical condition. When the well-known fact is considered that an infantryman in the United States Army, on an all-day march in time of war is required to walk rapidly and at the same time to carry as ordinary equipment arms and baggage aggregating 57 pounds, the fact that in the instant case an employee, accustomed to outdoor labor, should be required to carry a 21-pound key for a distance of only 250 to 300 yards would seem negligible as a factor in demonstrating or illustrating any actual "overexertion."

The only evidence before the respondent commission which in any way would authorize a finding to the effect that the death of the employee was proximately caused by an accident arising out of his employment was that contained in the testimony of the physician, who, with some hesitancy and qualification, stated, in substance, that he believed that "this cerebral hemorrhage was caused from the fact that he (the employee) over-exerted himself at that time." The further testimony of the physician shows that from clinical observations it is shown that not more than 20 or 25 per cent. of the cases of

cerebral hemorrhage occur following exertion, and that "*it would only be a guess*" * * * to determine whether a cerebral hemorrhage occurring as in the present instance is caused by overexertion, or any of the numerous causes that might cause high blood pressure."

[3, 4] A rule, which is beyond question either in its soundness or in its legal establishment, is that a finding by any tribunal having jurisdiction, based upon substantial evidence, is final and conclusive. *Southern Pacific Co. v. Ind. Acc. Com.*, 177 Cal. 378, 380, 170 P. 822; *Dearborn v. Ind. Acc. Com.*, 187 Cal. 591, 594, 203 P. 112; *Tartar v. Ind. Acc. Com.*, 191 Cal. 703, 704, 218 P. 39; *Royal Indemnity Co. v. Ind. Acc. Com.*, 192 Cal. 675, 678, 221 P. 371; *Western Pacific R. R. Co. v. Ind. Acc. Com.*, 193 Cal. 413, 417, 224 P. 754; *Stacey Bros. Co. v. Ind. Acc. Com.*, 197 Cal. 164, 169, 239 P. 1072; *Standard L. Co. v. Ind. Acc. Com.*, 60 Cal. App. 331, 338, 212 P. 720; *Royal Indemnity Co. v. Ind. Acc. Com.*, 70 Cal. App. 435, 436, 233 P. 381. It should therefore be remembered that, if the conclusion on the facts rendered by the respondent commission was supported by any competent evidence, this court is powerless to interfere. Considering that immediately following the claimed "overexertion" of the employee, and for some time thereafter, he appeared to be "all right," that he was "normal and about the same as usual," and that he resumed his ordinary labor before the fatal seizure was experienced by him, together with the positive testimony of the physician that not more than 20 to 25 per cent. of cerebral hemorrhages occur following exertion, it is clear that in arriving at the conclusion that the evidence did not establish that the death of the employee was proximately caused by an injury arising out of the employment, the respondent commission was acting in accordance with an inference deducible from the evidence. Although to have decided otherwise the commission would have been obliged to act as against 75 or 80 per cent. of "clinical observations," as testified by the physician, from a legal standpoint it is not impossible that such a conclusion would likewise have found support in the evidence. The authorities are numerous which indicate that the burden of showing causal connection between the death of the employee and the work performed by him rests with the applicant for adjustment of compensation. In 27 Cal. Jur. p. 488, § 156, it is said:

"It devolves upon a claimant seeking compensation to establish the fact that the injury which caused disability or death arose out of and in the course of the injured person's employment, by evidence from which such a conclusion is fairly inferable."

See, also, *Casualty Co. of America v. Ind. Acc. Com.*, 176 Cal. 530, 169 P. 76; *Employ-*

ers' Liability Assurance Corp. v. Ind. Acc. Com., 182 Cal. 612, 187 P. 42; *Eastman v. Ind. Acc. Com.*, 186 Cal. 587, 200 P. 17; *Simpson C. Co. v. Ind. Acc. Com.*, 74 Cal. App. 239, 245, 240 P. 58.

[5] To again use the language of the learned physician witness in the instant case, the most that can be said for the opinion, that the proximate cause of the death of the employee was his "overexertion" in the course of his employment, "would only be a guess." As is aptly stated in the opinion in the case of *U. S. Fuel Co. v. Industrial Commission*, 310 Ill. 87, 141 N. E. 402:

"* * * Before a claimant can recover compensation he must prove by a preponderance of competent evidence that the injury arose out of and in the course of the employment. Liability under the Compensation Act cannot rest upon imagination, speculation or conjecture—upon a choice between two views equally compatible with the evidence—but must be based upon facts established by a preponderance of the evidence [citing cases]."

And in *William Simpson C. Co. v. Ind. Acc. Com.*, 74 Cal. App. 239, 240 P. 58, it is held that, where the evidence is such that any opinion as to the proximate cause of the death of an employee is a mere surmise and conjecture, and not based upon any foundation sufficient to support a finding of fact, an award in favor of the dependents of the employee must be annulled.

Furthermore, it will be remembered that before the employee carried the 21-pound key for the distance of 250 to 300 yards he had made two mistakes in work in which he was very familiar, to wit, in turning separate water valves; and, when requested to return with the valve key from the intake to the hatchery, instead of using an automobile which was available to him, he had chosen to walk the distance of 250 or 300 yards and to carry the key with him. Such facts, in connection with the testimony of the physician, to the effect that after a rupture of a small artery in the brain the resultant hemorrhage may continue for a period of several hours before the volume of blood becomes large enough to cause a collapse, may have caused the respondent commission to reach the conclusion that the reason for the irregular conduct and mistakes made by the employee before he carried the 21-pound key was that the rupture had already occurred, with the result that his mind was "muddled" and not quite normal.

[6] As a conclusion from the facts and law applicable to the instant case, it is manifest that the evidence adduced before the respondent commission justified the finding of fact of which complaint is made, and that such finding is conclusive in the premises.

The award is affirmed.

We concur: CONREY, P. J.; YORK, J.

87 Cal. App. 642

REITER v. ANDERSON et al. (Civ. 5781.)

District Court of Appeal, First District, Division 1, California. Dec. 19, 1927.

1. Sales ⇨7—Contract to buy goods to sell on buyer's account constitutes "sale," though called agency by parties.

If one contracts to buy goods to sell on his own account, the transaction constitutes a "sale," though called an agency by the parties.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Sale.]

2. Sales ⇨8—Contract granting exclusive sales agency, in consideration of agreement to purchase minimum number of machines, and order showing agreement to pay for goods at prices specified, held to establish sale, not consignment.

Contract granting exclusive agency to sell sewing machines in certain territory on any terms that buyers chose, at not less than price specified, in consideration of agreement "to purchase" not less than 12 machines per month, and an order showing agreement to pay for goods ordered at prices and on terms specified therein, held to establish a sale, not consignment, of goods delivered.

3. Sales ⇨201(1)—Delivery of possession passes title, in absence of anything indicating contrary intent.

Where there is nothing indicating a contrary intent, delivery of possession of goods sold operates to pass title, and, in ordinary sale on credit, title passes on delivery.

4. Factors ⇨1—Partners, granted exclusive sales agency in consideration of agreement to purchase minimum number of machines, held not factors; title passing on delivery.

Partners, granted exclusive sales agency, in consideration of agreement to purchase minimum number of sewing machines at prices and on terms specified, held not factors, as title to goods does not pass on delivery under such relationship, but remains in consignor.

5. Sales ⇨84—Buyers' notice of termination of contract could not extinguish indebtedness already incurred thereunder.

Buyers' notice of termination of contract to purchase minimum number of sewing machines per month, in manner provided therein, operated to release them from further obligation to purchase goods, but could not extinguish indebtedness incurred under contract before giving notice.

6. Principal and agent ⇨155(1)—Written sale contract held not superseded by agent's unauthorized oral agreement to accept return of machines delivered.

Written contract to purchase minimum number of sewing machines per month held not superseded by oral contract of seller's agent to accept return of machines delivered, where novation was not pleaded, nor any finding made thereon, such agent's authority to make new agreement was not shown, contract and order stipulated that no other promise or agreement

was binding on seller, and all offers of settlement on basis of repossessing goods were definitely rejected in seller's letters.

Appeal from Superior Court, Santa Clara County; P. F. Gosbey, Judge.

Action by James E. Reiter against O. B. Anderson and others, individually and as co-partners, doing business as the Anderson Music Company, and such Company. Judgment for defendants, and plaintiff appeals. Reversed.

Edward J. Jose, of San Francisco, for appellant.

Louis Oneal, of San Jose, for respondents.

KNIGHT, J. Plaintiff brought this action to recover the purchase price of certain sewing machines alleged to have been sold to defendants by plaintiff's assignor, the Standard Sewing Machine Company. The evidence shows without dispute that the machines were ordered and received by defendants, and that they were not paid for. But defendants claimed, and the trial court found, that the machines had been shipped to defendants on consignment under the terms of a written contract of agency which was later terminated by defendant, and the machines stored subject to the company's disposal; that therefore the transaction did not constitute a sale. Judgment was rendered accordingly in defendants' favor, and plaintiff appealed.

The determination of the question as to whether the transaction constituted a sale or a consignment depends principally upon the legal construction which shall be placed upon the contract and the order for the goods given in pursuance of the contract. The essential portions of the contract, which is dated April 16, 1925, were as follows:

"Whereas, party of the second party (defendants herein) is desirous of obtaining the agency of Standard Sewing Machines in the following territory, to wit: Santa Clara county, party of the second part agrees to maintain a store in the above-mentioned territory, and to diligently work in the sale of Standard Sewing machines and Standard products. *The party of the second part hereby agrees to purchase from the party of the first part not less than 144 machines per year, or 12 each calendar month, shipments to be made to said party of the second part f. o. b. Cleveland, Ohio, at the regular wholesale price listed at the factory at the time and date of shipment. In case party of the second part orders machines shipped from San Francisco, or any other point other than factory, party of the second part hereby agrees to pay freight and drayage costs incurred by party of the first part. The party of the second part further agrees to sell or resell all sewing machines at the regular retail price established by party of the first part, excepting party of the second part has the privilege of making discounts for cash or short time pay-*

ments, and has the privilege of making any allowances on machines or other articles traded in. Under no conditions will the party of the second part be allowed to advertise in newspapers, periodicals, magazines, or in any other way advertise anything but the retail list price as aforesaid mentioned."

Then followed a schedule of prices under which the machines were to be sold; the sewing machine company reserving the right to change the same at any time. Continuing, the contract provided:

"No other contract, either verbal or written, other than that which is written or printed herein, will be recognized by the party of the first part, and we hereby agree to all of the conditions as set forth in the above. This agreement shall be in effect from the date first above written until written notice of thirty days shall be given by either party to the other, to terminate same."

The order for the goods bears the same date as the contract, and was apparently executed as part of the same transaction. It was addressed to said company, signed by defendants, and read as follows:

"* * * Please ship at once the following sewing machines, for which we agree to pay according to prices, terms and conditions given herein, subject to your approval. * * * 2% discount 30 days or 60 days net. * * * Upon receipt of freight bill with railroad agent's notation of any damage thereon, you are to replace prepaid and without charge all parts which may become broken in transit. 'Rotary' machines, manufactured under your United States patents, we agree to sell, * * * at retail, to intending users, and according to your schedules and instructions. The above is an exact statement of the terms agreed upon as per order above; and it is fully understood and agreed that no claims or demands on account of any promise, either verbal or written, or any agreement of any kind whatever, outside of this order, will or can be made; the undersigned agreeing to be bound strictly by the terms and conditions above named, and not to countermand this order."

The goods were shipped pursuant to said order to the defendants at San Jose where they were conducting a music store, and they acknowledged receipt of the same. Monthly statements of the account were thereafter sent to them for a period of several months; and during that period of time they ordered and paid for other goods shipped to them under the terms of said contract.

About two months after the shipment of the goods in question said company wrote to defendants calling attention to the maturity of the "invoice dated April 20, 1925, amount \$1,452.50, covering sewing machines shipped" from San Francisco pursuant to their order, and, among other things, stated: "The terms on this sale provide for sixty days' trade acceptance," and an early remittance was requested. Under

date of July 9, 1925, defendants replied stating:

"We are in receipt of your letter of June 30th, 1925, calling attention to the maturity of your invoice for sewing machines *recently purchased by us*. Because of the absence of the manager from San Francisco at this time, we are writing to you so that our account will be taken care of directly"

—and, after referring to certain suggestions claimed to have been made to them by the company's representative relating to the handling of installment contracts taken by defendants in the disposal of the goods by them, said:

"Will it be satisfactory to make payment as follows: One-third on or before the 25th day of July; one-third in thirty days and one-third in sixty days? Advise us at once if satisfactory."

In response, the company telegraphed from its office in Cleveland, Ohio, to the effect that the terms of payment mentioned were not satisfactory; that the "terms of sale specified for payment sixty days following shipment," and that defendants "should comply strictly with those terms"; that the company would not settle on a basis of installment contracts. After some further correspondence, defendants, under date of August 11, 1925, wrote to said company terminating the contract. In this letter defendants stated:

"After going over the situation carefully, we have decided to discontinue handling sewing machines and wish to cancel at once the contract which we entered into as well as the verbal arrangements made at the same time,"

—giving as the main reason for the cancellation the unsatisfactory development of the business, and the letter concluded:

"Arrangements for closing up our account will be made when your representative calls."

Replying, the company wrote:

"Replying to yours of the 11th inst., in reference to the past due account with the Standard Sewing Machine Company, of Cleveland, Ohio, amounting to \$1,452.50, which was due June 30th, would say that it is not necessary to wait until the arrival of our representative as mentioned in your letter to bring about a settlement of this account,"

—and, after expressing regrets because of the discontinuance of the business, stated that the "contract will be attended to by Mr. Knowlden" on his next visit to San Jose, but that "this arrangement has nothing whatever to do with the collection department; we are supposed and expected to collect all bills at maturity and all we know about the transaction is the order which you signed and is in our possession a copy of which I am herewith inclosing, we ship the goods to you in good faith and expect a prompt payment, but as there has been through Mr.

Knowlden, talked extension of a portion of this bill." Concluding, the letter stated:

"Now gentlemen, if you will remit by return mail \$726.26 cash and indorse the inclosed trade acceptance for the same amount falling due in 30 days we will accept same as a matter of accommodating you, therefore, I hope you will immediately attend to this matter that I may square our records with the company."

The foregoing proposition was apparently not acted upon, for on August 22, 1925, defendants again wrote said company as follows:

"Since the writer has returned from a short trip up to the northern part of the state no further delay will be necessary to advise you how we expect to close up your account. The arrangements which we had in mind several weeks ago for payment will have to be changed and we will expect to pay for the machines as contracts are cashed or sales made. This is in accordance with the arrangement originally made that it would not be necessary for this firm to advance any cash for the handling of the sewing machine business. * * * *We wish to be advised whether the machines we have on hand can be turned back in case we make arrangements for complete settlement.* Would you accept some of the contracts we have on hand as part settlement?" (All italics ours.)

The company replied as follows:

"* * * in reference to your indebtedness to the Standard Sewing Machine Co., of Cleveland, Ohio, would say, I am very much surprised at this late date and under all the circumstances surrounding this transaction that you would hold the idea expressed in your letter. Now gentlemen, we know of no such arrangement as expressed in your letter. The only arrangements that we have accepted are those embodied in the order indorsed by you, upon which we shipped you the goods and extended you the credit. * * * It would be impossible for us to repossess any portion of these sewing machines as a credit to your indebtedness. I am willing at all times to compromise and bring about a settlement, but I cannot go beyond reason. Your account is now over 60 days past due, and the head office has instructed me to proceed to collect this amount without further delay; at the same time, if you care to accept the proposition made you in my last letter, it will hold good, providing same is accepted and reported to this office at once. If you have made agreements aside from the ones mentioned on the order, it is between yourselves and the one you made the agreement with."

The evidence further shows that, some time during the following month, Knowlden conferred with defendants in San Jose, at which time he suggested transferring the agency to other parties and turning back the unsold machines as used ones, at a discount. But nothing resulted from this conference, and defendants afterwards notified said company that the machines they had not disposed of had been stored subject to the company's order; whereupon

said company assigned its account to plaintiff, and this action was commenced.

[1] In discussing this same question as to the legal relationship created by the form of contract such as the parties here entered into, Professor Mechem says:

"A qualified form of 'agency' which has grown up in modern times is that which exists when the owner or manufacturer of patented or other proprietary articles grants the privilege of sale or of exclusive territory to one who otherwise might not be at liberty to sell the goods in question. It is entirely consistent with this arrangement that the so-called agent is to buy, of the proprietor or manufacturer, the goods which he is thus authorized to sell, and when this is the fact there is little more of 'agency' in the case than the name itself. It is also entirely consistent with the arrangement that the 'agent' is to sell the goods at a price or upon terms or conditions fixed by the proprietor or manufacturer. A person so situated is often, in popular language, said to have obtained the 'agency' for the goods, when all that is meant is that he has obtained a more or less exclusive right to buy and resell them in a prescribed territory. The transaction is simple enough, but the reports show many cases in which the parties have, perhaps, deceived themselves and have certainly attempted to deceive others by calling that an 'agency' which had no resemblance to agency in fact, but was simply a sale of a proprietary article with a right of resale under terms and conditions fixed by the proprietor." 1 Mechem on Sales, pp. 41, 42.

And in announcing a test to be applied in differentiating between a sale and an agency to sell on consignment, the same author says:

"Sale, further, is to be distinguished from the creation of an agency to sell. The essence of sale is, as has been seen, the transfer of the title to the goods for a price paid or to be paid. Such a transfer puts the transferee, who has procured the goods to sell again, in the attitude of an owner selling his own goods, and makes him liable to the first seller as a debtor for the price, and not, as an agent, for the proceeds of the resale. The essence of the agency to sell is the delivery of the goods to a person who is to sell them, not as his own property but as the property of the principal, who remains the owner of the goods and who therefore has the right to control the sale, to recall the goods and to demand and receive their *proceeds* when sold, less the agent's commission, but who has no right to a *price* for them before sale or unless sold by the agent." 1 Mechem on Sales, pp. 40, 41.

In other words, the determinative rule is that, if a person contracts to buy goods from another to sell on his own account, the transaction constitutes a sale, and not an agency, even though it be so called by the parties. Piper v. Oakland Motor Co., 94 Vt. 211, 109 A. 911, and cases therein cited.

[2, 3] We are of the opinion that the contract and the order in the present case, construed together as respondent contends they should be, clearly prove that, although an

agency was created conferring upon defendants the exclusive privilege to resell the company's goods at a specific price within certain territory, it was contemplated thereby that the delivery of the goods by the company to defendants should constitute a sale thereof to the latter, and not a consignment. This is made evident, first, by the language of the contract itself, from which it appears that the consideration for the creation of the exclusive agency to sell said goods was that defendants agreed "to purchase" from said company not less than 12 machines every month; and again by the order which shows that defendants agreed "to pay" said company for the goods ordered according to the schedule of prices therein specified upon the following terms: "2% discount 30 days or 60 days net." Furthermore, it is a well-established rule of the law of sales that, where there is nothing indicating a contrary intent, the delivery of the possession of goods operates to pass title; and that in the ordinary sale on credit title to the goods passes on delivery. *Phillips v. Stark*, 186 Cal. 369, 199 P. 509. Neither of the documents under consideration here indicates that title to the goods should remain in the company after delivery thereof to defendants, nor that defendants had the right after delivery to return the same or any part thereof to said company. For aught said documents show, the goods ordered by defendants were to be paid for in 60 days, whether sold by defendants or not, clearly implying a sale and credit. Moreover, under the terms of the contract, defendants were allowed to sell the goods when and on what terms they chose, provided they maintained the selling price specified in the contract. No accounts of sales were required to be rendered to the company, and, so far as the contract shows, there was to be no privity between the sewing machine company and defendants' customers. If defendants accepted cash for the sale of said goods, they were not required to keep it separate, and, if installment contracts or notes were taken from their customers, it was no concern of said company's; and the context of the contract and of the order evidence the fact that, after delivery of said goods to defendants, absolute control and dominion over the same, except as to the resale price to the trade, was vested in them.

It is evident, we think, from the facts and circumstances above set forth, that the contract and order in question implied a sale, and not a mere agency to sell; that is, that defendants were to purchase the goods from said company to resell on their own account. All of the essential elements of sale are present, including the passing of title and assumption of risk and exclusive control by defendants following delivery. Furthermore, it would appear that defendants themselves regarded the transaction of delivery as a

sale, because they proceeded to resell the goods on their own account and on terms of their own choosing. They also acknowledged the debt, and offered to liquidate the same in various ways: First, by making three separate payments; secondly, by turning over the installment contracts which they had taken from their customers or the cash received therefrom as the contracts were paid, and, finally, by returning to the company the unsold machines. For the foregoing reasons we are unable to sustain the trial court's finding that the shipment of said goods to defendants constituted a consignment and not a sale.

The situation is not altered by the fact that the contract employs the word "agency." As stated in the case of *Commercial Credit Co. v. Girard Nat. Bank*, 246 Pa. 88, 92 A. 44:

"It is true that they are described in the contract as 'agents' and 'sales agents,' but as was said by Lord Justice James in *Ex parte White*, *In re Nevill*, L. R. 6 Ch. App. 397, 399: 'There is no magic in the word "agency." It is often used in commercial matters where the real relationship is that of vendor and purchaser.' In the same opinion Lord Justice Mellish said (page 403): 'Persons may suppose that their relationship is that of principal and agent, when in point of law it is not.' In *Ex parte Flannagans* (U. S. D. Ct. E. D. Va.) 2 Hughes, 264, 268, Fed. Cas. No. 4855, the court quoted with approval the above language, and added: 'If the contract in its terms really constituted them purchasers, the use of words implying that they were agents does not change the fact.'"

[4] Nor can defendants' status be brought within the classification of a factor, as they claim, for the reason that under such relationship title to the goods does not pass with delivery, but remains in the consignor. *Cass v. Rochester*, 174 Cal. 358, 163 P. 212; 12 Cal. Jur. 411. Here, as pointed out, title passed upon delivery.

[5] Defendants also urge in support of the judgment that, whether the contract be deemed to be one of agency or of sale, plaintiff may not recover, because defendants terminated the contract in the manner therein provided. We find no merit in the point. It is evident that the 30 days' notice of termination given by defendants, dated August 11, 1925, operated to release the defendants from further obligation to purchase goods after the notice became effective; but obviously said notice could not serve to extinguish the indebtedness which defendants had incurred under the contract prior to giving the notice.

[6] Further contention is made by defendants that, as a result of the conference with Knowlden in September, 1925, following the termination of the agency, the written contract in question was superseded by an oral one made by Knowlden whereby he agreed to accept a return of the machines, and that

he actually did take one of them with him. Knowlden's testimony was somewhat at variance with the foregoing claim. However, novation of contract was not pleaded as a defense, nor was any finding made on such an issue. There was no evidence offered to prove that Knowlden was authorized to make any substituted or new agreement on behalf of said company; and, moreover, both the contract and the order contained express stipulations that no other contract, promise, or agreement was binding upon said company. On the other hand, definite rejection of all offers of settlement of the debt on the basis of repossessing the goods was declared in the company's letters; it having expressly stated in one of them that Knowlden's contemplated visit to San Jose would have nothing whatever to do with the collection of the account. We therefore find no merit in this final contention.

The evidence, in our opinion, being legally insufficient to support the finding that there was no sale of the goods, the judgment is reversed.

We concur: TYLER, P. J.; CASHIN, J.

87 Cal. App. 772

MILTON REALTY CO. v. BUTTERFIELD.
(Civ. 3400.)

District Court of Appeal, Third District, California. Dec. 23, 1927.

1. Vendor and purchaser ⚡187—Where contract provided for initial payment on certain day, subsequent acceptance of payments by installments waived any requirement of time as essence.

Where contract for purchase of real property provided that initial payment be made on July 1st and payment was in fact made by installments between July 1st and August 4th, *held*, that, if time was of essence of contract, acceptance of such payments would constitute a waiver of such requirement.

2. Contracts ⚡212(1)—Where time is not of essence of contract, performance within reasonable time constitutes compliance therewith.

Where time is not of the essence of contract, performance within reasonable time would constitute compliance therewith.

3. Vendor and purchaser ⚡123, 341(3)—Finding that vendor was able to convey title at time of performance held not sustained by evidence.

In purchaser's action to rescind contract for the purchase of several lots on ground that vendor was unable at time of performance to convey title to some of lots, and to recover installment of purchase price, evidence *held* not to support finding that vendor was able to convey title.

4. Vendor and purchaser ⚡112(1), 334(5)—Where vendor is unable to convey title when contract matures, purchaser may rescind and recover payment.

Where vendor, whether with or without fault, is unable to convey title at time contract matures, purchaser may rescind contract and recover purchase money paid by him as part of purchase price.

5. Vendor and purchaser ⚡107—Where vendor conveys title subject to outstanding contracts, vendee cannot rescind.

Where vendor having title conveys property subject to any contracts into which he has entered, then in that case, vendee's rights having been protected, he is not entitled to rescind.

6. Vendor and purchaser ⚡112(1)—Where vendor entitled to receive conveyance receives title after time allowed therefor, vendee is not entitled to rescind.

Where vendor is entitled to receive conveyance, fact that he did not receive title until after time allowed for completion of his purchase will not entitle vendee to rescind.

7. Vendor and purchaser ⚡339—Where vendee made part payment and vendor by his own act is unable to convey title, vendee may recover payment without tendering balance.

Where vendor by his own act has rendered himself unable to convey title, tender of remainder of purchase money is unnecessary, and he may maintain his action to recover portion of purchase money paid without tendering balance and demanding conveyance.

8. Vendor and purchaser ⚡112(1), 334(5)—Purchaser held entitled to rescind and recover payment on vendor's inability to convey part of property because of failure to exercise option to purchase.

Where vendor contracted to convey title to certain lots, including two on which he had option to purchase, which option he failed to exercise before it expired, vendee *held* entitled to rescind entire contract and recover payment on purchase price.

Appeal from Superior Court, Los Angeles County; J. A. Allen, Judge.

Action by the Milton Realty Company against James I. Butterfield to rescind a contract for the purchase of real property. Judgment for defendant, and plaintiff appeals. Reversed, with direction.

Lorin Andrews, of Los Angeles, for appellant.

Spicer, Meacham & Mason, of Long Beach, for respondent.

PLUMMER, J. Action by plaintiff to rescind a contract for the purchase of four lots situate in the city of Long Beach, on the grounds of fraud, and a second cause of action, with common counts, for the recovery of \$15,000 paid as first installment on the pur-

chase price thereof. The defendant had judgment for costs, and the plaintiff appeals.

The record shows: That prior to the 1st day of April, 1923, the plaintiff and the defendant had some negotiations relative to the purchase by the plaintiff from the defendant of lots 14 and 16, in block 93, situate in Long Beach town site, in the city of Long Beach. That during such negotiations the plaintiff informed the defendant that lots 14 and 16 were not of sufficient size to meet the purposes for which the plaintiff desired to purchase said lots, and that the plaintiff would desire lots 10 and 12 in said block. The record shows: That at that time lots 10 and 12 belonged to one Alexander. That thereafter, on or about the 1st day of April, 1923, the defendant entered into a contract with said Alexander for the purchase of lots 10 and 12, upon the following terms, to wit: \$5,000 cash; \$11,750 on or before 90 days from the 6th day of April, 1923; and further, the assumption of a mortgage on said premises in the sum of \$8,250, making the purchase price of said lots 10 and 12 in the aggregate sum of \$25,000. After the securing of this contract the plaintiff and the defendant entered into a written contract for the purchase of said lots, in the words and figures following, to wit:

"Long Beach, California, April 14, 1923. Milton Realty Company, Incorporated, 114 Locust Avenue, Long Beach, California—Gentlemen: I, the undersigned, owner of lots 10, 12, 14, and 16 block 93 Long Beach town site, Long Beach, California, offer for sale to your company, and will deliver to your company fee title to, the above-mentioned property upon the following terms, namely: First. I am to receive from your company the sum of seventy-five thousand (\$75,000) dollars, in cash, on the following terms: On July 1, 1923, \$15,000. On September 1, 1923, \$60,000. Second. I am to receive from the holding company, which you will organize to handle the project of building upon the above lots, 750 shares of the capital stock of said holding company at one hundred dollars par value, to be placed in escrow and to remain intact, until all apartments in the apartment building to be erected upon the above-described property have been sold. Third. That the above-mentioned 750 shares of the capital stock are to represent the value of apartments in the building to be erected upon said property, which said apartments are to be selected at random by the undersigned. Fourth. That for and in consideration of services rendered me by architects, Messrs. Davies and Baume, of Long Beach, California, I will retain their services as architects in the construction of the building to be erected upon the foregoing described property. I have, furthermore, agreed to pay said architects five (5) per cent. of the gross cost of the construction of said building for their services. If the foregoing terms are agreeable to your company, I shall appreciate an acknowledgment of this communication. Respectfully yours, James I. Butterfield, 114 Locust Avenue, Long Beach, California.

"April 14, 1923. Mr. James I. Butterfield, Long Beach, California—Dear Sir: We, the

undersigned, president and secretary, respectively, of the Milton Realty Company, Incorporated, on behalf of said company agree to the terms herein enumerated, and the company also agrees to assume all indebtedness now outstanding on the property in question. Respectfully yours, Milton Realty Company, Incorporated, by Jack Milton, President, by H. Gooding Field, Secretary. [Seal.]"

The \$15,000 specified in said contract to be paid on July 1, 1923, was paid by the plaintiff to the defendant in installments. The last installment, making the full payment of \$15,000, was paid by the plaintiff to the defendant on August 4, 1923.

The period mentioned in the option or contract given by Alexander to the defendant to purchase lots 10 and 12, in block 93, was, by said Alexander, extended to August 27, 1923. On August 27, 1923, the defendant, not having paid to Alexander the \$11,750 provided to be paid on account of the purchase price of said lots, Alexander canceled the optional contract theretofore given to the said defendant to purchase said lots, and drew down the forfeit money deposited by the defendant at the time of the execution of such contract, and no contract was thereafter given by Alexander to the defendant to purchase said lots 10 and 12. On the 7th day of September 1923, the plaintiff gave notice to the defendant of rescission of the contract hereinbefore set forth, entered into between the plaintiff and the defendant for the purchase of said four lots, and demanded return of the \$15,000 paid as aforesaid as the first installment of the purchase price for said lots. The notice of rescission and demand for the return of said money were based upon the alleged ground that the defendant did not have any title to said property at the time of the execution of said contract, and was not, at the time thereof, nor at the time of the notice, able to convey any title thereto.

The trial court found that there was no fraud in the inception of the contract, and that the plaintiff was aware of the title to lots 10 and 12, in block 93, held by the defendant, and of the contract obtained by him for the purchase of said premises, the trial court also, by general language, finding that the allegations of the defendant's answer were true, found that the defendant was able to convey title to lots 10 and 12, in block 93, on the 1st day of September, 1923, and upon the date of the demand for the return of the \$15,000, made by the plaintiff, and that defendant was upon the said 1st day of September, 1923, and at all times thereafter up to the institution of suit, able to convey title to said premises. The finding of the court in these particulars is not specific, but is in general language finding allegations of the answer to be true.

Upon this appeal the appellant assigns 80 specifications of error as to the findings of the trial court, and also sets forth 4 alleged

errors of the trial court in relation to the conclusions of law drawn from the findings. Only one error as to the findings and conclusions drawn therefrom needs to be considered, and that is the general finding in relation to the capacity of the defendant to convey title to lots 10 and 12. If that finding is unsupported by the evidence, the plaintiff is entitled to judgment for the return of the sum of \$15,000, together with interest thereon at the rate of 7 per cent. per annum from the 7th day of September, 1923.

[1-3] The contract entered into between the plaintiff and the defendant, dated April 4, 1923, does not make time the essence thereof. But if time were of the essence thereof, the acceptance by the defendant of the \$15,000 paid in installments, as heretofore stated, between the 1st day of July, 1923, and August 4, 1923, would constitute a waiver thereof. So that, in any event, the contract was in full force and effect on the 1st day of September, 1923. However, time not being of the essence of the contract, the performance, within a reasonable time, would constitute compliance therewith. Was the defendant, on September 1, 1923, able to convey title to lots 10 and 12, in block 93? There is no controversy in the testimony that the contract between Alexander and the defendant expired on the 27th day of August, 1923, and that after that date the defendant had no written agreement enabling him to purchase said premises, or to compel a conveyance of title thereto from Alexander to himself. The testimony of the defendant himself shows that he had no such power. Before quoting the testimony of the defendant, however, we may state that the record shows that the plaintiff had paid to the defendant a sum of money greater in amount than would have been required to be paid by the defendant to Alexander to keep alive his agreement with Alexander for the purchase of said lots 10 and 12. We may also state that there is some testimony in the record to the effect that the defendant had agreed with the plaintiff to use the \$15,000 paid by the plaintiff to the defendant, in making payment of the sum of money agreed to be paid by the defendant to Alexander. But this does not affect the legal status of the matter, but is only set forth in order to shed light upon the testimony of the defendant, which is as follows:

"I never made any statement or promise to the Milton Realty Company as to what I would do with the whole or any portion of the \$15,000. No representative of the Milton Realty Company ever questioned me as to what I should do or had done with the \$15,000. It is true that the testimony of Mrs. Alexander shows that on or about the 27th day of August, 1923, she closed the escrow, and I forfeited \$5,000 that I had in that escrow. I did have a conversation with Mrs. Alexander on or about that time in regards to closing this escrow. There was no representative of the plaintiff present when this conversation with

Mrs. Alexander, relative to the closing of the escrow took place. On the 7th day of September, 1923, the day upon which I was served with the notice of rescission in this matter by the Milton Realty Company, I was ready, able, and willing to deliver the titles to lots 10, 12, 14, and 16 upon payment of the contract. I knew I could deliver the title to lots 10 and 12 upon the statement of Mrs. Alexander."

The testimony of Mrs. Alexander upon this question is as follows:

"It is a fact that at all times we looked to Butterfield for the money, and no one else. In conversation with Butterfield there was another person with him whom I knew was an officer of the Milton Realty Company; he introduced himself and told us who he was, and he also had the plans of the proposed building with him, and went into detail, telling us what a fine building was going to go up on the property and that it was going to be erected by the Milton Realty Company. The person who was with Butterfield told us who he was, so that was how we knew he was an officer of the Milton Realty Company. It is a fact that some time after the forfeiture of the money by Butterfield and the cancellation of the escrow agreement, Butterfield came to me and asked me to sign certain papers, which I refused to do. I did not see any papers; he merely said he would like me to give him another extension; that was what he wanted us to sign after the forfeiture. I did not see any papers. I stated that the matter was closed, and that we had decided to hold the property."

From this testimony it is evident that the statement of the defendant, Butterfield, that he could convey title to the premises was based simply upon his hope that he might be able to induce the Alexanders to give him an extension of time or another agreement for the purchase of the lots in question. The testimony of Mr. Alexander is of the same effect, that the agreement with Butterfield was canceled on the 27th day of August, 1923, and that he had no further conversations about the lot. From this recital it appears without controversy that the general finding that the defendant on the 1st day of September, 1923, or at any time after the 27th day of August, 1923, was able to convey title to lots 10 and 12, in block 93, is wholly unsupported.

[4] The law appears to be well settled that where a vendor, whether with or without fault, is unable to convey title at the time the contract matures, the purchaser may rescind the contract and recover the purchase money paid by him as a part of the purchase price. In the case of *Burks v. Davies*, 85 Cal. 110, 24 P. 613, 20 Am. St. Rep. 213, the law in such cases is thus stated (we are quoting from the syllabus):

"If the vendor, though not the absolute owner, has it in his power by the ordinary course of law or equity to make himself such owner, he will be permitted, within a reasonable time, to do so; but if he has no contract for the title, and makes no attempt to obtain it until

after the contract of purchase has been rescinded, and he could not have conveyed it during the time within which the contract was to be performed, it is immaterial that he thereafter receives an offer for it on condition that the purchaser is ready to take the property, and the court need not pass upon the question whether the purchaser was then willing or anxious to take it."

In support of its decision, the court cites *Sanders v. Lansing*, 70 Cal. 429, 11 P. 702, and *Marshall v. Caldwell*, 41 Cal. 614. In *Brimmer v. Salisbury*, 167 Cal. 523, 140 P. 30, the rule is thus stated:

"Where a vendee contracts with one having none or an imperfect title, he contracts in the hope or expectation that the vendor may be able to perfect the title. Such is not the case where the vendor has title and thereafter parts with it. Of the essence of the contract is the security to the vendee, in his payments, of the title which the vendor has; and if the vendor parts with that title to the impairment or destruction of that security, the vendee may be heard justly to complain, and it is no answer to say that the vendor thereafter may be able to go into the open market and repurchase the property. Common experience tells us that such an expectation is in its nature but a remote possibility and that such a vendor has not the slightest intention of so doing."

[5] The rule is also stated that if a vendor having title conveys the property subject to any contracts into which he has entered, then and in that case, the vendee's rights having been protected, he is not entitled to rescind. Such, however, is not the case here. The record shows the title possessed by the defendant or the right which the defendant possessed to acquire title to lots 10 and 12, and that he allowed said right to lapse before he was entitled to the second payment under his contract with the plaintiff. Again, as stated in 25 Cal. Juris. 719, § 191:

"A purchaser may rescind, regardless of the motives which prompt such action, if the vendor is unable to furnish a marketable title when the time for performance arrives. But unless he was induced to make the purchase by reason of the representations as to the title, he may not do so merely because the vendor had no title when the contract was entered into or prior to the time of performance. One may contract to sell property which he does not then own, and his want of title is not ground for rescission unless he is unable to perform when performance is due or the defect is such that it cannot be cured by ordinary business negotiations."

[6, 7] Again, under such circumstances, if the vendor is entitled to receive a conveyance, the fact that he did not receive the title until after the time allowed for completion of his purchase, the vendee is not entitled to rescind. In other words, in any case where the vendor has not title to the property which he has contracted to convey, he

must possess a legal right which by ordinary procedure may be caused to ripen into a good and sufficient title, and if such right does not exist at the time set for the completion of a contract with his vendee, the vendee may rescind. Or, as stated in the case of *Brimmer v. Salisbury*, the vendee is not required to wait until his vendor may go into open market and possibly purchase the property or obtain another contract from the owner thereof. The same rule setting forth the right of the vendee to rescind, in the event that his vendor is not able to convey title at the time for performance fixed in the contract, is set forth in 27 R. C. L. 641, § 410. Again, where the vendor by his own act has rendered himself unable to convey title, tender of the remainder of the purchase money by the vendee is unnecessary, and he may maintain his action to recover the portion of the purchase money paid without tendering the balance and demanding conveyance. In the case of *Wilhelm v. Fimple*, 31 Iowa, 131, 7 Am. Rep. 117, the rule is thus stated:

"Where a vendor of real estate has, by his own act or by operation of law, been rendered unable to perform his contract to convey such real estate to the vendee, the vendee may rescind the contract and recover the purchase money paid, without first tendering to the vendor the purchase money due, and demanding a deed; and the vendee may exercise this right where a vendor has permitted a mortgage executed by him and existing at the time of the purchase, to be foreclosed, and the lands sold thereunder."

Likewise, in the case of *Wright v. Dickinson*, 67 Mich. 580, 35 N. W. 164, 11 Am. St. Rep. 602, it is held:

"Where the vendee has agreed to purchase and the vendor to convey land in fee, and the latter cannot make title, the former may bring his action to recover the purchase money paid without first tendering a performance."

See, also, the cases cited in the note to *Wright v. Dickinson*, as reported in 11 Am. St. Rep. 611.

To the same effect is the more recent case of *Ihrke v. Continental Life Insurance & Investment Co.*, 91 Wash. 342, 157 P. 866, L. R. A. 1916F, 430, where the same question was under consideration, and it was there held that one who has entered into an executory contract to purchase real estate may cease his payments and maintain an action to rescind where the vendor has placed himself in a position where he cannot perform on his part. See, also, 25 Cal. Juris. 716, § 188, where authorities are cited supporting this statement:

"Failure or refusal of the vendor to perform the contract on his part, or the fact that he puts it out of his power to perform, is ground for rescission by the purchaser. Accordingly, he may rescind and recover the purchase money paid," etc.

In 27 R. C. L. 653, § 413, we find the law thus stated:

"If the vendor's want of title and consequent inability to convey are admitted, this will dispense with the necessity for an actual tender by the purchaser of the unpaid purchase money; and if the vendor has placed it out of his power to perform, when the time arrives the purchaser may cease performing on his part without affecting his right to rescind. This is true where the vendor, by his own act or omission to act, has placed it out of his power to convey, as where he has permitted the title to pass by him by the foreclosure of a mortgage executed by him and existing at the time of the sale" (citing a number of authorities).

[8] In the case at bar the vendor, by allowing his contract with the Alexanders to lapse, voluntarily placed himself in the position where he was unable, at any time after the 27th day of August, 1923, to convey title, and under the authorities cited, the vendee (the plaintiff in this action) had a right to rescind and demand the return of the \$15,000 paid on account of the purchase price thereof. In view of the authorities which we have cited, and the facts which we have set forth herein, and also in consideration that no change in those facts can be made, it necessarily follows that the finding of the trial court, numbered 19, which is to the effect that each and every allegation of the defendant's answer, except as otherwise found in the findings, is true, which finding is the only one which supports the allegation of the answer that the defendant was able to convey title, is contrary to the evidence and must be and is hereby set aside. And in view of section 4¾ of article 6 of the state Constitution, and section 956a of the Code of Civil Procedure (as added by St. 1927, p. 583), the following finding is substituted therefor, to wit: It is hereby found that on the 27th day of August, 1923, the defendant voluntarily permitted his contract for the purchase of lots 10 and 12, in block 93, of Long Beach town site, in the city of Long Beach, to lapse, and that since said date the defendant has had, neither in law nor in equity, any title to said lots or any contract or agreement for the purchase thereof. It is further ordered that all portions of the findings of the trial court inconsistent herewith be stricken out. It is further ordered that the conclusions of law drawn by the trial court be stricken out, and the following substituted, to wit: As a conclusion of law from the substituted findings herein and the findings of the trial court as modified by the order above stated, it is concluded that the defendant, J. I. Butterfield, has not, at any time since the 27th day of August, 1923, been able to convey title to said lots 10 and 12 by reason of his voluntarily allowing his contract for the purchase thereof to lapse. Second, as a fur-

ther conclusion of law from the substituted finding hereinabove set forth, and the order modifying or striking out inconsistent findings of the trial court, the conclusion is drawn that the plaintiff is entitled to judgment against the defendant for the sum of \$15,000, the amount of the first installment of purchase price paid on account of his contract with the defendant, dated April 14, 1923, and also to interest thereon at the rate of 7 per cent. per annum from the 7th day of September, 1923.

It is further ordered that the judgment of the trial court be reversed, and the trial court directed to enter judgment for the plaintiff in the said sum of \$15,000 and interest thereon at the rate of 7 per cent. per annum from the 7th day of September, 1923.

We concur: FINCH, P. J.; HART, J.

87 Cal. App. 626

AVERDIECK et al. v. BARRIS. (Civ. 6071.)★

District Court of Appeal, First District, Division 2, California. Dec. 16, 1927.

Rehearing Denied Jan. 13, 1928. Hearing Denied by Supreme Court Feb. 14, 1928.

1. Death ⇨17—Time elapsing between injury and death is not controlling circumstance as to cause of death.

In an action by decedent's widow and children for decedent's death from being struck by defendant's automobile, where it was shown that decedent lived for about 19½ months after the injury and death resulted directly from heart disease, *held*, that the length of time elapsing between the injury of such decedent and his death did not control as to the proximate cause of death.

2. Death ⇨76—Evidence held to support finding injuries received by automobile were proximate cause of death from heart disease.

In action by decedent's widow and children to recover for his death from being struck by defendant's automobile, evidence *held* to support the finding that the injuries received in the automobile accident were the proximate cause of decedent's death about 19½ months later from heart disease.

3. Death ⇨99(4)—\$4,000 for 63 year old father's death held not excessive, though he had recovered \$2,500 (Code Civ. Proc. § 377).

Where, in a suit by widow and children of a 63 year old decedent for his death resulting from being struck by defendant's automobile, a verdict of \$4,000 was awarded, such judgment *held* not excessive, under Code Civ. Proc. § 377, although prior to his death the decedent himself had recovered judgment against the same defendant in the sum of \$2,500 for general damage and loss of earning capacity.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by Berta Averdick and others against F. L. Barris. Judgment for plaintiffs, and defendant appeals. Affirmed.

Knight, Boland & Christin, of San Francisco, for appellant.

Ford, Johnson & Bourquin, of San Francisco, for respondents.

KCFORD, P. J. The plaintiffs, being the surviving widow and children of Richard Averdick, deceased, recovered a judgment of \$4,000 for the death of said deceased caused by the negligent operation of an automobile driven by the defendant. The defendant appeals from the judgment upon the ground that the evidence is insufficient to prove that the negligence of the defendant resulting in injuries to the deceased was the proximate cause of the death of said deceased, and upon the further ground that the amount of the verdict is excessive.

The accident to the deceased occurred October 13, 1921, and the death occurred on May 27, 1923, about 19½ months later. The deceased was at the time of his death 63 years old, and the cause of his death, according to the testimony and death certificate, was cardiac vascular renal disease.

[1, 2] The appellant's argument is scarcely distinguishable from an argument upon the weight of the evidence. Appellant emphasizes the quality and directness of the expert witnesses called on behalf of the defendant without printing the expert testimony opposed to them. The respondent, in reply, quotes the testimony of a physician who testified as an expert witness on behalf of the plaintiffs. This physician testified in response to hypothetical questions based upon the testimony of members of the deceased's family and other witnesses. The testimony of this physician covers 30 pages of the type-written transcript. It is only necessary to consider as much of it as is relied upon in support of the verdict. This physician first testified that an injury which would cause the deceased to remain in bed in the hospital, in bed and in an armchair at home, and to discontinue his usual activities, would have a degenerative effect upon his heart, and that such degenerative effect on the heart of a man of the age of the deceased, if continued, would result in death. He explained in some detail the reasons for his opinion. It was then stipulated that the injuries received by the deceased resulted in fractures of the collar bone and of the fifth to tenth ribs, inclusive, on the left side. When the serious nature of the injuries was thus made known to this expert witness, he explained the possible and probable results of such injuries, and gave it as his opinion that the heart disease with the involvement of the blood vessels and kidneys resulted from the

injuries received by the deceased at the time of the accident. The testimony of the widow of the deceased was to the effect that deceased was well and active until the time he received the injuries and that since that time until his death he had never recovered, but had continually complained of pain in his left side and of difficulty in breathing. We are unable to distinguish in principle the facts of this case from those in *Ensign v. Southern Pacific Co.*, 193 Cal. 311, 223 P. 953, *Salmon v. Rathjens*, 152 Cal. 290, 92 P. 733, and *Moreno v. New Guadalupe Mining Co.*, 35 Cal. App. 744, 170 P. 1088. The length of time elapsing between the injury and death of deceased is not a controlling circumstance. It makes no difference in principle. We conclude that the testimony is sufficient to support the implied finding of the jury that the injuries received by the decedent were the proximate cause of his subsequent death.

[3] The deceased, in the interim between his injury and death, recovered a judgment on his own behalf in the sum of \$2,500. This judgment must be taken to include compensation for all general damage suffered by the deceased himself, including the loss of earning capacity. The judgment in the instant case therefore represents pecuniary compensation for the loss suffered by the plaintiffs, under the provisions of section 377 of the Code of Civil Procedure, which would include the loss of society, comfort, and protection afforded by the deceased to his surviving wife and children, two of the children being minors. It is not claimed that the judgment in this case includes any of the pecuniary loss for which compensation was made by the judgment obtained by the deceased on his own behalf during his lifetime, but this prior judgment is used to argue that the amount of the verdict here is excessive in view of the compensation made to the deceased during his lifetime. The case of *Parsons v. Easton*, 184 Cal. 764, 195 P. 419, is relied upon to show that the verdict in the instant case is excessive. The opinion in the *Parsons Case* shows that the damages there held to be excessive were awarded to the father and mother of a deceased son 27 years old, who had scarcely ever contributed anything to the support of his parents, had been a burden and a cause of solicitude and care to them, was physically deformed and mentally inferior and of restless habits. The relations between the deceased and the plaintiffs here are so entirely different from the *Parsons Case* that there is no comparison whatever. The verdict of \$4,000 is not excessive under the facts in this case.

The judgment is affirmed.

We concur: STURTEVANT, J.;
NOURSE, J.

87 Cal. App. 617

ECKEL v. SPRINGFIELD TUNNEL & DEVELOPMENT CO. (Civ. 3355.)★

District Court of Appeal, Third District, California. Dec. 15, 1927.

Hearing Denied by Supreme Court Feb. 9, 1928.

1. Waters and water courses ⇨101—Where spring above plaintiff's land was tributary to creek running through plaintiff's land, plaintiff had riparian owner's rights to spring water.

Where water from spring above plaintiff's land would naturally flow into creek which ran through plaintiff's lands, plaintiff's rights to spring water were those of a riparian owner.

2. Waters and water courses ⇨101—That riparian owner diverted spring water above his land through pipe and ditches held not to destroy riparian rights.

Fact that riparian owner diverted water from spring above his land and converted it to his land through pipe, flume, and ditches, instead of letting it flow naturally through creek channel, held not to destroy its character as riparian water or his rights as riparian owner.

3. Waters and water courses ⇨101, 117—"Reasonable use" of percolating or surface waters does not mean all that is necessary to any one owner, but only reasonable share.

"Reasonable use" of percolating or surface waters does not mean all the water that may be reasonably beneficial or even necessary to land of one owner, regardless of the needs of others, but only reasonable share thereof, if there is not enough water to supply the needs of all.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Reasonable Use.]

4. Waters and water courses ⇨107(1)—In action to enjoin interference with natural flow, fact that drainage was more valuable to defendant than flow of spring was to plaintiff held immaterial.

In action to enjoin interference with natural flow of water, fact that drainage of defendant's mines was more valuable to defendant than flow of spring and creek which such drainage prevented was to plaintiff held immaterial, since private property cannot be taken for private use merely because it is more valuable to taker than to him from whom it is taken.

5. Eminent domain ⇨13—Property cannot be taken for private use because it is more valuable to taker than to him from whom it is taken.

Private property cannot be taken for private use on the ground that it is not as valuable to him from whom it is taken as to him who takes it.

Appeal from Superior Court, Tuolumne County; D. M. Young, Judge.

Action by Henry W. Eckel against the Springfield Tunnel & Development Company. From the judgment, both parties appeal. Reversed.

Hearing denied by Supreme Court; PRES-
TON, J., voting for a hearing.

Edwin L. Forster and Robert R. Moody,
both of San Francisco, for appellant.

Grant & Zimdars, of San Francisco, and J.
C. Webster, of Sonora, for respondent.

FINCH, P. J. The plaintiff brought this action to enjoin the interference by defendant with the natural flow of water from a certain spring and for damages caused by past interference therewith. The facts hereinafter stated appear from the findings.

The plaintiff is the owner of 87½ acres of land, through which Mormon creek flows, all of such lands being riparian to the stream. The defendant is the owner of a tract of land adjoining plaintiff's land on the north and containing approximately 1,000 acres. Patents were issued by the United States more than 50 years ago for all of said lands of both parties. Mormon creek is a small stream, and "in dry seasons there is little or no water in this creek as it passes through" plaintiff's land. About "one quarter of a mile above plaintiff's lands and on the bank of said creek is a spring of water * * * known as Fales spring, which spring is an opening in the crevice in limestone formation and has a normal flow of water of 24 inches of water, which waters for more than 50 years prior to the commencement of this action have been conveyed by means of a pipe, flume, and ditches to plaintiff's said lands and there used for irrigation, domestic, and household purposes. * * *

For more than 8 years last past the defendant has been continuously engaged in operating upon said lands for the purpose of discovering and extracting therefrom the gold contained therein, and never acquired said land for any other purpose, and has never used said lands for any other purpose, and has never sunk any shafts or run any tunnels or drifts therein for or with any other purpose, object, or design, other than to take and remove from said lands the gold contained therein, estimated to be in large and paying quantities." A large part of defendant's land lies at an elevation about 180 feet above the surface of plaintiff's land and "upon a plateau or table mountain at the base of a slope. Easterly and somewhat northeasterly from this tract there are higher altitudes. Immediately east and northeast is a flat area of limestone formation. Further east it is mountainous. Across defendant's land, running northerly and southerly and almost at right angles to Mormon creek, is a reef of rock slate varying in width from 100 to 600 feet. The depth of this reef of slate is not known further than that it extends below the strata of gold-bearing gravel underlying defendant's land, where its underground mining operations are carried on. * * *

On the east side of the

slate the soil, composed largely of limestone and gravel, is saturated with water to such an extent that the water constantly seeps into defendant's underground workings and shafts." These shafts range in depth from 242 feet to 265 feet.

The defendant undertook, without success, to drain the mine by means of large pumps. During the operation of the pumps the flow of water in Mormon creek and from the spring was greatly diminished. Thereafter the defendant "began the construction of a drain tunnel * * * about 1 mile west of the mine within the lower boundaries of the defendant's land at an elevation lower than the bottom of its mining shafts, and where the water when discharged through the same would flow into Mormon creek at a point below the lands of the plaintiff. Defendant expended on the construction of this tunnel over a half million dollars, and was engaged in the work of construction for more than 5 years." When completed, "the tunnel drew the percolating water from the saturated soil east of the slate reef. Within a few hours after the water began flowing through the tunnel, the spring on plaintiff's land and Mormon creek where it passes through his lands ceased to flow. * * * Great quantities of water in rain and snow fall upon the hills and mountains east of this property. Much of this sinks into the ground and works its way westward in its general course toward the sea through the porous soil and gravel and through crevices and interstices until it reaches the slate reef. This being impervious to water, the further flow westward is obstructed, and the water level of this underground water is raised in such soil as is pervious to water until it finds some means of outlet along the hillside and elsewhere. Thus, through some unknown seam or crevice in the rocks, some of the water when at a high level on defendant's land finds its way to plaintiff's spring and to Mormon creek. * * * Most of this water percolates through rock and gravel that has filled an old surface stream. The bed of this stream, if such it can be called, is some 250 feet below the surface of defendant's land at its highest point, and about 60 feet lower than the surface of plaintiff's lands. Plaintiff's lands are not riparian to this underground channel. * * * The water now saturating the soil where the old channel seems once to have been is diffused in many directions. * * * Much more water is now passing through the tunnel than heretofore rose to the surface in the vicinity of plaintiff's property. * * * Of the water underlying defendant's land, much of it has hitherto escaped from the soil lying east of the reef of slate in other ways than by arising on lands of plaintiff into Mormon creek and into the springs. * * * The water saturating the soil east of the slate reef on defendant's land and now being drawn through the tunnel, and a part of which heretofore

found its way into plaintiff's spring and into Mormon creek, * * * is percolating water. * * * The lands of plaintiff are not underlain with the same character of soil that underlies the lands of defendant. There is no general connected stratum of soil underlying the lands of plaintiff and defendant, through which the same waters are percolating, and in which the plaintiff and defendant would have common and correlative rights, and the waters some distance below the surface of plaintiff's lands are not so connected with the water in defendant's land as that the draining of defendant's land through the tunnel will lower the water to the level in plaintiff's land to which it is lowered in defendant's land."

The defendant paid \$145,605 as the purchase price of its lands and has expended thereon an additional sum of more than \$730,000. It cannot "carry on its mining operations or remove any gold therefrom unless it be permitted to continue to keep said waters drained from all of its said lands by means of said tunnel, * * * and defendant never at any time from the time it was incorporated to the present date offered for sale or distribution to any person any of the waters it has encountered, * * * and the method of operating its mines by means of draining the same with said tunnel is a reasonable and proper means of mining on said lands. * * * Plaintiff has suffered damages by reason of the drying of the said Fales spring," and, for want of water therefrom, during the years 1921 and 1922, his fruit crop and his alfalfa did not mature.

Judgment was entered in favor of the defendant, denying plaintiff the relief prayed for in the complaint, but providing that if the defendant shall at any time "for a period of 90 days discontinue or cease mining operations on its said land," it shall, "at its own expense and cost, place in said tunnel * * * a concrete bulkhead which will permanently prevent any water from passing beyond said bulkhead," and further requiring the defendant to give a bond in the penal sum of \$1,000, "conditioned for the erection of said bulkhead within 90 days after the discontinuance of mining of its said lands." The plaintiff has appealed from the judgment, and the defendant has appealed from the part thereof containing the aforesaid provisions and conditions. Both appeals are on the judgment roll alone. From a stipulation filed herein, signed by the attorneys for the respective parties in this and two other actions against the defendant, E. G. Fisher, as guardian, being the plaintiff in one and Lillian Engler in the other, it appears that the three actions "were tried in superior court at the same time and upon the same testimony"; that the plaintiffs and the defendant "in each and all of said actions" have appealed; and that the decision on appeal "as entered in the one case * * * shall be considered as given, made, and decid-

ed in each of the other two cases." In the defendant's opening brief it is said:

"Similar averments of the ownership of certain lands and of the existence of springs thereon and the ownership and use of the waters thereof are alleged in the complaints in each of the other two actions against this defendant."

It clearly appears from the findings that the waters underlying defendant's lands are percolating waters, not, as the defendant seems to contend, mere "vagrant, wandering drops moving by gravity in any and every direction along the line of least resistance," but "a vast mass of water confined in a basin filled with detritus, always slowly moving downward to the outlet" or outlets. City of Los Angeles v. Hunter, 156 Cal. 603, 607, 105 P. 755.

[1, 2] The court found that these percolating waters naturally supply the plaintiff's spring and Mormon creek, that his land is riparian to Mormon creek, and that the spring in question is "on the bank of said creek." It follows that the natural flow of the water from the spring is down and through the creek, and that the plaintiff's rights therein are those of a riparian owner. The fact that he diverts the water from the spring and conveys it to his land through "a pipe, flume, and ditches," instead of letting it flow naturally through the channel of the creek, does not destroy its character as riparian water or his rights therein as a riparian owner. Turner v. James Canal Co., 155 Cal. 82, 92, 99 P. 520, 22 L. R. A. (N. S.) 401, 132 Am. St. Rep. 59, 17 Ann. Cas. 823; Miller & Lux v. Enterprise Canal & Land Co., 169 Cal. 415, 436, 147 P. 567; Holmes v. Nay, 186 Cal. 231, 240, 199 P. 325. The following language of the court in Hudson v. Dailey, 156 Cal. 617, 628, 105 P. 748, 753, is applicable to the facts found by the trial court in this case:

"Undoubtedly the water in the lands of many of the defendants would be of the class ordinarily designated as percolating water. It is therefore important to determine the relative rights of the owner of the nonriparian land containing percolating water, which feeds a surface stream, and those who have acquired riparian or prescriptive rights in said stream, where the pumping of such percolating water and its use on the land in which it is found will diminish the surface stream, to the injury of those having such riparian or prescriptive rights therein.

"The owner of land has a natural right to the reasonable use of the waters percolating therein, although it may be moving through his land into the land of his neighbor, and, although his use may prevent it from entering his neighbor's land or draw it therefrom. This right arises from the fact that the water is then in his land so that he may take it without trespassing upon his neighbor. His ownership of the land carries with it all the natural advantages of its situation, and the right to a reasonable use of the land and everything it contains, limited only by the operation of the maxim 'Sic utere tuo ut

alienum non lœdas.' It is upon this principle that the law of riparian rights is founded, giving to each owner the right to use the waters of the stream upon his riparian land, but limiting him to a reasonable share thereof, as against other riparian owners thereon. We think the same application of the principle should be made to the case of percolating waters feeding the stream and necessary to its continued flow. There is no rational ground for any distinction between such percolating waters and the waters in the gravels immediately beneath and directly supporting the surface flow, and no reason for applying a different rule to the two classes, with respect to such rights, if indeed, the two classes can be distinguished at all. Such waters, together with the surface stream supplied by them, should be considered a common supply, in which all who by their natural situation have access to it have a common right, and of which they may each make a reasonable use upon the land so situated, taking it either from the surface flow, or directly from the percolations beneath their lands. The natural rights of these defendants and the plaintiff in this common supply of water would therefore be coequal, except as to quantity, and correlative."

See, also, City of San Bernardino v. City of Riverside, 186 Cal. 7, 14, 198 P. 784; City of Los Angeles v. Hunter, 156 Cal. 603, 608, 105 P. 755; McClintock v. Hudson, 141 Cal. 275, 281, 74 P. 849.

[3] It is clear from the foregoing quotation, as well as from other authorities, that in this state the term "reasonable use," as employed therein, does not mean that one of two or more persons having correlative rights in a common supply of water may take all that is reasonably beneficial to his land, regardless of the needs of the others, as the defendant contends, but only his reasonable share thereof, if there is not enough to supply the needs of all. "Necessity is not the sole measure of right in such cases." Verdugo Cañon Water Co. v. Verdugo, 152 Cal. 655, 667, 93 P. 1021, 1027. "There is a distinction between the English rule as modified by the modern American rule of reasonable use and the rule of correlative rights. Under the rule of reasonable use some of the authorities hold that a land owner has a right to make such a beneficial use of the water found percolating through his land to the extent that may be necessary for the improvement of his land, so long as it is used thereon, although in so doing he may drain the lands of his neighbors. Upon the other hand, the rule of correlative rights to these owners is the rule which abrogates the English rule as to these waters and holds that the rights of all land owners over a common basin, saturated strata, or underground reservoir, are coequal or correlative, and that one land owner can not extract more than his share of the water even for use on his own lands, where the rights of others are injured thereby." Kinney on Irrigation and Water Rights (2d Ed.) § 1192. "It is a question of reasonable use, and that applies both to the

land of the person disturbing the percolation and to adjoining land." *Katz v. Walkinshaw*, 141 Cal. 116, 143, 70 P. 663, 666 (64 L. R. A. 236, 99 Am. St. Rep. 35).

[4, 5] It may be that the defendant would derive a greater benefit from the drainage of its mine than the plaintiff receives from the use of the water flowing from the spring, but that fact is wholly immaterial. The value of a flow of 24 inches of water is in no sense unsubstantial or negligible, and it is elementary that private property cannot be taken for private use upon the ground that it is more valuable to the taker than to him from whom it is taken. *Scott v. Fruit Growers' Supply Co.* (Cal. Sup.) 253 P. 1095. Since both parties have correlative rights in the waters in question, however, the situation may be such as, under appropriate issues, to warrant a conditional injunction only, restraining the defendant from diverting the flow of water from plaintiff's spring except during such times as it shall restore to the plaintiff's land an equal quantity of water of like quality as that which naturally flows from the spring, or such part thereof as constitutes the plaintiff's reasonable share of the common supply. *Gould v. Eaton*, 117 Cal. 539, 543, 49 P. 577, 38 L. R. A. 181; *Montecito Valley Water Co. v. Santa Barbara*, 144 Cal. 578, 602, 77 P. 1113; *Newport v. Temescal Water Co.*, 149 Cal. 531, 539, 87 P. 372, 6 L. R. A. (N. S.) 1098; *Huffner v. Sawday*, 153 Cal. 86, 94, 94 P. 424. The facts found by the court show that the plaintiff is also entitled to damages caused by the defendant's wrongful diversion of the water from his spring. It is clear that the plaintiff is not estopped to maintain the action. *Verdugo Cañon Water Co. v. Verdugo*, 152 Cal. 655, 684, 93 P. 1021.

The judgment is reversed, the plaintiff to recover his costs of appeal.

We concur: PLUMMER, J.; HART, J.

PEOPLE v. CAMPRIDON. (Cr. 1395.)★

District Court of Appeal, First District, Division 1, California. Dec. 9, 1927.

Hearing Granted by Supreme Court Feb. 6, 1928.

1. Highways ⇨186—Evidence held sufficient to support conviction of violating Motor Vehicle Act by not stopping after accident (Motor Vehicle Act, § 141).

Evidence held sufficient to support conviction of automobile driver, under Motor Vehicle Act, § 141 (St. 1923, p. 562), providing that driver of any vehicle striking person shall stop, give his name, address, and the registration number of his vehicle, and render necessary aid.

2. Criminal law ⇨1160—Jury's verdict approved by trial court is conclusive, unless entirely unsupported by evidence.

Before jury's verdict in criminal case which has been approved by trial court can be set

aside for insufficiency of evidence, it must clearly appear that upon no hypothesis whatever is there substantial evidence sufficient to support the trial court's conclusion.

3. Highways ⇨186—Extent of injuries to prosecuting witness held admissible in prosecution for violating Motor Vehicle Act by failing to stop after accident (Motor Vehicle Act, § 141).

In prosecution for violating Motor Vehicle Act, § 141 (St. 1923, p. 562), requiring that where automobile driver strikes a person he should stop, give name and address, and render any necessary assistance, nature and extent of injuries to prosecuting witness held admissible.

4. Criminal law ⇨1156(1)—Trial court's refusal of new trial will not be disturbed, unless clear abuse of discretion is shown.

Trial court's refusal to grant new trial after conviction for crime will not be disturbed on appeal, in the absence of a showing of manifest abuse of discretion.

5. Criminal law ⇨938(1)—Refusal to grant new trial for new evidence held not abuse of discretion, where evidence was cumulative, and inability to procure new witnesses' attendance at trial was not shown (Motor Vehicle Act, § 141).

Refusal to grant new trial for new evidence after conviction for violating Motor Vehicle Act, § 141 (St. 1923, p. 562), held not abuse of discretion, where evidence was cumulative, and defendant made no showing that the attendance of the new witnesses could not have been procured at the trial.

6. Criminal law ⇨1173(1)—In prosecution under Motor Vehicle Act failure to instruct jury that to convict they must agree on one of alternative charges, if error, held harmless, where evidence showed defendant failed to stop after accident (Motor Vehicle Act, § 141).

In prosecution under Motor Vehicle Act, § 141 (St. 1923, p. 562), providing that, after striking a person, automobile driver should stop, give name, address, and registration number of his automobile, and render necessary assistance, failure to instruct jury that to convict they must agree either on defendant's failure to stop, to give name, to give address, to give registration number, or to render necessary assistance, if error, held harmless, where evidence showed defendant failed to stop after accident, and thus violated all such duties.

Appeal from Superior Court, City and County of San Francisco; J. J. Trabucco, Judge.

Albert Campridon was convicted of violating Motor Vehicle Act, § 141, relating to an automobile driver's duty to stop and give assistance after an accident, and he appeals. Affirmed.

John V. Copren, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Emery F. Mitchell, Deputy Atty. Gen., for the People.

TYLER, P. J. Appellant was accused and convicted of violating section 141 of the Motor Vehicle Act (St. 1923, p. 562). The information charged, in substance, that on or about the 21st day of January, 1926, while operating his automobile on Potrero avenue, in the city and county of San Francisco, defendant struck one Patrick Biggins, and he then and there lawfully failed and neglected to give to the person so struck his name or address, or the registration number of his automobile, or the name and address of any passenger in said vehicle, and likewise failed and omitted to render to Patrick Biggins all or any necessary or other assistance contrary to the provisions of the act. Defendant upon arraignment pleaded not guilty. Trial was had by jury on the 1st day of March, 1927, which resulted in a conviction. Thereafter a motion for a new trial was made, which was denied, and defendant was sentenced to serve 8 months in the county jail. This appeal is prosecuted from the order and judgment. It is the contention of appellant that the evidence is insufficient to justify the verdict of the jury. It is also contended that the trial court erred in permitting the complaining witness to testify as to the extent of his injuries and the length of time he was confined in a hospital in consequence thereof; and, finally, the further claim is made that the court erred in refusing defendant's motion for a new trial. The facts, briefly stated, show that Patrick Biggins, the complaining witness, was on the morning of the day charged in the information struck by an automobile driven by defendant while he was attempting to cross Potrero avenue at Twenty-fourth street, and in consequence thereof was rendered unconscious and spent 18 weeks in a hospital with a broken leg.

[1] A special police officer, called by the prosecution, testified that at the time in question he was proceeding in a northerly direction on Potrero avenue; that while he was crossing Twenty-Fourth street, a Ford coupé driven by defendant passed him quite suddenly and turned partly toward his machine; that he had to pull towards the curb in order to avoid being hit; that at this time he heard a dull sound and saw a man fall; that defendant's machine came to a stop momentarily, and then proceeded; that he pursued defendant and caught up with him in a traffic jam when about 150 feet away from the accident; that defendant did not attempt to give his name to Biggins before he was brought back to the scene of the accident or the name of his companion, or render any aid or assistance to the injured man. Some four other witnesses called on behalf of the defense testified that defendant did stop, and that he returned to the scene of the accident and made no attempt to escape. Whatever conflict there may be in this evidence, it is apparent that the testimony of the police officer is sufficient to support the verdict.

[2] It is the function of the jury in the first instance, and of the trial court after verdict, to determine what facts are established by the evidence, and before the verdict of the jury, which has been approved by the trial court, can be set aside on appeal upon the ground of the insufficiency of the evidence to support it, it must be made clearly to appear that upon no hypothesis whatever is there substantial evidence sufficient to support the conclusion of the trial court. *People v. Tom Woo*, 181 Cal. 315, 184 P. 389. There is, therefore, no merit in this contention.

[3] Nor do we think the action of the trial court in permitting the prosecuting witness to testify as to the nature of his injuries constitutes reversible error. The very purpose of the provision of the act was designed to prohibit, under pain of severe punishment, negligent or wanton drivers of vehicles from leaving persons injured by them in distress and danger for want of proper medical or surgical treatment. *People v. Kaufman*, 49 Cal. App. 570, 193 P. 953. The fact of injury and its extent is most material to prove the commission of the offense. Without an injury there would be no need for medical assistance.

[4, 5] Equally without merit is the remaining contention that the trial court erred in refusing defendant's motion for a new trial. In support of this motion certain affidavits of two additional witnesses were offered and received in evidence. These affidavits recited that defendant did not attempt to flee after the accident. There was no showing made that defendant could not have procured the attendance of these witnesses at the trial. Moreover, the evidence set forth in the affidavit was merely cumulative, and the question as to whether or not it was sufficient to warrant the granting of a new trial was a matter addressed to the sound discretion of the trial court, and its conclusion upon the subject cannot here be disturbed in the absence of a showing of manifest abuse, and here there is no such showing. *People v. Lakenan*, 61 Cal. App. 368, 214 P. 1021.

[6] Since the filing of his opening brief appellant has drawn our attention to the case of *People v. Scofield* (Cal. App.) 258 P. 656, wherein it is held that in a prosecution under section 141 of the Motor Vehicle Act it is incumbent upon the trial judge to instruct the jury that, in order to find an accused guilty, the members of the jury must agree upon at least one of the alternative charges pleaded; that is, that the accused failed to stop, or to give his name, or to give his address, or to give the registration number of his car, or to render necessary assistance, and this notwithstanding that defendant failed to request such instruction. A transfer has been granted in this case to the Supreme Court, and it is no longer authority on the subject. The rule has been generally recognized in this state that, where a party in a criminal case

fails to ask the court to give instructions to the jury upon a particular point, he cannot complain of error on the part of the court in not giving the instructions. *People v. Rogers*, 163 Cal. 476, 126 P. 143.

However, irrespective of what the proper rule may be upon the subject, we do not see what possible prejudice could have resulted to defendant in the present case because of the absence of an instruction on this point. While there is evidence in the record to the effect that defendant did not give his name, address, or registration number to any one, the testimony of the police officer shows that defendant immediately drove away from the scene of the accident without rendering his victim any aid, and that he was only prevented from escaping by reason of a congestion in the traffic. This act on his part made it impossible for him to comply with the enumerated duties imposed by the statute. By immediately driving away without rendering aid he put it beyond his power to comply with the other acts, the omission of which is denounced by the statute. He therefore violated all such duties. Under such circumstances, the fact that the trial judge failed to instruct the jury that it was necessary to agree upon one of the alternative charges is immaterial.

The judgment and order are affirmed.

We concur: KNIGHT, J.; CASHIN, J.

87 Cal. App. 717

MCDONALD v. BERNARD et al. (Civ. 6061.)

District Court of Appeal, First District, Division 2, California. Dec. 21, 1927.

1. Brokers ⇨61(1)—Broker's right to compensation for procuring exchange properties held not to depend on validity of title.

Where broker is employed to procure the acceptance of a proposition to exchange certain properties, his right to compensation does not depend on validity of title, and failure of person who employed him to perfect title, which would enable such person to complete the exchange, does not affect his liability to the broker.

2. Brokers ⇨61(2)—Assignee held entitled to commissions under contract employing brokers for procuring exchange of properties, notwithstanding exchange failed because defendant's wife clouded title.

Where defendant promised to pay assignors of plaintiff a commission for securing acceptance of proposition to exchange properties, which acceptance brokers procured, plaintiff held entitled to recover commissions, notwithstanding exchange failed because defendant's wife clouded title by recording a declaration of homestead on defendant's property, especially since defendant knew of wife's threats to cloud title before he executed contract employing brokers.

Appeal from Superior Court, Sonoma County; Ross Campbell, Judge.

Action by J. F. McDonald against J. Bernard and others to recover commissions on exchange of real estate. Judgment for plaintiff, and defendants appeal. Affirmed.

See, also, 262 P. 431.

Geary & Geary, of Santa Rosa, for appellants.

Eugene F. Conlin, of San Francisco, for respondent.

NOURSE, J. Plaintiff sued as assignee of two real estate brokers to recover the commission claimed by them to be due for their services in connection with the proposed exchange of real properties. Plaintiff had judgment for \$3,000, without interest, from which defendant has appealed on a type-written transcript.

The services were performed in accordance with the terms of a written contract wherein defendant promised to pay a commission of \$3,000 "upon acceptance of this agreement" by the owner of the properties which were to be conveyed to defendant. This acceptance was procured in writing, and deeds of conveyance were duly executed, but, before defendant's deed was recorded, his wife recorded a declaration of homestead upon his property, and the exchange was not completed. Though the property owned by defendant and proposed to be exchanged by him was his separate property, the wife opposed his plan to sell or exchange it, and notified the brokers before the commission agreement was executed that she would not execute a conveyance of the property, and would do all in her power legally to prevent the exchange. Of this the defendant was fully aware at the time he executed the contract with the brokers.

This constitutes the only defense raised by appellant to the payment of the commission. It is argued that the brokers, knowing the opposition of appellant's wife to the exchange, entered into the contract at their peril, and therefore may not recover. There is no charge of fraud or misrepresentation; no claim that appellant was not at all times the sole owner of the property, and able to give clear title, except for the lien of the homestead created by his wife.

The rule of law involved is simple and well settled. The appellant knew of his wife's objection to the exchange when he employed the brokers to procure an acceptance from the owner of the other piece of property. It may be that he thought he could satisfy her objections if he had the exchange contract signed, or that he would complete the exchange without her consent, or that she might change her mind, but these

are matters with which the brokers were not concerned. They were employed to procure the acceptance of the other owner, and they performed that service in strict accordance with their contract.

[1] When a broker is employed to procure the acceptance of a proposition to exchange specified properties, his right to compensation does not depend upon the validity of the title. *Gonzales v. Broad*, 57 Cal. 224, 226. The refusal of the wife to join her husband in a conveyance of community property does not affect the liability of the husband on his individual contract with a broker to procure a purchaser. *Goodrich v. Turney*, 44 Cal. App. 516, 520, 186 P. 806; *Johnson v. Krier*, 59 Cal. App. 330-333, 210 P. 966; *Russell v. Ramm* (Cal. Sup.) 254 P. 532. These cases merely follow the general rule that a party may contract with a broker to procure a suitable purchaser for property which he does not own and his subsequent failure to perfect a title which would enable him to complete a sale does not affect his liability to the broker. *Martin v. Ede*, 103 Cal. 157-161, 37 P. 199, and cases cited.

[2] We see no reason for a different rule, where a perfect title is clouded before the sale is completed through no fault of the broker. Here both parties had knowledge of the wife's threats to cloud the title before the written contract of employment was executed. Notwithstanding this knowledge, appellant agreed to pay the stipulated sum, if the brokers procured the acceptance by the owner of the other parcel. If appellant hoped to be relieved of this obligation if the wife carried out her threat, he should have so stipulated in the written contract.

The judgment, in so far as it is attacked on this appeal, is affirmed.

We concur: KOFORD, P. J.; STURTEVANT, J.

87 Cal. App. 720

McDONALD v. BERNARD et al. (Civ. 6048.)

District Court of Appeal, First District, Division 2, California. Dec. 21, 1927.

Brokers §87—Assignee of brokers who procured exchange of properties could recover interest on commissions from date acceptance was procured (Civ. Code, § 3287).

In suit by assignee of brokers to recover commissions for procuring acceptance of a proposition to exchange real property, where judgment was for plaintiff, plaintiff held entitled to interest on the sum recovered from date the acceptance was procured, in view of Civ. Code, § 3287.

Appeal from Superior Court, Sonoma County; Ross Campbell, Judge.

Action by J. F. McDonald against J. Bernard and others to recover commissions on exchange of real property. From a judgment for plaintiff which denied him interest, plaintiff appeals. Modified.

Eugene F. Conlin, of San Francisco, for appellant.

Geary & Geary, of Santa Rosa, for respondents.

NOURSE, J. This is a separate appeal by the plaintiff from the same judgment considered in *McDonald v. Bernard* (No. 6061) 262 P. 430, and particularly from that portion of the judgment which denied plaintiff interest on the sum recovered from the date of performance to the rendition of the judgment. The appeal is taken on a separate typewritten transcript.

The contract called the plaintiff's assignors to procure the acceptance of defendant's proposal to exchange real properties. Written acceptance of this proposal was procured by them on November 19, 1920. Defendant's obligation to pay for the services became fixed as of that date, and, as the amount was determined by the contract, interest should have been allowed from that time. *Gray v. Bekins*, 186 Cal. 329, 399, 199 P. 767; Civ. Code, § 3287.

The judgment is modified by adding after the word "action" in the last line thereof the following: "And interest on said sum of \$3,000 from November 19, 1920, at the rate of 7 per cent. per annum." Appellant to have his costs on this appeal.

We concur: KOFORD, P. J.; STURTEVANT, J.

87 Cal. App. 418

FACKRELL v. McDONALD. (Civ. 3377.)★

District Court of Appeal, Third District, California. Dec. 9, 1927.

Hearing Denied by Supreme Court Feb. 6, 1928.

1. Appeal and error §110, 782—Order denying new trial is not appealable, and appeal must be dismissed.

Order denying new trial was not appealable, and attempted appeal therefrom had to be dismissed.

2. Malicious prosecution §56—Burden is on plaintiff to prove malice and want of "probable cause."

In action for malicious prosecution, burden is on plaintiff to prove both malice and want of "probable cause"; "probable cause" being a suspicion founded upon circumstances sufficiently strong to warrant reasonable man in belief that charge is true.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Probable Cause (in Malicious Prosecution).]

★Hearing denied by Supreme Court.

3. Malicious prosecution ☞8—That date of offense charged in complaint was wrong was immaterial in malicious prosecution action.

Where complaint charged plaintiff with stealing on June 18th note and mortgage turned over to him by defendant to sell, when they were not delivered into his possession until August 1st, was immaterial in malicious prosecution action, where matter of placing proper charge against plaintiff was left entirely to deputy district attorney.

4. Malicious prosecution ☞8—That defendant in malicious prosecution action did not read criminal complaint was immaterial.

That defendant in malicious prosecution action testified that he did not read criminal complaint charging plaintiff with stealing defendant's note and mortgage defendant had turned over to him to sell, after same had been prepared by deputy district attorney, was immaterial, where matter of preparing legal papers and placing proper charge against plaintiff had been left entirely to deputy district attorney.

5. Malicious prosecution ☞16—To support "malicious prosecution" action, there must be want of probable cause and malice.

In order to support an action for "malicious prosecution," two essential facts must occur; namely, want of probable cause and malice.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Malicious Prosecution.]

6. Malicious prosecution ☞27—To constitute "malice" supporting malicious prosecution action, defendant must have had some evil or sinister purpose.

To constitute "malice" supporting an action for malicious prosecution, there must be malus animus denoting that party who instituted proceeding was actuated by wrong motive; that is, he must have had in his mind some evil or sinister purpose.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Malice.]

7. Malicious prosecution ☞31—Defendant's threat to have plaintiff arrested if he did not return note belonging to defendant did not show malice.

Where defendant had turned over note and mortgage to plaintiff to sell, and plaintiff had failed to do so, and defendant had been trying for five or six months to get note and mortgage back, and another party was claiming to own mortgage, defendant's telling plaintiff that he would have him arrested if he did not return note and mortgage did not import malice supporting malicious prosecution action.

8. Malicious prosecution ☞71(2)—Evidence of want of probable cause for prosecution or charge of larceny of note or existence of malice, held insufficient for jury.

Where defendant in malicious prosecution action had charged plaintiff with stealing note and mortgage which defendant had turned over to plaintiff to sell, and which plaintiff had refused to return, evidence of want of probable

cause or existence of malice held insufficient to go to jury.

Appeal from Superior Court, Los Angeles County; John M. York, Judge.

Action for damages for malicious prosecution by C. E. Fackrell against Hugh McDonald. From a judgment for plaintiff, and from an order denying a new trial, defendant appeals. Appeal from the order denying a new trial dismissed. Judgment reversed.

Fred W. Heath, of Los Angeles, for appellant.

Warren L. Williams and Seymour S. Silverton, both of Los Angeles, for respondent.

PRESTON, Justice pro tem. [1] This is an appeal by defendant, Hugh McDonald, from a judgment entered against him upon a verdict of a jury in the sum of \$5,000 in an action for malicious prosecution. Appellant also appeals from the order denying him a new trial. The order denying a new trial is not appealable, and for that reason the attempted appeal therefrom must be dismissed.

The plaintiff, C. E. Fackrell, brought this action in the superior court of Los Angeles county, alleging that the defendant, Hugh McDonald, did, maliciously and with probable cause, swear to a complaint charging him with the crime of grand larceny, and procured a warrant for his arrest upon that charge.

At the conclusion of plaintiff's evidence defendant made a motion for a nonsuit upon the ground that plaintiff had failed to establish want of probable cause and the existence of malice in the criminal prosecution. This motion was denied. A motion for a new trial was made upon various grounds which motion was also denied.

The facts necessary for a correct understanding of the questions involved in this appeal may be thus briefly stated: The plaintiff and respondent was, at the time of the transaction involved herein, a stock salesman, 33 years of age, residing at Glendale, Cal. During the latter part of December, 1922, respondent called upon the appellant, Hugh McDonald, at his home near Glendale, Cal., and sought to sell him stock in a corporation known as the "Blue Tank Company." On his first visit respondent was unable to interest Mr. McDonald in the stock, and thereafter made a number of other calls upon appellant from time to time for the same purpose. During one of these visits respondent learned that appellant had no ready money, but owned a note for \$8,000, secured by a first mortgage on certain real estate situate in or near Glendale, Cal. Finally, on June 18, 1923, it was agreed between respondent and appellant that respondent would take said note and mortgage and dispose of them at a discount of not more than 10 per cent., and

from the proceeds buy \$5,000 worth of "Blue Tank Company" stock in the name of appellant and return the balance of the money, amounting to some \$2,200 in cash to appellant. Thereupon appellant signed what is called a "purchasing order" for the stock, and at the same time gave plaintiff an order on a bank in Glendale for the note and mortgage, where it had been left for safe-keeping by appellant. No time limit was specified in said "purchasing order" as to when the stock should be purchased or the note and mortgage sold. The note was not indorsed by appellant, and the mortgage was not assigned to respondent. Neither did respondent have any power of attorney from appellant under which he could assign the note and mortgage. Respondent received the note and mortgage from the bank on the 1st day of August, 1923.

Shortly thereafter, and on the 23d of August, 1923, appellant left California on a visit in the east, having placed all his business in the hands of his attorney, Mr. Fred W. Heath, and requested respondent to deliver the stock and money, etc., to Mr. Heath, his attorney. During his absence, and on October 4, 1923, while in Boston, appellant received a telegram from his attorney stating that respondent was trying to dispose of the note and mortgage to the Nugent Oil Company for stock, and that the situation was not favorable, and for him, appellant, to wire respondent to deliver the note and mortgage to Mr. Heath. Upon receipt of this telegram appellant sent a telegram to respondent requesting him to deliver the note and mortgage to his attorney, Mr. Heath. This request was not complied with by respondent.

Appellant returned to Glendale on October 22, 1923, and on the next morning had a conversation with respondent, in which respondent stated that the note and mortgage could not be sold at a discount of 10 per cent. and wanted appellant to agree to a discount of 20 per cent., which appellant refused to do. Respondent did not return the note and mortgage and did not purchase the stock. Soon after this conversation on October 23, 1923, Mary C. Ward, the maker of the note and mortgage, called upon appellant and told him that a lady by the name of Mrs. George had informed her that she, Mrs. George, owned the McDonald note and mortgage of \$8,000, and insisted that Miss Ward pay the interest to her. The agent of Miss Ward also called upon Mrs. George, and she also informed him that she was the owner of the McDonald note and mortgage and had purchased it in August, 1923, and stated to this agent that she desired respondent to be present before she would allow the agent of Miss Ward, to inspect the note and mortgage. A few days later this agent of Miss Ward, a Mr. Heald, interviewed respondent and told him that it was immaterial to Miss Ward who received the interest, but that Miss Ward must know

that she was paying the interest to the right party. Thereupon respondent replied, "I think Mrs. George has advanced money for the transaction." Neither the note nor mortgage, or any assignment thereof, was exhibited to Mr. Heald. Mr. Heald then called upon appellant and informed him of what respondent had said, and also told him that Mrs. George claimed to own the note and mortgage. Shortly before or after this conversation Mr. Nugent of the Nugent Oil Company informed appellant that respondent had offered to sell the Nugent Oil Company the \$8,000 note and mortgage and had stated to him that he, respondent, "had a power of attorney in the matter of the mortgage and could dispose of it to anybody he wanted to." Both before and after this conversation with Mr. Nugent, appellant had consulted Mr. Heath, his attorney, regarding this matter, and Mr. Heath directed appellant to again call upon respondent and demand the return of the note and mortgage, or the delivery of the money and stock. In pursuance to this request, appellant set about looking for respondent and after two or three days finally located him and again demanded the return of his papers, which demand was again ignored by respondent. Appellant testified that on this occasion, after he had demanded the return of his papers, respondent replied, "I have gotten in a hard row of stumps and had to use your mortgage and put it up for collateral," whereupon appellant replied, "If you did, you will get into trouble." Respondent denies having made any such statement, but does not deny that appellant demanded a return of the note and mortgage, and that such demand was not complied with. Appellant again reported to his attorney that his efforts to obtain the note and mortgage from respondent were unavailing, whereupon his attorney again requested appellant to take a witness and go and again demand a return of his papers from respondent.

Appellant again called upon respondent, this time in company with his brother, and demanded the return of his note and mortgage, and, according to both appellant and his brother, respondent admitted that he had pledged appellant's note and mortgage, and that appellant would have to pay \$7,200 to get his note and mortgage back, and that appellant said, "See here, Fackrell, you put the Blue Tank stock in escrow by Saturday, or there will be trouble," and respondent said "I won't do it." The respondent, Fackrell, testified that this conversation occurred on November 19th, and that appellant told him that he, McDonald, had decided to go through with the deal as he had agreed in the first place and let Fackrell sell the papers subject to 10 per cent. discount, but that he said, "I will give you five days to sell them in, and if you haven't sold them in five days I will have you arrested. * * * He told me he

would be back in five days after the papers. The 24th, he said, would be Saturday, and he would be back to my office for the papers."

After this conversation, whatever date it took place, no further demands were made upon respondent, and neither the note nor mortgage or stock or money, or any part thereof, was ever delivered either to the attorney, Mr. Heath, or appellant. Another conference was had with the attorney, and Mr. Heath advised appellant to go to see the district attorney and gave appellant a letter to the district attorney. Appellant called upon Mr. Orme, a deputy district attorney of the county of Los Angeles, and stated to him all the facts relative to the transaction with respondent. Mr. Orme advised him that he wanted to make some independent investigation before issuing a warrant and asked appellant to secure certain other information relative to the transaction, which appellant furnished, and, after Mr. Orme had made an independent investigation and about one month had elapsed, a complaint charging respondent with grand larceny on the 18th day of June, 1923, was prepared by the deputy district attorney and appellant requested to take it to the justice of the peace and sign and swear to it before him, which was done on the 30th of November, 1923. Respondent was arrested upon that date and in default of bail was held in the county jail until December 3, 1923, when he gave bail in the sum of \$3,000 and was released. On December 5, 1923, the preliminary examination was commenced and continued to the 13th, at which time it was agreed by the district attorney's office and the attorney for respondent that if respondent would deliver to appellant the note and mortgage the criminal action would be dismissed. Thereupon the note and mortgage were produced and given to appellant, and a receipt was prepared by the deputy district attorney and signed by appellant acknowledging the return of his note and mortgage, and the action was dismissed and respondent discharged. Following the dismissal of the action the case at bar was commenced.

There is some conflict between the testimony of appellant and the testimony of respondent as to what was said and done at some of these conversations between them, but all the other facts are substantially uncontradicted.

The appellant first contends that the evidence is wholly insufficient to show that he instituted the criminal proceedings against respondent without probable cause. A careful study of all the evidence in the case convinces us fully that this contention must be sustained.

[2] The law is well settled that in an action of this character the burden is upon the plaintiff to prove both malice and want of probable cause. *Potter v. Seale*, 8 Cal. 217; *Anderson v. Coleman*, 53 Cal. 188; *Grant v.*

Moore, 29 Cal. 644; *Jones v. Jones*, 71 Cal. 89, 11 P. 817; *Smith v. Liverpool*, 107 Cal. 433, 40 P. 540; *Davis v. Pacific Telephone Co.*, 127 Cal. 312, 57 P. 746, 59 P. 698; *Lacey v. Porter*, 103 Cal. 597, 37 P. 635; *McKenna v. Heinlen*, 128 Cal. 97, 60 P. 668; *Lee v. Levison*, 173 Cal. 166, 159 P. 438; *Morris v. Moore*, 61 Cal. App. 314, 214 P. 995; *Booraem v. Potter Hotel Co.*, 154 Cal. 99, 97 P. 65; *Jirku v. Brod*, 42 Cal. App. 796, 184 P. 413; *Squires v. Southern Pacific Co.*, 42 Cal. App. 459, 183 P. 695; *Hewelcke v. Shipman*, 65 Cal. App. 257, 223 P. 1019; *Franzen v. Shenk*, 192 Cal. 572, 221 P. 932; *Pickering v. Havens*, 70 Cal. App. 381, 233 P. 346; *Redgate v. Southern Pacific Co.*, 24 Cal. App. 573, 141 P. 1191.

Reasonable or probable cause has been defined to be "a suspicion founded upon circumstances sufficiently strong to warrant a reasonable man in the belief that the charge is true." *Potter v. Seale*, supra; *Redgate v. Southern Pacific Co.*, supra; *Lee v. Levison*, supra; *Morris v. Moore*, supra; 2 *Greenleaf on Evidence*, § 453, 457.

The facts and circumstances of which appellant had knowledge at the time he sought the arrest of respondent were such as would naturally excite the honest belief in any reasonable mind that respondent had committed a crime. Appellant had turned over to respondent a note and mortgage of \$8,000 six months before, with the understanding that respondent would sell the same and out of the proceeds purchase for appellant \$5,000 worth of "Blue Tank Company" stock, and return the balance in cash to him, less a discount of 10 per cent. Respondent did not purchase the stock as agreed; neither did he return the note and mortgage to appellant, or the proceeds thereof. Appellant had many times demanded the return of his papers both personally and through his attorney. The maker of the mortgage had informed appellant that another party was claiming to own the note and mortgage and demanding that the interest be paid to her. These facts alone as we have stated, would be sufficient to create in the mind of any reasonable person the belief that respondent had misappropriated the property of appellant; but appellant, not being satisfied with his own judgment that respondent had misappropriated his property, sought the advice and counsel of his attorney and laid before him fully and fairly all the facts within his knowledge, and after so doing he was advised by his attorney that in the opinion of the attorney a crime had been committed, and directed that he take the matter up with the district attorney. Following the advice of his own counsel, the appellant took the matter up with a deputy district attorney and likewise made to him a full and fair disclosure of all the facts within his knowledge and, after so doing, the deputy district attorney advised appellant that a crime had been committed.

Respondent lays great stress upon the fact

that the note was not indorsed by appellant and, he having no power of attorney from appellant, the note and mortgage were not negotiable and valueless in his hands under such conditions. There is no merit in this contention. The fact that the note and mortgage had been placed in respondent's possession without indorsement and for a specific purpose, coupled with the fact that this specific purpose had not been carried out by respondent, but, on the contrary, information was coming to appellant that respondent had represented to others that he had a power of attorney to dispose of the mortgage in any way he saw fit, and the further information coming to appellant that another person was actually claiming to own the note and mortgage, and such alleged owner was demanding the interest from the mortgagor, would certainly be sufficient suspicious circumstances to warrant appellant or any reasonable man, in believing that respondent had misappropriated his property and was guilty of a crime. It is not what respondent could have *lawfully done with the note and mortgage*, but the test of probable cause is, Were the facts and circumstances that were known to appellant sufficient to warrant him, as a reasonable man, in honestly believing that respondent had disposed, or was attempting to dispose, of his property unlawfully? A careful review of all the evidence convinces us that appellant had abundant evidence upon which to base such a belief.

[3, 4] Respondent also lays particular stress upon the fact that the complaint states that the note and mortgage were stolen on the 18th day of June, 1923, when they were not delivered into the possession of respondent until August 1st, and that appellant testified that he did not read the criminal complaint after the same had been prepared by the deputy district attorney. There is no merit in either of these contentions. The matter of preparing the legal papers and placing the proper charge against respondent was left entirely to the deputy district attorney. Appellant was not an attorney and could not have known the exact name of the crime that the facts indicated respondent had committed.

[5] Appellant also contends that there is no evidence that he acted maliciously in causing the arrest and prosecution of respondent. We need not however, dwell at length upon the question of malice, for, as we have seen, the evidence is wholly insufficient to show want of probable cause. The law is well settled that, in order to support an action for malicious prosecution, two essential facts must concur; namely, want of probable cause and malice. *Runo v. Williams*, 162 Cal. 444, 122 P. 1082; *Burke v. Watts*, 188 Cal. 118, 204 P. 578; *Redgate v. Southern Pacific Co.*, supra; *Potter v. Seale*, supra; *Anderson v. Coleman*, supra.

[6] To constitute malice, *there must be*

"malus animus," denoting that the party who instituted the proceeding was actuated by a wrong motive; that is he must have had in his mind some evil or sinister purpose. *Pickering v. Havens*, supra; *Redgate v. Southern Pacific Co.*, supra.

We find no direct evidence of malice and no facts or circumstances from which malice or bad faith on the part of appellant could be lawfully inferred. The evidence of respondent, which is relied upon to show malice, is the following:

"Q. When was the next conversation you had with Mr. McDonald before he had you arrested? A. On November 19th. * * *

"Q. State what Mr. McDonald said to you there? A. He told me he had decided to go through with the deal, as he agreed to in the first place, and let me sell the papers subject to 10 per cent. discount; but he says, 'I will give you five days to sell them in, and if you haven't sold them in five days I will have you arrested.' * * *

"Q. What is the next you heard about Mr. McDonald or the case? A. He told me he would come back in five days after the papers. The 24th, he said, would be Saturday, and he would come back to my office for the papers.

"Q. What is the next thing that happened in connection with it? A. The officers came for me and arrested me on November 30th."

[7] This evidence, as above stated, was contradicted by appellant and his brother, who was present. Assuming that respondent's statement is correct, nevertheless, this would not constitute malice, especially in view of the circumstances under which it was made. Appellant had been trying for five or six months to get his property back, and another party was claiming to own the mortgage. To tell a man, under such circumstances, that he would have him arrested would certainly not import malice. To tell a man he will be arrested, if you find that he has stolen your automobile, is no basis for the inference of malice. If respondent was acting in the best of faith, as he contends, *why did he not return to appellant, or to his attorney, the note and mortgage?* At the preliminary examination in the justice court, he delivered up the note and mortgage to appellant. He was certainly obligated to either carry out the contract that he had made with appellant or return to the appellant his property. Respondent did neither until he was arrested, and then he was more than willing to surrender up appellant's property.

[8] We conclude, therefore, that there is no evidence upon which the jury could infer a want of probable cause or the existence of malice, and that the motion for a nonsuit made by appellant should have been granted, or, if not granted, a directed verdict should have been ordered in favor of the defendant and appellant.

From the conclusions that we have reached, it is unnecessary for us to discuss the other points relative to the instructions and the

admission of testimony, urged by appellant. We find no basis whatever upon which the judgment can be sustained.

The appeal from the order denying a new trial is dismissed. The judgment is reversed.

We concur: FINCH, P. J.; PLUMMER, J.

87 Cal. App. 273

MOSEE v. FIREMEN'S INS. CO. OF NEWARK. (Civ. 5783.)★

District Court of Appeal, First District, Division 1, California. Dec. 12, 1927.

Hearing Denied by Supreme Court Feb. 9, 1928.

1. Insurance ⇨504—Interest created by mortgage is separate "insurable interest," and separate insurance thereon is not "other insurance" requiring apportionment of loss (Civ. Code, § 2546).

Interest created by mortgage or deed of trust in nature of mortgage is an "insurable interest," distinct from that of mortgagor or grantor, under Civ. Code, § 2546, and separate insurance procured thereon is not "other insurance," requiring an apportionment of loss upon claim by owner of policy insuring his interest.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Insurable Interest; Other Insurance.]

2. Insurance ⇨504—Union mortgage clause in mortgagor's policy, for benefit of mortgagee who refused to accept policy, did not become effective to reduce payment of loss by apportionment with policy purchased by mortgagee.

Mortgagor's policy for benefit of mortgagee who refused to accept it, providing that, in case of loss, company should be liable for no greater proportion of loss than amount insured bears to whole amount of insurance, did not preclude action by mortgagor, since mortgage clause which was to give mortgagee benefit of direct obligation never became effective as part of policy.

3. Taxation ⇨87—Payment by insurer into court of sum less than insured recovered, which he refused to accept, was ineffective to charge insured with taxes assessed on deposit (Pol. Code, § 3647; Civ. Code, § 1504; Code Civ. Proc. §§ 997, 1030).

Sum paid into court by insurance company representing its claimed proportion of loss, which was rejected by insured and was less than sum recovered by insured, remained property of insured, in view of Code Civ. Proc. §§ 997, 1030, and was ineffective to stop running of interest as provided by Civ. Code, § 1504, or for any purpose, and taxes assessed on deposit under Pol. Code, § 3647, were not chargeable to insured.

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Action by John W. Mosee against the Firemen's Insurance Company of Newark on a policy of fire insurance. Judgment for plaintiff, and defendant appeals. Affirmed.

Chauncey F. Eldridge and George O. Bahrs, both of San Francisco, for appellant.

Miller & Thornton, of San Francisco, for respondent.

CASHIN, J. An appeal by defendant, Firemen's Insurance Company of Newark, from a judgment entered in favor of the plaintiff in an action on a policy of fire insurance.

The appeal involves the question whether the defendant is liable for the full amount of a loss or for the proportion thereof which the amount of its policy bears to the total amount of insurance on the property insured.

The facts are as follows: On November 7, 1912, the plaintiff executed to Charles Mettler a promissory note for \$1,225, payable three years after date, and to secure the payment thereof executed to Los Angeles Title & Trust Company, a deed of trust to certain real property upon which a dwelling house was situated. The trust deed authorized the trustee and the beneficiary thereunder to maintain insurance upon the dwelling house to the satisfaction of either of them at the expense of the plaintiff. At the time the trust deed was executed, a policy of insurance upon the dwelling was issued to the plaintiff by defendant, insuring him against loss or damage by fire, the loss, if any, being made payable to Mettler, who then selected the defendant as a company satisfactory to him. On February 20, 1913, this policy expired, and the defendant, at the request of the plaintiff, issued and delivered to him the policy involved in this action, which was for \$1,300, and covered the same property. The latter policy insured the interest of the plaintiff; the loss or damage, according to a mortgage clause or rider attached, being made payable to Mettler, who, however, refused to accept the policy as being satisfactory. On February 21, 1913, Mettler, without the knowledge or consent of the plaintiff, procured from the Queen Insurance Company a policy upon the same property for \$1,250, which also insured the plaintiff; the loss or damage being payable to Mettler. The plaintiff in turn refused to accept the policy issued by the Queen Insurance Company or to pay the premium thereon, of which facts the latter company was notified; whereupon it requested Mettler to retain the policy, and agreed to recognize liability to him alone to the extent of his interest in the property insured. The plaintiff and Mettler each retained the policy procured by him, and on October 20, 1913, a fire occurred which damaged the property to the extent of \$825.

In the body of the policy issued by the defendant appears the following clause:

"This company shall not be liable under this policy for a greater proportion of any loss on the described property or for loss by and expenses of removal from the premises endangered by fire than the amount hereby insured bears to the entire insurance covering such property whether valid or not or by solvent or insolvent insurers."

And the mortgage clause or rider attached provided as follows:

"In case of any other insurance upon the within described property, this company shall not be liable under this policy for a greater proportion of any loss or damage sustained than the sum hereby insured bears to the whole amount of insurance on said property issued to or held by any party or parties having insurable interest therein whether as owner, mortgagee, or otherwise."

It is contended by defendant that the clauses quoted limited its liability to a proportionate part of the loss, namely \$420.55; and that the conclusion of the trial court that plaintiff was entitled under the policy to a judgment for the full amount of the loss was erroneous.

[1] According to the agreement between Queen Insurance Company and Mettler, the insurance issued to the latter was limited to his interest in the property; and, it being the rule that the interest created by a mortgage or deed of trust in the nature of a mortgage is an insurable interest distinct from that of the mortgagor or grantor (Civ. Code, § 2546; 26 Corp. Jur. "Fire Insurance," § 11, pp. 29, 30; Davis v. Phoenix Ins. Co., 111 Cal. 409, 43 P. 1115; Loring v. Dutchess Ins. Co., 1 Cal. App. 186, 188, 81 P. 1025), as is held in the following cases, separate insurance procured thereon is not other insurance requiring an apportionment of the loss upon a claim by the owner on a policy insuring his interest, as the clause first quoted above has no application to insurance obtained upon another distinct insurable interest in the property: Commercial, etc., Assur. Co. v. Scammon, 144 Ill. 506, 32 N. E. 916; Traders' Ins. Co. v. Pacaud, 150 Ill. 245, 37 N. E. 460, 41 Am. St. Rep. 355; Home Ins. Co. v. Koob, 113 Ky. 360, 68 S. W. 453, 58 L. R. A. 58, 101 Am. St. Rep. 354; Hardy v. Lancashire Ins. Co., 166 Mass. 210, 44 N. E. 209, 33 L. R. A. 241, 55 Am. St. Rep. 395; Tuck v. Hartford Fire Ins. Co., 56 N. H. 326; Eddy v. London Assurance Corporation, 143 N. Y. 311, 38 N. E. 307, 25 L. R. A. 686; Smith v. American Ins. Co., 177 Mich. 123, 143 N. W. 54; Dietzel v. Patrons' Mutual, etc., Co., 232 Mich. 415, 205 N. W. 149.

[2] The form of mortgage clause or rider attached to the policy issued to the plaintiff is that known as the union mortgage clause; and, unlike the open mortgage clause, which is but a provisional assignment of the contingent proceeds of the policy (Reynolds v. London, etc., Ins. Co., 128 Cal. 16, 60 P.

467, 79 Am. St. Rep. 17), operates as an independent contract of insurance between the insurer and the mortgagee, giving the latter the same protection as if he had taken out a separate policy (Collinsville Sav. Soc. v. Boston Ins. Co., 77 Conn. 676, 60 A. 647, 69 L. R. A. 924; Hartford Fire Ins. Co. v. Olcott, 97 Ill. 439; Magoun v. Firemen's Fund Ins. Co., 86 Minn. 486, 91 N. W. 5, 91 Am. St. Rep. 370; Allen v. St. Paul F. & I. Ins. Co., 167 Minn. 146, 208 N. W. 816; Phenix Ins. Co. v. Omaha L. & T. Co., 41 Neb. 834, 60 N. W. 133, 25 L. R. A. 679; Smith v. Union Ins. Co., 25 R. I. 260, 55 A. 715, 105 Am. St. Rep. 882; Ormsby v. Phenix Ins. Co., 5 S. D. 72, 58 N. W. 301; Eddy v. London Assurance Corp., supra; Hastings v. Westchester Fire Ins. Co., 73 N. Y. 141; Syndicate Ins. Co. v. Bohn [C. C. A.] 65 F. 165, 27 L. R. A. 614; People's Savings Bank v. Retail Merchants', etc., Ass'n, 146 Iowa, 536, 123 N. W. 198, 31 L. R. A. [N. S.] 455). As stated, the provision of the mortgage clause last quoted is not found in the body of the policy; and it is manifest from the omission that it was the intention that the same should apply only in the event that contractual relations between the insurer and a mortgagee should be established. The sole purpose of the mortgage clause was to give Mettler the benefit of the direct obligation of the insurer under a policy which the plaintiff assumed would be satisfactory; and, as held in the above cases, such would have been its effect had the policy been accepted. It cannot fairly be assumed, however, that the plaintiff agreed or that the insurer contemplated that the obligation of the latter should be limited further or otherwise than as provided in the body of the policy unless the benefit of the mortgage clause should be accepted by Mettler. The latter by his refusal, having declined to enter into contractual relations with the insurer, or to accept the proposed benefit, the circumstances sufficiently support the implied conclusion of the trial court that the mortgage clause never became effectual as part of the policy.

[3] The defendant paid into court a sum equal to a proportionate part of the loss for which it acknowledged liability; and from the sum deposited certain taxes thereon were deducted by the proper authorities pursuant to section 3647 of the Political Code. It is contended that the tender under the provisions of section 1504 of the Civil Code stopped the running of interest on the obligation, and that the amount deducted for taxes was chargeable to the plaintiff as the party ultimately entitled to the deposit. Los Angeles v. Los Angeles Water Co., 137 Cal. 699, 70 P. 770. Whatever the effect of an offer made and accepted as part payment of the claim in suit, here, as shown by the record, the offer—which was not accepted by the plaintiff—was to be in full satisfaction of the claim. Under such circumstances the amount de-

posited remained the property of the defendant, as such, was subject to taxation, and, in view of the finding that the plaintiff was entitled to judgment for a sum in excess of that offered, the offer was ineffectual for any purpose. Code Civ. Proc. §§ 997, 1030; *Fell v. Frierson*, 171 Cal. 351, 153 P. 229.

It is our conclusion that the construction placed upon the policy by the trial court was correct, and that the plaintiff was entitled to recover from the defendant the full amount of the loss.

The judgment is affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

87 Cal. App. 654

TILLOTSON et al. v. FINDLEY. (Civ. 4865.)★

District Court of Appeal, Second District, Division 2, California. Dec. 19, 1927.

Hearing Denied by Supreme Court Feb. 16, 1928.

1. Trusts §44(2)—Evidence held to show that stock was actually held by decedent for plaintiffs under complete understanding and upon valuable consideration.

In action against executrix to compel assignment of corporate stock, evidence held to show that stock was actually held by decedent for plaintiffs under a complete understanding between the parties and upon a valuable consideration.

2. Trusts §61(3)—One holding corporate stock in trust for others could not divest owners of interest therein at will (Civ. Code, § 2280).

One holding corporate stock in trust for others could not, because of Civ. Code, § 2280, by his own actions and at his own will, divest owners of such property of their interest therein.

3. Specific performance §70—Specific execution of assignment of corporate stock having no determinable market value held proper remedy against one breaching agreement to assign to plaintiffs (Civ. Code, § 3387).

In an action against an executrix seeking execution of an assignment of corporate stock claimed to have been held by the decedent for the plaintiffs, the fact that at the time of trial the corporation was a struggling one with its success or failure yet unproved, the stock therefore being without determinable market value, held to make specific execution of the assignment a proper remedy; the facts not bringing the case within the provision of Civ. Code, § 3387, relative to money damages being the appropriate remedy for breach of personal property trust or contract.

4. Trusts §51—That agreement to hold stock for plaintiffs violated corporation commissioner's escrow provisions against assignment prevented stock's being held in trust, though all other trust elements were present.

In an action to compel an executrix to execute assignments of corporate stock claimed

to have been promised by the decedent, the fact that the agreement to hold the stock in trust violated the corporation commissioner's escrow provisions against its being assigned prevented the stock's being held in trust, although all other elements of a trust relationship were present.

5. Trusts §371(8)—Where testimony is one way as to trust's existence, courts should go as far as possible under pleadings to make judgment conform to true determination of issue.

Where the testimony is all one way on the ultimate fact, to wit, was a trust existent at the time of the death of the one claimed to have held personal property in trust, courts ought to go as far as possible under the pleadings, to the end that the judgment may conform to the true determination of the issue.

6. Evidence §594—Uncontradicted testimony tending to establish issuable fact must be accepted as proof unless inherently improbable.

Uncontradicted and unimpeached testimony of a witness tending to establish an issuable fact must be accepted as proof of the fact which it is offered to establish, unless it can be said that such testimony is so inherently incredible and improbable as to amount to no evidence at all.

7. Pleading §430(2)—Issue whether trust existed held raised under evidence, although not specifically by pleadings, variance being immaterial (Code Civ. Proc. § 469).

In an action to enforce execution of corporate stock assignments by the executrix of a decedent claimed to have made such assignments to plaintiff, the question whether said decedent had held such stocks in trust held to be before the court, where testified to without objection, although not specifically raised by the pleadings, and hence variance between pleading and proof would be deemed immaterial, under Code Civ. Proc. § 469.

Appeal from Superior Court, Los Angeles County; Pat R. Parker, Judge.

Action by Clifford Tillotson and Ada Tillotson against Mary E. Findley, individually and as executrix of the estate of Mathew W. Findley, deceased. Judgment for defendant, and plaintiffs appeal. Reversed.

I. Henry Harris, of Los Angeles, for appellants.

Peyton H. Moore, of Los Angeles, for respondent.

STEPHENS, Justice pro tem. Clifford Tillotson and his mother, Ada Tillotson, plaintiffs and appellants herein, brought this suit in May, 1922, to compel Mary E. Findley, executrix of the estate of Mathew W. Findley, deceased, to execute to them an assignment of 2 certificates of stock, each representing 7½ shares in the Atlas Fire Brick Company, a California corporation. The trial court denied any relief to plaintiffs and ordered judgment for defendant for her costs. Most

of the facts are uncontroverted and may be fairly stated as follows:

M. I. Powers, N. B. Harris, and Mathew W. Findley organized the Atlas Fire Brick Company with an authorized capital of \$25,000, divided into 250 shares of a par value of \$100 each. Powers' interest was 125 shares; Harris' and Findley's, 62½ shares each. In consideration therefor Powers paid \$12,500 to the corporation, and Harris and Findley delivered and sold certain secret formulas for the manufacture of brick to the company. The amount of cash put up by Powers was to be repaid to him out of the first dividends, before any other holder of stock should enjoy a dividend. The corporation began to function in February of 1918. All issued stock was in Powers' name escrowed by order of the corporation commissioner. A condition of the escrow was that:

"The holders of the shares evidenced thereby shall not sell or offer for sale, or otherwise transfer, or agree to sell or transfer, such shares, without the written consent of said commissioner shall have been first obtained in writing so to do."

This permit is dated July 18, 1918.

Mathew W. Findley had known each of the plaintiffs, the appellants herein, for a long time and had had close business and friendly relations with each of them. When the negotiations for the incorporation of the Atlas Fire Brick Company were practically completed, Findley sought to induce (Christmas Day, 1917, and during January, 1918), and did induce Clifford Tillotson to quit a position paying \$175 per month, with fair prospects for betterment, and accept a position with the Atlas Company paying him \$100 per month. Tillotson accepted the proposition offered by Findley on or about February 1, 1918, and actually entered the services of the Atlas Company about May of the same year. Later, commissions on sales were added and raises to \$150 and \$200 a month were given him. As an additional inducement to secure the services of Clifford Tillotson to the Atlas Company, Findley agreed to give him 25 per cent. of his interest in the company stock, this being conditional that one-half of this 25 per cent. should belong to Ada Tillotson and apply on or cancel an antecedent debt from Findley to her. This was accepted by both the Tillotsons. Later, in May or June, 1918, this agreement was changed so that the Tillotsons were to receive 7½ shares each on the same consideration. When the stock was issued to Findley he directed it to be divided into separate certificates, one of 42½ shares, two of 7½ shares, and one of 5 shares. Powers testified:

"He wanted the services of Mr. Tillotson on the plant and he wanted to give him— he told me he wanted to have those 7½ shares, and 7½ to Mrs. Tillotson and 5 to Stewart [a son of Findley]. That was the reason he wanted them in that form."

On February 28, 1918, Findley and Harris entered into a pooling agreement whereby the stock held by them was to be voted as a whole or not at all.

On the 27th of December, 1918, an agreement was entered into between Atlas Fire Brick Company and the Tillotsons, as follows:

"This agreement, made and entered into this 27th day of December, A. D. 1918, by and between Atlas Fire Brick Company, a corporation, and Clifford Tillotson and Mrs. A. Tillotson, his mother, said *Clifford Tillotson and his mother being assignees of stock of M. W. Findley in said company, said stock being held in escrow according to the terms and conditions of permit No. 5454*, issued by the state corporation department of California. * * *"
[Then follows a recital that the incorporators have entered into an agreement against divulging secret formulas and a recital that the Tillotsons, being assignees of some of the original stock, are so bound.]

"In witness thereof parties hereunto have set their hands the day and year first above written. Atlas Fire Brick Company. [Seal.] [Signed] M. W. Findley, Pres. [Signed] Nick B. Harris, Sec. Clifford Tillotson. Mrs. A. Tillotson."

The company did not make money immediately, but it continued to go and some time prior to trial declared at least one dividend. It borrowed about \$21,000 from Powers, who did not care to advance more money, and in order that the company should be in funds, on February 20, 1920, Findley and Harris each paid into the corporation \$6,250, par value of the stock which they received, whereupon the escrow was closed and the stock released. Up to this time no written consent to transfer of stock had been given by the corporation commissioner. There is no evidence that either of the Tillotsons was ever consulted or ever agreed to the payment of the \$6,250 to the corporation by Findley. The full 125 shares of stock in the divided certificates were issued to Findley, who explained the matter to Clifford Tillotson for himself and Ada Tillotson that this was desirable under the pooling agreement, and Clifford Tillotson then assented thereto. The latter continued to work for the company, receiving salary until Findley died, on or about January 15, 1922, and the pooling agreement remained in effect to that date. No stock was ever issued to either of the Tillotsons, and claim for same was rejected by the executrix of the estate of M. W. Findley.

The testimony of Clifford Tillotson assenting to the request of Findley that the stock should remain in his name while the pooling agreement was in effect is as follows:

"Mr. Findley never made out that stock to me directly. He made it out in what he explained to me to be the necessary forms to comply with this agreement he had with Mr. Nick Harris, pooling agreement. That was in—that was at the time, or just a few days—well, I will say at the time that the stock was released by

the corporation commissioner. I could not give you the date on there; but I know that near the time the stock was released I was interested to know where my stock was coming, if I would not receive it, and he told me that there was a paper in Mr. Moote's office that had been written up, but never signed up, we would go up there and have that executed; but he says, 'After this, stock, you know, will have to be voted by myself and Nick Harris to conform to our pooling agreement.' He asked me if I saw any reason or had any objection to that way of handling the matter. I saw none, so I told him—

"Mr. Harris: Do you recall anything else that was said about the stock? A. There was no further conversation at that time as the matter was made clear to me. Mr. Findley never delivered that stock to me. I never asked him to.

"Q. Did he ever tell you when he would deliver it to you? A. That the stock would be held so that the vote of the stock would be in his name; that proxies would be of no value only from time to time, and, if the stock was issued to other than his name or that of Nick Harris, the one in whose name the stock stood would naturally have the voting power of the stock; that the stock for that reason would have to stand in his name so long as the pooling agreement existed between him and Nick Harris. However, that he was having a paper drawn up by Mr. Moote, an attorney, which would show my interest and my mother's interest and right and title to that stock and the benefits of that stock, but that as long as this pooling agreement existed, the stock would remain on the books of the company in his or Mr. Harris' name, had to be one of the two; but that if the pooling agreement was canceled, why, quite naturally the stock would come to me and my mother. The pooling agreement was never canceled, to my knowledge, during his lifetime. It was canceled after his death."

[1] Under the facts as here stated, it would seem to us that the stock was actually held by Findley for the Tillotsons under a complete understanding between the parties and upon a valuable consideration.

Counsel for respondent in his brief complains that:

"Counsel for the appellants has failed to segregate the points upon which he relies to reverse the judgment appealed from in this action, and therefore it is somewhat difficult to answer said arguments specifically."

But counsel for respondent should appreciate that his antagonist is faced with the difficulty of attacking a judgment which does not reveal, in findings, conclusions, or judgment, the point or points upon which the trial court found against him. The findings are simply that all allegations of the complaint which refer to the alleged agreement between the Tillotsons and Findley are untrue. Appellant attacks the findings on the ground that they are not supported by the evidence, and this necessarily presents a negative problem. To convert it into an affirmative problem we shall have to

consider the narrative of facts from the undisputed evidence in the case. The problem may be stated as follows: Does the evidence which stands unattacked and as to which there is no conflicting evidence entitle plaintiff to any relief under the pleadings? The evidence is here under a bill of exceptions and respondent has in her brief set out the points upon which she relies in support of the trial court's findings and judgment based thereon. With the above question in mind we shall recite defendant's points and comment thereon:

[2] (1) That under the evidence introduced "the stock was never released from escrow upon the basis in which it was originally placed therein, and was only released upon a reorganization of the company being effected and upon Findley and associates paying for said stock in cash." It may be doubted that the payment of money by Findley and Harris equal to the par value of the stock they had subscribed for was in effect a reorganization of the company. It must be remembered that the formula given remained the property of the company, and the sole testimony on the subject is that it had taken more money to run the business than was anticipated; that Powers, having paid in more than his share in money loaned, did not care to furnish any more money; and that the difficulty was met by Harris and Findley paying in the par value of their stock and having the same released from escrow. But if the Tillotsons had any interest in stock that stood in Findley's name, such an arrangement could not of itself divest them of such interest. Civ. Code, § 2280; *Hellman v. McWilliams*, 70 Cal. 453, 11 P. 659.

(2) "The record shows that Findley did not declare that he held said stock in trust for Tillotson in present, but merely promised a delivery of stock in futuro upon the happening of certain stipulated conditions." It seems to us that the various conversations, acts, and admissions of Findley leave no uncertainty as to the fact that it was the intention and belief of all of the parties concerned that the two Tillotsons owned $7\frac{1}{2}$ shares each of the stock escrowed in Findley's name, subject not to the whims or caprice or option of Findley or anybody else, but only to the fixed terms of the escrow. This is a delivery in present, unless there is some legal inhibition to the delivery. We think the only possible conclusion from the evidence is that the stock was given unconditionally by Findley for the desired services of Clifford Tillotson to the company and the satisfaction of an indebtedness owing to Ada Tillotson, both of which Findley got upon the assent of the offer made to the Tillotsons by Findley. Therefore there was no element of future delivery present, unless a legal inhibition intervened to prevent the consummation of Findley's intention.

[3] (3) The claim that "appellant fails to

recognize the distinction between a delivery in escrow to be made upon conditions which may never be fulfilled and an actuality." This is sufficiently treated under the last two paragraphs. Respondent claims that plaintiffs have mistaken their remedy in that they should have proceeded in an action in damages for breach of covenant to convey personal property. Counsel correctly states the law that:

"In general, a court of equitable jurisdiction will not decree the transfer of personal property which has a market value and no special or unique value."

But the record reveals that this company, at the time this case was tried, was a struggling corporation with its success or its degree of success or failure as yet unproved. The facts in the case do not bring it under the principle stated in section 3387, Civil Code.

[4] It was unquestionably the intention of Findley in splitting the stock into separate certificates to hold the same for the Tillotsons until it was freed from the escrow conditions and the pooling agreement and every element of a trust was present (*Souza v. First Nat. Bank of Hanford*, 36 Cal. App. 388, 172 P. 175), but this action violated the provision of the escrow conditions prohibiting assignment of any part of said stock, and failed of being a trust because thereof. However, upon the release of the stock from escrow, Findley reavowed, reacknowledged and reasserted to the Tillotsons that he held their stock for them. Whereupon the Tillotsons consented to its remaining in trust with Findley (and here the close relations of the Tillotsons and Findley should be remembered) so as to preserve the pooling agreement.

[5, 6] The case was tried upon the theory that the evidence was not sufficient to constitute a trust. The allegations of the complaint are that a trust was formed because of the acceptance of the offer from Findley to Clifford Tillotson and Tillotson's engaging in the work mentioned in the offer, and at the time the stock was issued in separate certificates under the escrow. The undisputed testimony establishes this allegation, and the trust only fails because of the provision in the escrow against alienation, placed there by order of the corporation commissioner. Where the testimony is all one way on the ultimate fact, to wit, Was a trust existent at the time of the death of Findley? courts ought to go as far as possible under the pleadings, to the end that the judgment may conform to the true determination of the issue. It is the general rule that the uncontradicted and unimpeached testimony of a

witness tending to establish an issuable fact in the case may not be arbitrarily disregarded by the trial court; that, to the contrary, such testimony must be accepted as proof of the fact which it is offered to establish unless it can be said that such testimony is so inherently incredible and improbable as to amount to no evidence at all. 10 Cal. Jur. § 362, and cases cited.

We find in paragraph I of the answer the following:

"That the defendants, and each of them, deny that on or about the month of February, 1920, or at any other time, Mathew W. Findley received from the Atlas Fire Brick Company, a corporation organized under the laws of the state of California, as trustee for Clifford Tillotson, one of the plaintiffs in this action, 2, or any, certificates representing 7½ shares of the capital stock of the Atlas Fire Brick Company."

And in paragraph III the following:

"* * * They [defendants], and each of them, deny that the said Mathew W. Findley promised or agreed prior or at the time of the issuance of said certificates, or at any other time, that he would take the same [shares of stock] in trust or for the benefit of the said plaintiff, Clifford Tillotson, or that he would indorse the same to the plaintiff Tillotson, or his assignee, upon demand or otherwise, or at all."

[7] Considering the fact that in the face of these denials Clifford Tillotson testified in full without objection being interposed as to the time that Findley reiterated his statements in regard to his possession of stock belonging to the Tillotsons, subsequent to release of the stock from escrow, it is apparent to us that the issue as to whether or not a trust of the stock existed at the time of Findley's death was before the court. "No variance between the allegation in a pleading and the proof is to be deemed material, unless it has actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits. * * *" Section 469, Code Civ. Proc.; *Carter v. Baldwin*, 95 Cal. 475, 30 P. 595; *Antonelle v. Kennedy & Shaw Lumber Co.*, 140 Cal. 309, 320, 73 P. 966; *Stockton Combined Harvester & Agricultural Works v. Glens Falls Ins. Co.*, 121 Cal. 167, 171, 175, 53 P. 573. Since the testimony is all one way, and there is no inherent improbability in it, we conclude that the evidence does not support the findings of fact, and that, therefore, the judgment based thereon must fall.

The judgment is reversed.

We concur: CRAIG, Acting P. J.; THOMPSON, J.

87 Cal. App. 510

PEOPLE v. RAYMOND et al. (Cr. 1536.)★

District Court of Appeal, Second District, Division 1, California. Dec. 13, 1927.

Hearing Denied by Supreme Court Feb. 9, 1928.

1. Jury ⇨118—Challenge to panel, not alleging departure from forms in drawing and return or omission to summon juror drawn, was properly overruled (Pen. Code, § 1059).

Defendant's objection to the panel was properly overruled under Pen. Code, § 1059, where there was no claim that there was a departure from the forms prescribed in respect to drawing and return of the jury, or that the sheriff omitted to summon one of the jurors drawn.

2. Jury ⇨131(13)—Refusal of individual examination of jurors as to acquaintance and conversation with jurors in related prosecution held not error, in view of collective inquiry and further individual inquiries.

In prosecution for compounding murder, refusal to permit defendant to examine every juror individually as to their acquaintance and conversation with jurors from panel in trial of principal, *held* not to have prejudiced defendant's substantial rights, where court, interrogating one of jurors as to such matter, and receiving negative reply, made same inquiry to all of jurors collectively, and jurors were individually questioned at length as to their prejudice by reason of conviction of principal, and as to whether any of them had sat in prosecution against him.

3. Criminal law ⇨1169(7)—Error, if any, in admitting declarations of codefendant in defendant's absence, was cured by similar testimony by codefendant as defendant's witness.

In prosecution for compounding a murder, error, if any, in admission of declarations and statements of codefendant, and another made at autopsy, and before coroner's jury, defendant not being present, was cured by codefendant testifying to same matter as defendant's witness.

4. Criminal law ⇨863(2)—Instruction to jury on return for further instructions that any juror refusing to accept circumstantial evidence was guilty of perjury held not prejudicial error (Pen. Code, § 118).

Court's instruction to jury returning for further instructions, and in answer to question as to result of jurors' opposition to circumstantial evidence, that any juror taking such attitude committed perjury, because they had sworn to try the case according to the evidence, *held* not prejudicial error; it being justified, in view of Pen. Code, § 118.

5. Indictment and Information ⇨189(1)—Defendant, charged with compounding murder, may properly be convicted of "compounding manslaughter" (Pen. Code, §§ 153, 950, 1159).

In prosecution for compounding a murder, court properly submitted to jury verdict authorizing them to find defendant guilty of compounding manslaughter, since, in view of Pen. Code, §§ 153, 950, 1159, the offense of compounding manslaughter is a lesser offense nec-

essarily included in charge of compounding murder, and conviction of former was an acquittal of latter, and bar to further prosecution of charge of latter.

6. Compounding felony ⇨6—Evidence held to sustain conviction of compounding manslaughter.

Evidence *held* to sustain conviction of compounding the crime of manslaughter in receiving money from one committing crime, on understanding to conceal such crime and withhold evidence thereof.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Dorothy MacKaye Raymond was convicted of compounding a felony, to wit, manslaughter, and she appeals. Affirmed.

Jerry Giesler and Roger Marchetti, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for the People.

McLUCAS, Justice pro tem. An indictment was returned by the grand jury of Los Angeles county charging appellant Dorothy MacKaye Raymond and Dr. Walter James Sullivan in count 1 of being accessories to a murder committed, and in count 2 of compounding a felony, to wit, the crime of murder. Dr. Sullivan was granted a separate trial. Count 1 was dismissed by the court at the close of the people's case. Dorothy MacKaye Raymond was convicted under count 2, and appeals from the judgment and from an order denying her motion for a new trial.

Appellant was the wife of Ray Raymond, the deceased, and both of them were actors. About eight weeks before his death the deceased went to San Francisco to fill a theatrical engagement, and during a part of this time appellant was doing theatrical work in Los Angeles and San Francisco. Paul Kelly was a moving picture actor, living in Hollywood, and knew both Mr. and Mrs. Raymond in New York before they came to California. While the deceased was absent from home Paul Kelly and appellant associated together. He often met her at the theater after evening performances and took her home, or to his home; and, when she was out of employment, they were in each other's company much of the time. A Japanese servant in Paul Kelly's home testified that Miss MacKaye (appellant's stage name) stayed at Mr. Kelly's house eighteen times; that she stayed over night; that he had once seen Miss MacKaye in bed with Kelly; and that he served breakfast to them in the dining room. Letters and telegrams addressed by Kelly to appellant contained passionate declarations of love. Appellant testified that she and Paul Kelly talked about getting married, but not seriously; and also that she and the deceased had talked about a separation and divorce. It also appears that

Ray Raymond and the appellant had frequently quarreled over Kelly's attentions to appellant, and at one time Raymond had ordered Kelly to stay away from his home.

Ray Raymond, the deceased, arrived home from his theatrical engagement about 1 p. m. on Friday, April 15th, and was greeted by appellant. The deceased stayed at home all afternoon, playing with his 4½ year old daughter; drinking considerable gin, and becoming somewhat intoxicated. Appellant, in the middle of the afternoon, went to the home of Paul Kelly, and visited for about an hour. On the following day (Saturday) she, in company with her friend, Miss Wilkinson, again visited Paul Kelly at his home between 1 and 2 o'clock in the afternoon. They drank some gin, and appellant and Miss Wilkinson left Kelly's home about 6 p. m. Shortly before that time Kelly left the living room, and went into a back room to use the telephone, and, after telephoning, he went through the living room, where appellant, Miss Wilkinson, and Max Wagner were sitting, and then to the home of the deceased, Ray Raymond, where he arrived about 6 o'clock. Miss Lee, a colored maid in the Raymond home, admitted Kelly into the home of the deceased. According to the testimony of Miss Lee, Kelly appeared to be very angry. He and Raymond sat down on the divan, and, when the deceased referred to his wife, Miss MacKaye, Kelly struck Raymond in the face three or four times with his fist. Raymond got up, and went into the dining room. Kelly caught Raymond by the shoulder, dragged him back into the living room, and threw him toward the divan. Raymond struck his head against the divan, and then Miss Lee helped him up. Kelly and Raymond sat down on the divan, and again Kelly struck Raymond. Raymond then struck Kelly for the first time. Both men got up, and Kelly struck Raymond, and knocked him down five or six times. They were clinched and struck each other. Kelly caught Raymond, and held him by the back of the neck, and struck him in the face with his fist. Raymond staggered back again into the dining room, against the dining room table. Kelly struck Raymond again in the face. The witness testified that the entire left side of Raymond's face was swollen; his lips swollen and bleeding; his left eye swollen and purple; and his forehead bruised.

Appellant arrived home about 7:30 or 8 o'clock p. m. the same evening. The appellant testified that about 9 o'clock on that evening she again went to the home of Kelly and reprimanded him for fighting with her husband; that she remained with Kelly for about 45 minutes, drove to the beach, and returned home, where she talked with her husband until 3 o'clock a. m., when they retired. Appellant also testified that before retiring the conduct and actions of the deceased were normal, and that he did not appear to be seriously ill

or injured. At 7 o'clock on the following (Sunday) morning appellant heard the deceased moaning on the floor between the twin beds, and she immediately called the servant, Miss Lee. Miss Lee testified that some time after 2 o'clock Sunday morning she saw deceased come out of his room and go into the bathroom; that he held out both hands, and acted as though he could not see, although the lights were turned on; that she next saw the deceased at 7 o'clock Sunday morning, lying on the floor between the twin beds; that he appeared to be unconscious, breathing unnaturally, with a gurgling sound, and frothing at the mouth; that, at the request of appellant, she lifted the deceased back into his bed; that Dr. Sullivan was called, and arrived about 2 o'clock p. m.; that Raymond's eye was still black, and his face swollen; that Dr. Sullivan asked appellant if Raymond had been hit, and appellant said "yes," and Dr. Sullivan said Raymond was in a serious condition, and should be removed to the hospital; that Raymond was taken to the hospital in an ambulance about 3 o'clock p. m. on Sunday; that about 6 o'clock Monday evening she answered the telephone, and Dr. Sullivan asked for Mrs. Raymond, and she told him Mrs. Raymond was on her way to his office; that Dr. Sullivan replied, "I am not going to wait here for Jesus Christ's sake; the newspaper reporters are after me; this is a police case, and I will have to report it, and, if Mrs. Raymond doesn't get here, her name will be in the newspapers tomorrow morning"; that within a few minutes afterward she conveyed the gist of this conversation to Mrs. Raymond.

The deceased died at the hospital at 5:20 o'clock the following (Tuesday) morning. Max Wagner, who lived with Kelly, testified that on Sunday afternoon, between 3 and 4 o'clock, appellant and her friend, Miss Wilkinson, came to Kelly's house, and told them that Raymond had been sent to the hospital; that they did not stay at Kelly's house very long. Kelly testified that on Tuesday morning, around 6 or 7 o'clock, he learned from Wagner, who had received the information by telephone from Miss Wilkinson, that Raymond had died that morning.

Frank H. Schoeffel, deputy coroner of Los Angeles county, testified that he had a telephone conversation with Dr. Sullivan on Tuesday morning, April 19th, about 7:30 o'clock, as follows:

"Q. Just relate the conversation? A. The party said, 'This is Dr. Sullivan, and I want to report a case that I believe is a medical case, but I just want to see what you have to say about it.' So I said, 'What are circumstances, Dr.?' And he said, 'I had a patient come to me in a state of coma two or three days ago, and he has since died.' And he felt that it was a medical case; that he could sign it. Q. Do you mean sign the death certificate? A. Sign the death certificate, and I asked him if he signed it how would he sign it, and he stated

'Acute or chronic alcoholism, with nephritis.' I asked him if there were any marks of violence on the body, and he said not to his knowledge; I said, 'Any history of violence?' and he said not to his knowledge. I asked where the body was then, and he said at the Roy Bagley Undertaking Parlors. I said, 'On whose order?' He said he believed on the order of the family. I further asked him if there was any insurance, and he said he didn't know that. During that time the chief deputy had come in, and I asked him to hold the wire until I found out what the chief deputy would say, and I told the chief deputy—Mr. Giesler: I object to that. The Court: Don't state any conversation with the coroner or his chief deputy unless it was in the presence of the defendant. A. After consulting with him, I told him it was all right for him to sign it, if the circumstances were as he reported. Mr. Murray: Did he state to you at that time that the man had a black eye? A. No, sir. Q. That he had a couple of ribs fractured? A. No, sir. Q. That he had a mark on his left chest three inches in width and four inches in length? A. No, sir. Q. Did he tell you that he had four or five bruises on the left-hand side of his forehead? A. No, sir. Q. When was the first time that you saw Dr. Sullivan after that? A. The morning of the inquest; that was two or three days afterwards."

Miss Lee testified that Dr. Sullivan came to the Raymond home about 9:30 o'clock on Tuesday morning, the day Raymond died, and conversed with Miss MacKaye and Miss Wilkinson in the sun parlor for half an hour, and then all of them left the house, and that appellant returned in half an hour, and said she had been to Dr. Sullivan's office, and he wanted her to pay his bill at once. Kelly testified that Miss Wilkinson phoned him near 11 o'clock on the morning that Raymond died that Miss MacKaye (Mrs. Raymond) wanted to borrow \$800; that he went to the bank and withdrew \$800, and handed it to Max Wagner, who went to appellant's house. Wagner testified that he gave the \$800 which he received from Kelly to appellant that same morning. Frank M. Loomis, a friend of deceased, testified that he received a telephone call from Miss Wilkinson requesting him to come to the Raymond home, and that on his arrival Miss MacKaye gave him \$800 in currency, and requested him to pay the hospital and doctor bills; she stating that the doctor's bill would be \$500; that he and Miss Wilkinson went to Dr. Sullivan's office, and that he paid Dr. Sullivan \$500 out of the \$800 which appellant gave him, and took his receipt therefor. At 4:15 on the day of decedent's death appellant made a statement to police officers, in which she stated that there had been strained relations between herself and husband for a couple of years; that Raymond was always accusing her of seeing Paul Kelly. She was asked: "Was there anything that might arouse Mr. Raymond's temperament between you and Mr. Kelly?" and she answered:

"Well, he told me that he had forbidden me to see Paul, and Paul was my friend first, and

Ray wasn't kind to me. It is a terrible thing to say since this awful thing has happened, but, after all, I can't help it, and I felt that Paul's friendship for me was very clean; it was very lovely and very beautiful, and I didn't want to give it up."

She also stated that Raymond had previously ordered Kelly out of his house; that she went over to see Kelly on Easter Sunday, and that Kelly told her how the fight had started, and that—

"he said that Ray had said a lot of terrible things about us, and wouldn't stand for it. Q. Meaning you and him? A. Yes, and our friendship. Q. That your husband had said a lot of things about you and Mr. Kelly, and Mr. Kelly said he wasn't going to stand for it? A. Yes."

At the conclusion of her statement to the police officers, appellant said:

"In case you find that his death didn't result from that, how much of this will come out? I am asking this for my baby, and I have to make a living, you know. How soon will you know?"

On or about April 19th an autopsy was performed on the body of the deceased. Dr. A. F. Wagner, autopsy surgeon, testified:

"A. I found two contusions of the forehead, shown on reflecting back the scalp, also ecchymosis of the left eye—that is, a black and blue bruised left eye. On opening the skull I found a large subdural hemorrhage, covering the entire right lateral surface of the right hemisphere of the brain. There was no fracture of the skull bones, nor any injury of the brain, except the pressure effects of the subdural hemorrhage. There were contusions of the right shoulder on its outer side, also the outer side of the left forearm, on the anterior surface of both shins, and on the left instep. There was also a contusion on the left side of the chest about three or four inches, extending outward from the left nipple to the left lateral surface of the chest. On opening the body I found the fourth rib fractured near its cartilagenous junction and the fifth rib cracked, but not completely fractured, about an inch to the left of the seat of fracture in the fourth rib. Both lungs showed considerable hypostatic congestion, and the anterior portion of the right lung was in a condition of pneumonia, sections of which sank in water, constituting a hypostatic pneumonia. The heart was normal; the liver markedly fatty, and the kidneys slightly swollen, but normal in color, and free from organic disease. The system contained a small quantity of decidedly greenish bile contents. I subsequently had a microscopic examination made of the kidneys; that, under the microscope, showed a few sclerotic changes in the kidney. Q. Anything else other than that? A. No, sir. Q. Did you form an opinion as to what was the cause of death, Doctor? A. I did. Q. What was it? A. The cause of death was hypostatic pneumonia, following extensive subdural hemorrhage on the right side of the brain. I added 'contributory acute alcoholism.' Q. Now, what was the sole or main cause of death, Doctor? A. Subdural hemorrhage. Q. What is a subdural hemorrhage? A. A subdural hemorrhage is a hemor-

rhage between the dura mater, one of the coverings of the brain, and the brain itself."

He further testified that the hemorrhage was traumatic, or one caused by an injury. Dr. Sullivan and Dr. McHugh, a consulting physician, were present at the autopsy. Dr. Wagner testified:

"A. About the first thing I asked was, directing my question to both of the doctors, I asked them what the history of the case was. Dr. McHugh spoke up, and said, 'We don't know much about this case. He was on a spree for several days, and we think he fell.' Q. Did Dr. Sullivan say anything to that? A. Dr. Sullivan was standing right by, and he never said anything."

The witness further testified that he spoke of the advisability of opening up the head, and Dr. Sullivan said:

"Yes; we want to open up the head because we suspect either a skull fracture or a hemorrhage," and that the spinal puncture showed blood, which caused him to suspect that there was a hemorrhage or a skull fracture.

Dr. Wagner further testified:

"Mr. Kemp: Did Dr. Sullivan or Dr. McHugh in Dr. Sullivan's presence tell you that Ray Raymond had been in a fight? A. No, sir."

The foregoing is a review of the main points in the testimony relied upon by the prosecution. It is contradicted in many respects by the testimony of defendant's witnesses; but we believe the statement of the case to be sufficient for the purpose of discussion of the points raised by appellant.

[1, 2] The first point presented by appellant is that the court erred in limiting and restricting appellant's examination of the jurors on voir dire, and in refusing the request of the defendant to examine every juror individually with respect to their acquaintance and conversation, if any, with the jurors from the panel who had sat as trial jurors in the case of *People v. Kelly*, wherein defendant Kelly was charged with the crime of the murder of Ray Raymond. The superior court of Los Angeles county is divided into a number of departments. The trial of this case was had in department 21, and jurors were first called from department 24. At the commencement of the trial, and before trial jurors were called to the jury box for examination, appellant interposed an objection to the panel upon the ground that it was from this panel that the jurors were selected who sat in the case of *People v. Paul Kelly* when he was tried for the murder of Ray Raymond and convicted of the crime of manslaughter, and that the same jurors called in appellant's case were examined in that case and excused. No claim is made that any juror who sat in Kelly's trial also acted, or was called, as a juror in appellant's case. The trial court overruled appellant's objection to the panel. A challenge to the panel can be founded only upon a

material departure from the forms prescribed in respect to the drawing and return of the jury in civil actions, or on an intentional omission of the sheriff to summon one or more of the jurors drawn. Pen. Code, § 1059. Appellant made no claim that there was a departure from the forms prescribed in respect to the drawing or return of the jury, or that the sheriff omitted to summon one of the jurors drawn. Appellant's objection to the panel was therefore properly overruled. *People v. Giminiani*, 76 Cal. App. 352, 244 P. 625.

The jurors were then examined collectively by the court as to their general qualifications. Mrs. Lillehoff, the first juror called, was then examined by appellant's counsel, and stated that she had been called as a juror in the Kelly Case, and was challenged and excused; that she did not hear anything concerning the Kelly Case in the courtroom during the time she was present; that some of the members of the panel were selected as jurors in the Kelly Case: that, after the Kelly Case was concluded, she talked to one juror who sat in that case concerning some of the facts of the case, and that she did not form any opinion as to the guilt or innocence of Mr. Kelly concerning the charge of murder against him. The trial court then questioned Mrs. Lillehoff as follows:

"The Court: Just a moment before you pass to Mrs. Kirkwood. Let me ask you, Mrs. Lillehoff, then, has anything you have heard said by any of your fellow jurors from the panel of department 24, or by anybody else, or any discussion you have had with any one, no matter who it was, whether on the jury or not, caused you to form any opinion whatsoever as to the facts of this case? A. No, sir. Q. You have not been influenced in any way by anything you have heard either for or against the defendant in this case or for or against the people; is that correct? A. No, sir, I have not. Q. Now, as to the rest of you ladies and gentlemen from department 24, would you all answer that question as Mrs. Lillehoff had answered it, or different? (No response.) I take it you would all answer the same way as she did, then. Then that ground has already been covered, Mr. Giesler. Mr. Giesler: Am I precluded from interrogating each individual juror as to the matter? The Court: Yes. They have already answered the question. Mr. Giesler: I challenge Mrs. Lillehoff for cause. The Court: Better wait until it is time, hadn't you? Mr. Giesler: For cause. Mr. Murray: We resist that, your honor. The Court: Challenge not allowed. In the first place, no cause has been stated. Mr. Giesler: I therefore ask permission to interrogate the other individual jurors on the same grounds, so as to ascertain their state of mind concerning the action. The Court: You may interrogate any of the jurors you desire, except that the court will not permit you to repeat any of the questions that have been asked and answered by the jurors in the box. Mr. Giesler: I appreciate that I could not do that, except this, I did ask special permission of your honor to interrogate the individual jurors. The Court: The court would not allow its time or the time of the jury to be wasted by repeating questions.

Mr. Giesler: But in this particular case—The Court: You have heard what the court said. Mr. Giesler: Very well, sir. Now, if your honor please, if I cannot interrogate these jurors individually, then, simply as to matters I am permitted to do so, may I interrogate them collectively in regard to the matters I desire to interrogate them about? The Court: Oh, yes. It would save time if you can do that as much as possible."

After examining several of the jurors individually as to occupation, counsel for appellant examined the jury as a whole at great length, among other matters, as to whether they would permit any prejudice to influence their verdict, and whether they would require the prosecution to prove the defendant guilty beyond a reasonable doubt of the particular crime as charged, and whether they would allow the fact that Paul Kelly had been found guilty in another case to influence their verdict in the case on trial. After both sides had passed the jury for cause, peremptory challenges were exercised, and the court questioned the first juror called after a peremptory challenge, as follows:

"By the Court: Q. Mrs. Eaton, did you hear the general statement of the nature of the case which I made to the others in the box with you? A. Yes, sir. Q. And you have heard all the questions that have been asked both by the court and counsel on both sides of this case? A. I have. Q. Would you answer any of those questions, either those asked by the court or Mr. Giesler or Mr. Murray, any differently than those in the box with you answered the questions? A. I would not. Q. You would answer them just the same as they did, would you? A. Yes, sir. The Court: All asked and answered, then except as to your occupation, and address and so forth."

The court permitted the appellant to examine this juror as to whether she was selected as a juror in the Kelly Case, and at no time refused appellant the right to ask this question individually of each juror. The juror was interrogated as follows:

"Q. Were you selected as a juror in the Kelly case? A. No, sir. Q. Were you examined as a juror? A. No, sir. Q. Were you in the courtroom? A. I came in a few minutes before half past four when the jury was being called. Q. But you got here too late? A. Yes, sir. Q. Are you acquainted with the ladies and gentlemen, whichever they may have been, from your department, who sat on that case? The Court: That question was covered in the questions that were asked of Mrs. Lillehoff, and Mrs. Eaton has answered that her answers would be the same as Mrs. Lillehoff's. Mr. Giesler: So I am precluded from that, your honor? The Court: Yes; that has been covered already."

All other jurors called after the jury had been passed for cause were examined by the court in substantially the same manner as Mrs. Eaton was examined, and at least one juror was specifically asked by the court as

to whether she had served in the Kelly Case; whether anything she had heard from fellow jurors or from anybody else had caused her to form any opinion one way or the other on any of the facts in this case. Appellant claims error on the part of the trial court in refusing to allow her to interrogate each juror individually as to whether or not he or she had talked about the Kelly Case with a juror who sat in that case, and, if so, whether the juror had formed any opinion as to the facts of the case on trial from what he or she had heard from such juror. Appellant cites the case of *People v. Riordan* (Cal. App.) 250 P. 190, where the trial court refused to permit certain questions to be asked of each individual juror when these same questions had been asked and answered by the jurors collectively, and states that the case is not to be used as authority in this case, for the reason that the appellate court only qualifiedly approved the action of the trial court in that case by holding that, under the circumstances of the case, there was no invasion of the defendant's substantial rights to his prejudice; also, that in the *Riordan* Case the questions which defendant desired to ask the jury individually related to matters for a peremptory challenge, and not a challenge for cause, whereas, in her case, the question related to matters upon which a challenge for cause could be predicated. In the *Riordan* Case it is said:

"Some of the questions put to the juror Buchanan by counsel for the defendant would, if answered, have been a possible basis for challenge for cause, but the court ruled that these questions when asked of one juror had been asked and answered, and the record shows this to be the case; that is, that the jurors other than Buchanan answered collectively. It is usually better practice to have each juror say for himself whether or not he would answer any of the questions asked of another juror differently from the answers given by the latter. When the jurors are examined en masse, there is a considerable likelihood of a juror not fully understanding the question and remaining silent, when should he give an answer, it might show ground for challenge. Also, the reporter might easily be mistaken in concluding that all of the prospective jurors being questioned had responded 'yes,' or 'no,' and yet we cannot say, as a matter of law, that the method pursued in this case, under the circumstances shown by the record, did not result in the questions asked of juror Buchanan being answered by the others. It is certain that there is nothing to impeach the record, which shows that they were answered. In some states it is provided by statute that the examination of jurors in criminal cases shall be directed to 'each juror,' 'any juror,' or 'a juror,' while in other states such limitation applies only to capital cases. It has been held, however, that in the absence of such legislation the examination of jurors is largely within the sound judicial discretion of the trial court. *Comm. v. Nye*, 240 Pa. 359, 87 A. 585; *State v. McGee*, 80 Conn. 614, 69 A. 1059; *State v. Munch*, 57 Mo. App. 207; *Connors v. U.*

S., 158 U. S. 408, 15 S. Ct. 951, 39 L. Ed. 1033; *Murphy v. U. S. (C. C. A.)* 7 F.(2d) 85. It has repeatedly been decided that, in jurisdictions where no statutory limitation or restriction of such examination to individual jurors exists, a judgment will not be reversed unless it shall affirmatively appear that the defendant was precluded from interrogating the jurors upon matters not theretofore covered, or that any juror who served was prejudiced or not qualified. *Nichols v. State*, 97 Tex. Cr. R. 174, 260 S. W. 1050; *Murphy v. U. S. (C. C. A.)* 7 F.(2d) 85; *State v. Munch*, 57 Mo. App. 207; *Johnson v. State*, 29 Wyo. [181] 121, 211 P. 484. While not intending to encourage this method of examining jurors, we cannot say that its use in this case constituted an invasion of the defendant's substantial rights to his prejudice."

As appears from the testimony hereinbefore quoted in the present case, the court, after interrogating Mrs. Lillehoff as to whether anything she had heard either from fellow jurors or any one else would influence her opinion as to the facts of the case on trial, received a negative reply, and then inquired from the rest of the jurors as to whether they would answer as Mrs. Lillehoff had answered. The record shows there was no response. Then the court said:

"I take it you would all answer the same as she did, then. Then that ground has already been covered, Mr. Giesler."

Under such circumstances, the silence of the jury, we believe, constituted an affirmative answer in the absence of any affirmative showing to the contrary. Subsequently, the court inquired of each juror upon entering the box whether he or she would answer any questions that were asked by the court or counsel in a different manner than by the others then sitting in the jury box. Each juror replied in the negative. As in the *Riordan Case*, so in the instant case, we cannot say, as a matter of law, that the method of examining the jurors here pursued, under the circumstances shown in this case, did not result in the questions asked of juror Lillehoff being answered by the others; nor that such method of examination constituted an invasion of the defendant's substantial rights to her prejudice. The case of *People v. Carmichael*, 198 Cal. 534, 246 P. 62, is to be distinguished from the present case, in that the *Carmichael Case* held it was prejudicial error for the court to refuse to permit defendant's counsel to examine prospective jurors as to whether they knew that the case was tried before; whether the failure of the former jury to agree would prejudice them against the defendant; whether they had heard how the former jury stood; whether such information would prejudice them against the defendant; whether they recognized that evidence might be produced on the second trial which was not brought out on the first; and whether knowledge as to

how the former jury stood had left their minds as open and impartial as if they had never heard of the case. Furthermore, the court forbade appellant from further mentioning the former jury to the members of the present jury. No such error was committed in the case at bar; to the contrary, similar questions were permitted to be asked of the first juror, and then the jurors were asked collectively whether they would answer in the same manner. In the case of *People v. Wismer*, 58 Cal. App. 679, 209 P. 259, cited by appellant, the defendant was compelled to accept a juror who was disqualified by reason of actual bias by reason of the fact that the juror sat in a previous trial of a similar offense, and formed an opinion that the organization of which defendant was charged with being a member was an unlawful organization. In the present case, there is no showing that any juror sat in a previous trial of a similar offense, or that such juror had formed any opinion as to the facts in the case on trial, or as to the guilt or innocence of the defendant. Counsel for appellant questioned the jury at length upon whether or not they were, or any one of them was, prejudiced because other jurors had found Paul Kelly guilty of killing appellant's husband, of which crime she was accused of compounding. Moreover, it does affirmatively appear that no juror who sat in the *Kelly Case* acted as a juror in the case on trial.

[3] Appellant next complains that the court erred in admitting in evidence the testimony of appellant's codefendant, Dr. Walter James Sullivan, given at the coroner's inquest held a day or two after the death of Ray Raymond, which testimony was given without the presence of the defendant and appellant. Appellant contends that such testimony was inadmissible as being hearsay, being a declaration made by an alleged coconspirator outside the presence of his codefendant after the termination of the alleged conspiracy; and also that the testimony was in the nature of an admission made without the presence of the conspirator on trial, and not in furtherance of the object of the conspiracy. Count 2 of the indictment charges:

"That the said defendants, Dorothy MacKaye Raymond and Dr. Walter James Sullivan, on or about the 19th day of April, 1927, at and in the county of Los Angeles, state of California, after the commission of the said crime, and having knowledge of the commission thereof, did willfully, unlawfully, and feloniously take and receive the sum and value of \$500, lawful money of the United States, from said Paul Kelly, upon the agreement and understanding had with said Paul Kelly to compound and conceal the said crime of murder aforesaid, so committed by the said Paul Kelly, and to withhold evidence thereof, and to abstain from any prosecution thereof, and that, in pursuance of said agreement and understanding, the said defendants Dorothy MacKaye Raymond and Dr. Walter James Sullivan did then and there inform and say to one

Frank H. Schoeffel, who was then and there a deputy coroner of the said Los Angeles county, that the said Raymond had died of natural causes alone, and that the body of said Raymond bore no signs of physical injury or of violence, and that the said Ray Raymond had died of acute alcoholism with neuritis and Bright's disease."

The testimony of Dr. Sullivan so admitted and complained of by appellant contains statements tending to prove appellant had concealed from Dr. Sullivan at the time he was called to attend decedent the fact that decedent had been in a fight at his home and with whom. It contained an answer given by the doctor to the effect that the reason he did not issue the death certificate was that, when he called the coroner's office, he did not wish to do so until he had heard from appellant; that appellant told him to use his own judgment, if he didn't think there was a skull fracture. He was asked the following question, and gave the following answer, which was read into the record:

"Q. Didn't Mrs. Raymond tell you that she didn't want any publicity about this case? A. Yes; on the morning that he died she said that she didn't want any."

Conceding without deciding, that the admission of the doctor's testimony given before the coroner's jury was error, such error was cured by the testimony of Dr. Sullivan, given as appellant's witness at the trial, when he testified as to those matters to which he had testified at the coroner's inquest. The witness testified on direct as follows:

"Q. Miss MacKaye, did tell you the first time when you called on Sunday that he had a fight? A. Yes, sir. Q. Did she tell you with whom? A. I asked her with whom, and she said she didn't know."

The witness was further interrogated, and answered as follows:

"Q. Now, there has been introduced here a transcript of the coroner's testimony of yourself, and there is one answer I would like to have you look at and explain what that was or what it means, if anything. Page 24, Mr. Murray, line 4. Have you read that answer? A. Yes, sir. Q. Did you give that answer as it is written there or not? A. I don't recall giving it exactly that way. I think I misspoke the name there. Q. I will read you this question and answer: 'Q.—Did you issue a death certificate? A.—Well, when I called the coroner's office, I didn't want to go on until I heard from Miss MacKaye, and Miss MacKaye said to use my own judgment, if I didn't think there was a skull fracture, and about that time the chief of police of Hollywood called up, and I made up my mind to sign nothing until you people had taken charge of the body.' Did you rely at all upon the judgment of Miss MacKaye as to what was the matter with Mr. Raymond? A. No; that was in reference to the coroner's office. I think I misspoke the word 'Miss MacKaye' for the coroner's office; there is no connection whatsoever."

The witness further testified on direct examination:

"Q. Did she at any time, directly or indirectly, seek to have you hush up or to cover up the cause of death? A. No, sir. Q. Or anything of that character? A. No, sir. There was one time she said something about publicity, and I have been trying to recall the exact date of that, but when she was talking about that, she stated that Mr. Raymond was very popular, and very prominent, and I think I testified at the coroner's inquest that was the day he died. As I recall, that was preparatory to that and in reference to the hospital when she said he was very prominent and very popular, and she hoped he wouldn't have a lot of publicity."

On cross-examination the witness testified as follows:

"Q. Did Miss MacKaye tell you that she didn't want any publicity about the case, Doctor? A. Yes, sir."

Appellant cites *People v. Oldham*, 111 Cal. 648, 44 P. 312, as holding that error in admitting the declarations of a coconspirator, made after the commission of the crime as to the details of the crime, is not cured by the fact that such coconspirator testified to the same statements. The *Oldham* Case is to be distinguished from the instant case in that in the *Oldham* Case the witness testified as a witness for the prosecution, while here the witness testified as a witness for the defendant and appellant. Here the error, if any, was cured by the appellant herself in calling Dr. Sullivan to the witness stand and having him testify in her behalf to the same matter concerning which he had testified before the coroner's jury. It follows that, whether the evidence was competent or incompetent, appellant cannot now complain.

Appellant attacks the rulings of the trial court in admitting in evidence the declarations and statements of Drs. Sullivan and McHugh made at the autopsy held on the afternoon of the day of decedent's death, and subsequently to a telephone conversation with the deputy coroner, alleged in the charging part of the indictment, upon the same grounds that she complains of the rulings of the trial court in admitting in evidence the declarations and statements given at the autopsy. The testimony to which objection is taken was given by Dr. A. F. Wagner, autopsy surgeon, and L. P. Ball, his assistant. In that case the error, if any, committed by the trial court in admitting such testimony, was cured by the testimony of Dr. Sullivan and Dr. McHugh, offered on the part of the defense.

[4] Appellant contends that the trial court erred in giving an oral instruction on the question of the belief of jurors in circumstantial evidence. After the jury had retired for deliberation, they returned to the court for further instructions, when the following proceedings occurred at 4:37 p. m.:

"The Court: Ladies and gentlemen, I understand that you want some further advice or in-

structions of some kind? A Juror: Yes, sir. We want further advice along what is considered as circumstantial evidence. The Court: Well, I can't give you any further instructions than I have on that, because that is all there is to the definition of circumstantial evidence, that it is any other evidence than the evidence of a direct eyewitness. In other words, it may consist of declarations made by the parties, circumstances that have been developed in the evidence in any particular case, anything that is in evidence before you other than the testimony of a direct eyewitness. Circumstantial evidence includes everything but that, and that is as far as I can go on an instruction of that kind, because that is all there is to it. Any other questions that you have? The Juror (to another juror): If you want to ask your question, go ahead and ask it. Another Juror: We don't know whether we would be permitted to ask that question. The Court: You can always ask, you know. I may not be permitted to answer it, but I can't tell until I know what it is you want. What is it you want to know? Go ahead and ask any question that you want to, ladies and gentlemen. Of course, as I say, it may be a question I am not permitted to answer. The Juror: Judge, if one is opposed to circumstantial evidence, don't believe in it, what then? The Court: If any one on this jury takes that attitude, then they have committed perjury, because you have sworn to try the case according to the evidence, and, if any one takes that view, they haven't any business on this or any other jury. Jurors are supposed to be people of sound minds, and to be able to understand the instructions of the court, and to abide by them. Now, are there any other questions? A Juror: No. The Court: You know, you might find people on the jury who are opposed to the doctrine that the earth is round, but you are supposed to be people of ordinary intelligence and to understand instructions and act upon them intelligently. You heard the oath when you were asked as to your qualifications."

Subsequently the court stated:

"Now, I want to give you folks all the time you need. Of course this case has taken a long while, and I want you to have all the time you need, and, if you haven't agreed on a verdict, why, we will say, half past five, then I will hear from you tomorrow morning. But don't think the court is going to hurry you in any way. You are entitled to all the time you want. If you need the time, take all that you need."

Thereupon the jury retired for further deliberation, and at 4:50 p. m. returned a verdict.

Appellant urges that language such as here used could have no other effect than to intimidate and coerce the juror, and cause him to bow his will to that of the majority because of his fear of the consequences. It is urged that it would have been much more proper for the court to have ascertained what was in the mind of the juror, and to have fairly and succinctly explained to him the value of circumstantial evidence and its construction in the eyes of the law, rather than to have told him that he was guilty of perjury and questioned intelligence, and not fit

to serve on this or any other jury. Appellant further contends that the speed with which the verdict was returned should be indicative of the harm done by such language. It is to be conceded that the remarks of the court could have been expressed in less direct terms; but we have here to determine only whether the language as used constituted reversible error. The question itself disclosed what was in the mind of the juror, and, in our opinion the reply of the court was not a misstatement of the law. It was not within the right of any juror to oppose circumstantial evidence, or refuse to consider it, and so to do constituted a violation of his oath as a juror. The jurors were sworn to answer such questions as might be propounded to them touching their qualifications to sit as jurors in the case, and were asked:

"Would all of you, do you think, be able to base your verdict on the evidence as you receive it here in court and upon the instructions of the court, and nothing else? (Various members of the jury answered in the affirmative.)"

The jury was instructed as to the law of circumstantial evidence as follows:

"There are two classes of evidence recognized and admitted in courts of justice, upon either of which juries may lawfully find an accused guilty of crime. One is direct evidence, which is the direct testimony of an eyewitness to a transaction, and the other is circumstantial evidence, which includes all evidence other than that of an eyewitness. Such evidence may consist of statements by defendant, plans laid for the commission of the crime; in short, any acts, declarations, or circumstances admitted in evidence tending to connect the defendant with the commission of the crime. There is nothing in the nature of circumstantial evidence which renders it less reliable than the other class of evidence. One may as well swear falsely to an absolute knowledge of the facts as to a number of facts from which, if true, the facts on which the guilt or innocence depends must inevitably follow. If upon consideration of the whole case you are satisfied to a moral certainty and beyond a reasonable doubt of the guilt of the defendant, you should so find, irrespective of whether such certainty has been produced by direct evidence or circumstantial evidence. The law makes no distinction between circumstantial evidence and direct evidence in the degree of proof required for conviction, but only requires that the jury shall be satisfied beyond a reasonable doubt by evidence of either the one character or the other, or both."

Section 118 of the Penal Code reads:

"Every person who, having taken an oath that he will testify, declare, depose, or certify truly before any competent tribunal, officer, or person, in any of the cases in which such an oath may by law be administered, willfully and contrary to such oath, states as true any material matter which he knows to be false, is guilty of perjury."

In the case of *In re De Martini*, 47 Cal. App. 228, 190 P. 468, it is said:

"The oath of a prospective juror on his voir dire examination binds him, under the pains and penalties of perjury, to truthfully answer the questions that may be propounded to him by either court or counsel. The language of section 118 of the Penal Code is certainly broad enough to include the offense of perjury when committed by a prospective juror upon his voir dire examination, and to hold otherwise would certainly be to open the door wide to all forms of collusion in the selection of jurors, if false answers knowingly and corruptly made under such circumstances can be given with impunity."

After a juror has answered under oath that he will base his verdict on the evidence and on the instructions of the court, and after the court has instructed him on the value and effect of circumstantial evidence, the juror cannot consistently say, at the time he is deliberating with his fellow jurors on a verdict, that he is opposed to, and does not believe in, circumstantial evidence. A false statement concerning such a fact, when made by a prospective juror under examination, constitutes perjury. And, under the circumstances existing in this case, the court had the right to use the language necessary to convey such information to the jury, when requested by a member of the jury, as in this case. The cases cited by appellant in support of her claim that the trial court should not say or do anything which might bring to bear upon the jury an influence not compatible with an unbiased verdict are cases where the court commented on the weight of the evidence, or the credibility of a witness. In one case relied upon by the appellant, the court referred to the deceased as the "victim." *People v. Williams*, 17 Cal. 142. In *People v. Matthai*, 135 Cal. 442, 449, 67 P. 694, the court gave an instruction erroneously stating the facts; in *People v. Frank*, 71 Cal. App. 575, 236 P. 189, the court recommended to the jury the high standing of two prosecuting witnesses; in *People v. McDonald*, 167 Cal. 545, 140 P. 256, the trial court stated that a witness for the prosecution had been courteous, kind, and modest; in *People v. Derwae*, 155 Cal. 592, 102 P. 266, the district attorney persisted in asking improper questions of the defendant. In the case of *People v. Mahoney*, 258 P. 607, the Supreme Court said:

"When, as in this case, the trial court persists in making discourteous and disparaging remarks to a defendant's counsel and witnesses, and utters frequent comment from which the jury may plainly perceive that the testimony of the witnesses is not believed by the judge, and in other ways discredits the cause of the defense, it has transcended so far beyond the pale of judicial fairness as to render a new trial necessary."

And in *State v. Tulip*, 9 Kan. App. 454, 60 P. 659, the following proceedings occurred:

"What are we going to do with a man who claims he don't believe any of the witnesses at

all? Court: I suppose you can argue with him. That is all I know to do. I don't suppose there is any man but who will act with some reason. * * * I put you in the box because you are 12 decent, sensible men; and I presume you will act that way, and I don't presume anything to the contrary. If you ask me what you are going to do with any man who acts the fool—but I don't suppose that you are, any of you, that kind of men. I suppose that you are twelve honest, conscientious men, and will act conscientiously according to your best judgment."

In each of the foregoing cases the trial court commented on the weight of the evidence, or credibility of witnesses, except that in one case the district attorney was guilty of misconduct. In the present case there was neither comment on the evidence nor on the credibility of witnesses. While we do not fully approve of the language employed by the trial court in conveying its ideas to the jury, yet we cannot say that we find any prejudicial error therein.

[5] Appellant next urges that the court erred in refusing to instruct the jury that, if they found that Paul Kelly was responsible for the death of Ray Raymond, but that his act constituted manslaughter and not murder, they should find the defendant not guilty, and in giving and submitting to the jury a verdict in the form of the one returned against this defendant. Count 2 of the indictment reads as follows:

"For a further and separate cause of action, being a different offense of the same class of crimes and offenses, and connected in its commission with the offense set forth in count 1 hereof, the said Dorothy MacKaye Raymond and Dr. Walter James Sullivan are accused by the grand jury of the county of Los Angeles, state of California, by this indictment, of the crime of compounding a felony, a felony, committed at and in the county of Los Angeles, state of California, and before the finding of this indictment as follows, to wit: That on or about the 19th day of April, 1927, at and in the county of Los Angeles, state of California, one Paul Kelly did willfully, unlawfully, and feloniously, and with malice aforethought, kill and murder one Ray Raymond, a human being; that the said defendants Dorothy MacKaye Raymond and Dr. Walter James Sullivan, on or about the 19th day of April, 1927, at and in the county of Los Angeles, state of California, after the commission of the said crime, and having knowledge of the commission thereof, did willfully, unlawfully, and feloniously take and receive the sum and value of \$500, lawful money of the United States, from said Paul Kelly, upon the agreement and understanding had with said Paul Kelly to compound and conceal the said crime of murder aforesaid, so committed by the said Paul Kelly, and to withhold evidence thereof, and to abstain from any prosecution thereof, and that, in pursuance of said agreement and understanding, the said defendants, Dorothy MacKaye Raymond and Dr. Walter James Sullivan, did then and there inform and say to one Frank H. Schoeffel, who was then and there a deputy coroner of the said Los Angeles coun-

ty, that the said Raymond had died of natural causes alone, and that the body of said Raymond bore no signs of physical injury or of violence, and that the said Ray Raymond had died of acute alcoholism with neuritis and Bright's disease; whereas in truth and in fact the body of the said Ray Raymond showed numerous marks and bruises and other evidence of violence, and the death of the said Ray Raymond was caused by injuries received by reason of blows struck said Ray Raymond by the said Paul Kelly as aforesaid. Contrary to the form, force, and effect of the statute in such cases made and provided, and against the peace and dignity of the people of the state of California."

The court instructed the jury as follows:

"You are instructed that, if you believe from the evidence beyond a reasonable doubt that on or about the 19th day of April, 1927, at and in the county of Los Angeles, state of California, one Paul Kelly did kill one Ray Raymond, a human being, and that in so doing said Paul Kelly was guilty either of murder or of manslaughter, and that the said defendant Dorothy MacKaye Raymond and Dr. Walter James Sullivan, on or about the 19th day of April, 1927, at and in the county of Los Angeles, state of California, after the commission of the said crime, and having knowledge of the commission thereof, did willfully, unlawfully, and feloniously take and receive the sum and value of \$500, lawful money of the United States, from said Paul Kelly, upon the agreement and understanding had with said Paul Kelly, to compound and conceal the said crime aforesaid, so committed by the said Paul Kelly, or to withhold evidence thereof, or to abstain from any prosecution thereof, you should find the defendant Dorothy MacKaye Raymond guilty as charged in count 2 of the indictment."

The jury returned the following verdict:

"We, the jury in the above-entitled action, find the defendant guilty of compounding a felony, to wit, manslaughter, a felony, as charged in the indictment."

Appellant urges that there are no degrees in the crime of compounding a felony; that, since the prosecution elected to accuse the defendant with the crime of compounding a murder, it was incumbent upon them to establish that offense; that the jury has found that the preceding crime necessary to conviction, to wit, murder, has not been committed, nevertheless they have proceeded to convict the defendant, and returned a verdict provided to them by the court for a different offense than charged in a manner not provided by law. It must be conceded that there is considerable force to the argument of appellant, yet no case directly in point is cited; nor have we been able to find any case holding that a defendant charged with the crime of compounding the crime of murder may not be convicted of compounding the crime of manslaughter, a lesser crime necessarily included in the crime of murder. As stated by appellant, it has been held in this state that manslaughter is a distinct crime

(People v. Huntington, 8 Cal. App. 612, 97 P. 760), and that a verdict of manslaughter acquits the defendant of murder (People v. Smith, 134 Cal. 453, 66 P. 669; Huntington v. Superior Court, 5 Cal. App. 288, 90 P. 141). It has also been held that the offense of manslaughter is included in the charge of murder. People v. Muhlner, 115 Cal. 303, 305, 47 P. 128; People v. Cyty, 11 Cal. App. 702, 706, 106 P. 257. Section 1159 of the Penal Code provides:

"The jury may find the defendant guilty of any offense, the commission of which is necessarily included in that with which he is charged, or of an attempt to commit the offense."

It follows that, if appellant had been placed on trial for the crime of murder, and had been found guilty of the crime of manslaughter, she could not complain. We see no difference from the foregoing in the case at bar. Where, as in this case, the indictment charges the crime of murder as having been compounded and concealed, and the proof shows that it was the crime of manslaughter that was compounded and concealed, the defendant is in no way prejudiced thereby, since the crime of manslaughter is necessarily included in the crime of murder. An examination of the indictment fortifies our conclusion. The indictment charges defendants with compounding a felony, after the commission of the crime of murder of Ray Raymond by Paul Kelly:

"Having knowledge of the commission thereof, did willfully, unlawfully, and feloniously take and receive the sum and value of \$500, lawful money of the United States, from said Paul Kelly, upon the agreement and understanding had with the said Paul Kelly to compound and conceal the said crime of murder aforesaid, so committed by the said Paul Kelly."

We believe the gist of the charge to be that defendants, having knowledge of the willful, unlawful, and felonious killing of Ray Raymond by Paul Kelly, did unlawfully take and receive from Paul Kelly the sum of \$500 upon the agreement with Paul Kelly to compound and conceal the said unlawful and felonious killing. The gravamen of the offense consists in stifling public prosecution, or in some way perverting public justice. 12 Corpus Juris, p. 305. An indictment for compounding a crime, as for crimes generally, must contain a statement of acts constituting the offense in ordinary and concise language, and in such manner as to enable a person of common understanding to know what is intended. People v. Bryon, 103 Cal. 675, 37 P. 754; Pen. Code, § 950. In section 153 of the Penal Code it is provided as follows:

"Every person who, having knowledge of the actual commission of a crime, takes money or property of another, or any gratuity or reward, or any engagement, or promise thereof, upon any agreement or understanding to compound or conceal such crime, or to abstain from any

prosecution thereof, or to withhold any evidence thereof, except in the cases provided for by law, in which crimes may be compromised by leave of court, is punishable as follows: 1. By imprisonment in the state prison not exceeding five years, or in a county jail not exceeding one year, where the crime was punishable by death or imprisonment in the state prison for life; 2. By imprisonment in the state prison not exceeding three years, or in the county jail not exceeding six months, where the crime was punishable by imprisonment in the state prison for any other term than for life; 3. By imprisonment in the county jail not exceeding six months, or by fine not exceeding five hundred dollars, where the crime was a misdemeanor."

In view of the provisions of section 1159 and section 153 of the Penal Code, we conclude that in the case at bar the indictment does contain a statement of facts in ordinary and concise language constituting the offense of compounding the crime of murder, or of any crime necessarily included in the offense of compounding the crime of murder, including manslaughter, and in such manner as to enable a person of common understanding to know what is intended. In our opinion, the offense of compounding the crime of manslaughter is a lesser offense necessarily included in the charge of compounding the crime of murder. The conviction of the lesser offense of compounding the crime of manslaughter was an acquittal of the charge of the greater offense of compounding the crime of murder, and was a bar to further prosecution of the charge of compounding the crime of murder, so that defendant was not prejudiced by such conviction. It follows that no error was committed by the trial court in giving the instruction and submitting the verdict authorizing the jury to find the defendant guilty of compounding the crime of manslaughter.

[6] Finally, appellant claims that the evidence is legally insufficient to sustain the verdict. We have reviewed the entire evidence, and, while there is much conflict, we believe the evidence offered by the prosecution, as heretofore outlined, is sufficient to support the verdict. The evidence offered by the prosecution tended to prove that appellant and Paul Kelly were associating in intimate relations; that appellant frequently had differences with her husband, Ray Raymond, concerning these relations; that Ray Raymond had ordered Paul Kelly to stay away from his home; that appellant was in Paul Kelly's home on many occasions both before and after Ray Raymond's death; that Kelly telephoned to Raymond while appellant was present in Kelly's home, and immediately Kelly went to Raymond's house, and beat Raymond up so severely that the blows delivered by Kelly resulted in Raymond's death; that appellant called her codefendant, Dr. Sullivan, to attend Raymond; that, upon Raymond's death,

Dr. Sullivan had a conference with appellant, and she then made payment of his bill for medical services, which was the sum of \$500, the money being furnished by Paul Kelly, with whom appellant had been in conference after the death of Raymond; that appellant and Dr. Sullivan were seeking to avoid publicity in regard to the cause of Raymond's death; that Dr. Sullivan concealed from the coroner the fact that Raymond had been injured in the fight. These facts, together with other evidence of the prosecution, justified the jury in concluding that Ray Raymond met his death as a result of the blows struck by Paul Kelly, and that appellant committed the crime of compounding a felony, to wit, manslaughter, after the commission of said crime and having knowledge thereof, in willfully, unlawfully, and feloniously taking and receiving the sum and value of \$500 from Paul Kelly upon the agreement and understanding had with said Paul Kelly to compound and conceal the said crime, and withhold evidence thereof, and abstain from any prosecution thereof.

After an examination of the entire cause, including the evidence, we cannot say that the errors complained of resulted in a miscarriage of justice.

The judgment and order denying the motion for a new trial are affirmed.

We concur: CONREY, P. J.; YORK, J.

87 Cal. App. 301

GAS APPLIANCE SALES CO., Inc., v. W. B. BASTIAN MFG. CO. (Civ. 6053.)

District Court of Appeal, First District, Division 2, California. Dec. 7, 1927.

1. Corporations ⚡503(3)—Affidavit of president of defendant corporation regarding its residence and principal place of business, being uncontradicted, was conclusive on motion for change of venue.

On motion for change of venue, affidavit of president of defendant corporation, being uncontradicted with respect to its residence and principal place of business, was conclusive in that regard.

2. Venue ⚡7—Time and place for consummation of contract, as regards venue, is place where and time when last act necessary to complete its validity is performed.

Time and place for consummation of contract, as regards venue of suit thereon, is place where and time when last act necessary to complete its validity is performed.

3. Appeal and error ⚡1024(3)—Conflict between caption of contract and allegation of affiant regarding place of consummation of contract must be resolved in favor of judgment granting change of venue.

In action for damages for breach of contract, conflict between caption of agreement and

allegation of defendant affiant as to place where contract was finally consummated must be resolved in favor of trial court's judgment granting change of venue.

4. Evidence ⚡414—Date of writing may be controverted by other evidence (Code Civ. Proc. § 1963, subd. 23).

Under Code Civ. Proc. § 1963, subd. 23, providing that it is a disputable presumption that a writing is truly dated, date may be controverted by other evidence.

5. Venue ⚡68—While place of execution designated in contract is prima facie location where it is made, this may be rebutted; "date" (Code Civ. Proc. § 1963, subd. 23).

While place of execution designated in contract is prima facie the location where it is made, this may be rebutted by other evidence, since term "date," as used in Code Civ. Proc. § 1963, subd. 23, includes both time and place when and where written instrument is deemed to have been made.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Date.]

6. Evidence ⚡385—Conclusive presumption of truth of facts recited in written instrument refers only to essential facts necessary to determine obligations of parties (Code Civ. Proc. § 1962, subd. 2).

Conclusive presumption of truth of facts recited in written instrument by the parties thereto, as declared by provisions of Code Civ. Proc. § 1962, subd. 2, has reference only to essential facts therein contained which are necessary to determine obligations or liabilities of contracting parties.

7. Venue ⚡7—Where contract is accepted by mailing, delivery is determined by time and place of mailing.

Although contract may purport to have been acknowledged in one county, upon competent evidence that it was in fact approved, executed, and mailed by one of parties from another county, and that it was not finally accepted or executed until mailing thereof, contract will be deemed to have been consummated at time and place where last act necessary to its validity was performed, and, under such circumstances, delivery would be determined by time and place where and when document was mailed to party entitled thereto with proper address affixed and postage prepaid.

8. Corporations ⚡503(3)—Conclusions of pleader will not create prima facie case entitling one to maintain action at county other than that of defendant corporation's residence (Const. art. 12, § 16).

Although corporation, moving for change of venue to location of its principal place of business, under Const. art. 12, § 16, sustains burden of showing that contract upon which action was instituted was neither executed, required to be performed, nor violated at place where action was commenced, mere conclusions or indefinite statements of pleader will not create prima facie case entitling one to maintain action at county other than that of residence of defendant.

9. Appeal and error ⚡1024(3)—Where evidence on motion for change of venue is conflicting, judgment will not be disturbed on appeal.

Where evidence on motion for change of venue is conflicting with respect to residence of defendant, place of performance of contract, or violation thereof, judgment will not be disturbed on appeal.

10. Corporations ⚡503(3)—Where evidence showed defendant corporation's principal business place was in another county, that contract involved was made and to be performed there, that breach, if any, followed rescission occurring there, court properly granted change of venue (Code Civ. Proc. § 397; Const. art. 12, § 16).

Where evidence showed that residence and principal place of business of defendant corporation was at Los Angeles, that sales contract appointing plaintiff agent for sale of defendant's heaters in other counties was made and was to be performed at Los Angeles and not elsewhere, that all sales and payments for heaters were made at Los Angeles, and that breach of contract on part of defendant, if any, followed rescission of agreement, which also occurred at Los Angeles, and that situs of basis for acts complained of was at Los Angeles, court properly granted motion for change of venue from Alameda county to Los Angeles, under Const. art. 12, § 16, and Code Civ. Proc. § 397.

Appeal from Superior Court, Alameda County; James G. Quinn, Judge.

Action for damages for breach of contract by the Gas Appliance Sales Company, Inc., against the W. B. Bastian Manufacturing Company. From an order granting defendant's motion for change of venue, plaintiff appeals. Affirmed.

Frank M. Carr, Stanley R. Sterne, and Richard Liebman, all of Oakland, for appellant.

Frank P. Doherty, of Los Angeles, and R. A. Carter, of San Francisco, for respondent.

THOMPSON, Justice pro tem. This is an appeal from an order granting a change of venue from Alameda county to Los Angeles, which is the place of residence of the defendant corporation.

Both appellant and respondent are California corporations. The residence and principal place of business of the former party is at Oakland, Alameda county, Cal., and the latter is at the city of Los Angeles. A written agreement between the parties purports to have been executed in Alameda county, November 13, 1923, the introductory paragraph of which reads: "Agreement made this 13th day of November 1923, in the city of Oakland, county of Alameda, state of California, etc. By the terms of this agreement, the respondent corporation appointed appellant corporation "exclusive sales agent for the sales of the Majestic, California, and Universal au-

tomatic water heaters," for all the northern counties of California, for the term of five years. The contract provided that appellant should purchase from respondent not less than 1,200 heaters for the first year, 2,500, per year for two succeeding years, and 3,600 each year thereafter, at specified prices, payable f. o. b. on cars at Los Angeles. Respondent reserved the right to cancel the contract for failure to purchase the specified number of heaters.

April 9, 1925, appellant filed a complaint in Alameda county, setting forth a copy of the contract, and alleging that the appellant's principal place of business, as well as the place where the contract was to be performed, and where it was violated, was at Oakland, Alameda county; that respondent was engaged in manufacturing said heaters at the city of Los Angeles; that appellant had organized his territory, employed salesmen, and advertised said water heaters throughout his district, and had at all times performed the conditions of said contract on its part; but that the respondent had broken the contract by refusal to sell or ship said heaters pursuant to their agreement, and by selling large numbers of said heaters to persons residing in said territory, other than appellant, to its damage in the sum of \$8,000.

May 9, 1925, respondent filed in the superior court of Alameda county, in due form, its motion for change of the place of trial to the city and county of Los Angeles, which motion was supported by proper affidavits alleging that the residence and principal place of business of respondent, as well as the place where said heaters were manufactured, was, at all times, at Los Angeles; that said contract was in fact drafted at Oakland on the date which it bears, but that it was then turned over to Wm. B. Bastian, the president of said corporation, for approval, and was taken by him to Los Angeles, where it was finally accepted, approved, executed on the part of respondent, and then mailed to appellant from Los Angeles on November 19, 1923; that appellant violated this contract, in that during the first year of its term appellant failed to order or purchase more than 981 heaters and for the first four months of the succeeding year, it failed to order more than 200 heaters; that on March 18, 1925, respondent notified appellant of said breach of contract, and thereupon canceled the agreement.

Appellant objected to that part of respondent's affidavit which contradicted the caption of the agreement reciting that the contract was made and executed at Oakland, October 13, 1923, on the ground that it varied the terms of a written instrument. Appellant also contends that the evidence shows that the breach of contract occurred in Alameda county, and not in Los Angeles.

The court may change the place of the trial

of a cause when the county designated in the complaint is not the proper one. Code Civ. Proc. § 397. The Constitution of California (article 12, § 16) provides:

"A corporation or association may be sued in the county where the contract is made, or is to be performed, or where the obligation or liability arises or the breach occurs; or in the county where the principal place of business of such corporation is situated, subject to the power of the court to change the place of trial as in other cases."

[1-5] The affidavit of Wm. B. Bastian, president of the respondent corporation, is contradicted with respect to its residence and principal place of business, and is therefore conclusive in that regard. The time and place for the consummation of a contract is the place where, and the time when, the last act necessary to complete its validity, is performed. *Fitzhugh v. University Realty Co.*, 46 Cal. App. 198, 188 P. 1023. With respect to the place where the contract was made, or where it is to be performed, the caption of the agreement and the allegation of the affiant, Bastian, are in conflict. The former recites that the contract was made "this 13th day of November, 1923, in the city of Oakland, Alameda county," while affiant for respondent declares that it was drafted at Oakland, but taken to Los Angeles for approval, where it was finally accepted, executed, and mailed to appellant from Los Angeles, November 19, 1923. If the date and place of execution of the contract may be disputed by extrinsic evidence, it would then satisfactorily appear that the contract was in fact finally consummated at Los Angeles, and not at Oakland, as it purports to have been done. At least, where such a conflict exists, it must be resolved in favor of the judgment of the trial court. It is a disputable presumption that a writing is truly dated, and the date may therefore be controverted by other evidence. Code Civ. Proc. § 1963, subd. 23. While the place of execution designated in a contract is *prima facie* the location where it is made, this may be rebutted by other evidence. The term "date," as it is used in section 1963, subd. 23, Code of Civil Procedure, includes both the time and the place when and where the written instrument is deemed to have been made. *Hammond v. Ocean Shore Dev. Co.*, 22 Cal. App. 167, 133 P. 978; 17 C. J. 1130, § 2; 1 *Bouvier's Law Dict.* (3d Rev.) 756. In the case of *Loud v. Collins*, 12 Cal. App. 786, 789, 108 P. 880, 881, it is said:

"The place where the contract was written, signed, or dated does not necessarily fix or determine the place where it was executed. Delivery of the instrument is the final act essential to its consummation as an obligation. Civ. Code, § 1626. * * * The place of delivery is the place of execution, and, in the absence of matters constituting an estoppel, this fact may be established by parol evidence, notwithstanding a venue other than that shown to exist is

designated in the date line of the instrument. Such designation is prima facie evidence only of the fact when disputed."

[6, 7] The conclusive presumption of the truth of facts recited in a written instrument, between the parties thereto, as declared by the provisions of section 1962, subd. 2, Code of Civil Procedure, has reference only to the essential facts therein contained, which are necessary to determine the obligations or liabilities of the contracting parties (*Osborne v. Endicott*, 6 Cal. 149, 65 Am. Dec. 498; *Ingersoll v. Truebody*, 40 Cal. 603, 610; *Moffatt v. Burlson*, 96 Cal. 106, 110, 30 P. 1022, 31 Am. St. Rep. 192; *Rhine v. Ellen*, 36 Cal. 362, 370), and does not preclude the contradiction of the unessential designation of the mere time and place of the execution of the contract by extrinsic evidence. Although a contract may purport to have been executed in one county, upon competent evidence that it was in fact approved, executed, and mailed by one of the contracting parties, from another county, and that it was not finally accepted or executed until the mailing thereof, the contract will be deemed to have been consummated and become binding at the time and place where the last act necessary to its validity was performed. Under such circumstances the delivery would be determined by the time and place where and when the document was mailed to the party entitled thereto, with the proper address affixed and the postage prepaid. *Ivey v. Kern County Land Co.*, 115 Cal. 196, 46 P. 926; *Michelin Tire Co. v. Coleman Co.*, 179 Cal. 598, 178 P. 507; *Swann-Day Lumber Co. v. Cornett*, 161 Ky. 98, 170 S. W. 516.

The cases relied upon by appellant in support of its contention that the affidavit of respondent was incompetent to dispute the time and place designated in the contract as the location of its execution have reference only to matters essential to the determination of the liabilities of the contracting parties in the respective cases. *Knoch v. Haizlip*, 163 Cal. 154, 124 P. 998, involved the acknowledgment contained in a written agreement between the parties litigant, of the ownership of certain lots of land, which the court properly refused to permit the contradiction of by extrinsic evidence. *Moore v. Gould*, 151 Cal. 729, 91 P. 616, held that the recital in a contract between the parties, which acknowledged the extension of time for the instituting of an action upon a promissory note and mortgage, could not be disputed. *Pierce v. Whiting*, 63 Cal. 540, was a suit upon an undertaking for attachment. It was there held that the recital in the bond as to the issuing of the writ, together with the attachment and subsequent release of the property were binding on the parties to the undertaking. These were essential matters affecting the very validity and liability under the bond. *Waldrip v. Black*, 74 Cal. 411, 16 P.

226, was a suit to foreclose a mortgage given by defendant to secure plaintiff harmless on account of his indorsement of a certain note as a mere surety. The due execution of the mortgage was not controverted, and was therefore admitted. Neither the date nor the place of execution were involved. Merely the essential recitals of the mortgage were deemed to be indisputable in that case. *Shaw v. Caldwell*, 16 Cal. App. 9, 115 P. 941, involved the construction of an agreement with respect to the development of a mine. It was there held that the recitals of the contract regarding the ownership of the mine were conclusive as between the parties. The merits of this case depended entirely upon the ownership of the mine, and this was therefore an essential recital. So also *Borland v. Borland*, 56 Cal. App. 642, 206 P. 478, cited by appellant, was a suit upon a written contract guaranteeing the payment of alimony awarded in a divorce suit previously tried and determined. It was there held that recitals in this contract to the effect that the guaranty was based upon a valuable consideration, and that the decree of divorce had been previously obtained, were binding on the parties, and barred them from now disputing these facts, for the reason that these matters had been determined in a former action and were therefore *res adjudicata*. The court said:

"Our conclusion that the validity of the contract between these parties was conclusively settled * * * in the former action disposes of the only real question on this appeal."

The uncontradicted evidence in the instant case shows that the breach of contract, chiefly relied upon, occurred in Los Angeles county, for that is where the water heaters were manufactured and sold, which is the subject-matter of the contract sued upon. The allegations of the complaint contain nothing to the contrary. The case of *Byrum v. Stockton C. H. & A. W.*, 91 Cal. 657, 27 P. 1093, presented a similar situation. In that case the plaintiff bought a combination harvester from the defendant, with a guaranty that the machine would satisfactorily cut and harvest grain. The defendant's principal place of business was at Stockton, where the contract of sale was made, and from which point the machine was shipped to Stanislaus county. A suit for damages was commenced in Stanislaus county for breach of contract. The complaint alleged that the machine was unfit to perform the work of harvesting according to the guaranty. A motion for change of venue was denied. On appeal to the Supreme Court, Mr. Justice Temple said:

"It is quite immaterial whether the corporation did business in Stanislaus county, if this contract was not made or was not to have been performed there. The affidavit of the moving party is positive to the effect that the contract, the breach of which is the subject of the action,

was made in San Joaquin county. This fact is not controverted in the complaint, but it is there stated that the breach occurred in Stanislaus county. This is, however, a mere legal conclusion, probably drawn by the pleader from the fact that the failure of the machine to perform was in that county. * * * It is not stated on either side where the machine was delivered to plaintiff, but, as the sale was at Stockton, defendant's principal place of business, the presumption is that it was delivered there. If the machine was, as charged, wholly inadequate * * * to perform according to the guaranty, the breach was there and then, and not when it failed to perform on plaintiff's farm, in Stanislaus."

It is true that the complaint in this case charges defendant with a breach of contract not only in refusing to sell and ship to plaintiff water heaters, when ordered pursuant to said contract, but also accuses defendant with alleged sales of water heaters to persons residing in said district in Northern California, other than appellant, and of appointing other agents in said district who were authorized to sell said heaters. But all these alleged acts, if unwarranted, constituted a violation of the contract which was to be performed at Los Angeles. Moreover, the complaint is extremely vague and indefinite as to these alleged violations of the contract. It is averred that these sales of heaters were made at times "the exact dates whereof plaintiff does not now remember." Neither the names of individuals to whom heaters are alleged to have been sold, or who are alleged to have been appointed agents for respondent, are mentioned, nor is the time of these alleged violations of contract stated. On the contrary, the affidavits of Mr. Bastian, in behalf of respondent, alleges that all sales of said heaters were made f. o. b. at Los Angeles; that, for failure on the part of appellant to purchase said heaters according to the terms of the contract, the respondent rescinded said contract in writing on March 18, 1925, and notified appellant that it refused to ship further heaters under said contract. The evident inference from the affidavits on file is that whatever sales or appointment of agents respondent made, if any, in conflict with the contract involved in this case, were made after its purported rescission of contract on March 18, 1925. There is no evidence to the contrary. Moreover, this is not an action for damages for the sale of heaters in Northern California to individuals other than appellant, but rather an action for damages for breach of a specific contract,

the performance of which was at Los Angeles, and not elsewhere.

[8, 9] While it is true that a corporation moving for a change of the place of trial to the location of its principal place of business sustains the burden of showing that the contract upon which the action was instituted was neither executed, required to be performed, nor violated at the place where the action was commenced (*Lakeside Ditch Co. v. Packwood Canal Co.*, 50 Cal. App. 296, 195 P. 284; *Chase v. S. P. Coast Ry. Co.*, 83 Cal. 468, 23 P. 532; 25 Cal. Jur. 910, § 42; 2 *Bancroft's Code Pl. & Rem.* 1457, § 1014), nevertheless, mere conclusions or indefinite statements of a pleader will not suffice to create a prima facie case entitling one to maintain an action at a county other than that of the residence of the defendant. In *Griffin & Skelly Co. v. Magnolia F. C. Co.*, 107 Cal. 378, 40 P. 495, it is said:

"If a plaintiff would avail himself of the privilege given by this exception to the general rule, he must bring himself clearly within the exception."

And in 25 California Jurisprudence, at page 910, it is said:

"The right of a plaintiff to have an action tried in a county other than that in which the defendant has his residence is exceptional, and, if the plaintiff would claim such right he must frame his pleadings in such a manner as to bring himself within the terms of the exception."

See *Hammond v. Ocean Shore Dev. Co.*, 22 Cal. App. 167, 133 P. 978.

Where the evidence on motion for a change of venue is conflicting with respect to the residence of the defendant, the place of the performance of the contract, or the violation thereof, the judgment will not be disturbed on appeal. 25 Cal. Jur. 911, § 43.

[10] From the evidence in this case it satisfactorily appears that the residence and principal place of business of the defendant was at Los Angeles; the contract involved was made and was to be performed there, and not elsewhere; all sales and payments for heaters were made at this place; the breach of contract, on the part of respondent, if any, followed the rescission of the agreement which also occurred at this place; the situs of the basis for the acts complained of was at Los Angeles, and not in Alameda county.

For the foregoing reasons, the order is affirmed.

We concur: KOFORD, P. J.; STURTEVANT, J.

87 Cal. App. 711

LIERLY et al. v. McEWEN et al.
(Civ. 5217.)

District Court of Appeal, First District, Division 1, California. Dec. 21, 1927.

Appeal and error  705—That appellant was awarded greater sum than entitled to, hence was uninjured, held not shown by record and not available to respondent.

In appeal from judgment determining the amount of oil royalties to which parties were entitled, contention that the appellant was awarded a greater sum than his contract required, hence was uninjured by the judgment, *held* not available to respondents, where basic facts to support such contention were not shown by the record but would have required an analysis of the schedule for determination.

Appeal from Superior Court, Kern County; Erwin W. Owen, Judge.

Action by W. S. Lierly and others against the Security Trust Company of Bakersfield, for whom Daniel H. McEwen and others were substituted as defendants. Judgment for plaintiffs, and the substituted defendants appeal. Reversed with directions.

Superseding former opinion in 259 P. 468.

James Donovan, of Los Angeles, and John L. McNab and Byron Coleman, both of San Francisco, for appellants.

W. W. Kaye, of Los Angeles, and Alfred Siemon, of Bakersfield, for respondents.

TYLER, P. J. This action was originally brought by plaintiffs against Security Trust Company of Bakersfield as defendant for the purpose of having determined the proportionate amount of royalties that certain locators of oil lands were entitled to under a leasing agreement with the Associated Oil Company, which royalties were held by the defendant banking company under a certain trust agreement. The company later came into court under motion, according to the provisions of the Code of Civil Procedure, and deposited the sum of \$1,704.32, the amount held by it, and procured an order bringing into the action certain defendants who thereafter filed pleadings alleging the proportion of the amount they were entitled to.

The facts are somewhat involved. It appears from the record that on January 1, 1910, W. S. Lierly, plaintiff herein, made a number of oil locations on government lands under the then existing system, and named B. F. Wilson as one of the locators. Shortly thereafter the Associated Oil Company leased certain of these locations, including those in which Wilson's name was used as a locator. As soon as Wilson ascertained the fact that his name had been used as one of the locators, he communicated the fact to his partner D. H. McEwen, defendant and appellant herein, advising him that the locations made in

his name were for the joint benefit of both, by reason of their partnership. Later the government sought to disturb the locations so made because of the withdrawal of the particular lands from location by President Taft in the fall of 1909. Nothing was determined under these controversies at this time. On February 25, 1920, Congress passed what is known as the Leasing Act. Comp. St. § 4640¼ et seq. On August 10, 1920, the Associated Oil Company entered into an agreement with certain locators, including McEwen, from whom leases were taken covering the locations in which B. F. Wilson was interested. This agreement had for its object the development of the lands under the Leasing Act, in the event that it should be determined that the locators were entitled to a lease. The Associated Oil Company succeeded in procuring a lease from the government upon the properties on condition that it effected a settlement among the various claimants of their conflicting interests. This the company succeeded in doing, and on April 2d all of the parties to this action, or their predecessors in interest, signed an agreement with the Associated Oil Company, whereby they agreed upon the proportion that each claimant should have under their various claims.

The substance of this contract is: That the government of the United States leased to the Associated Oil Company the southeast quarter of section 26, township 30 south, range 24 east, on condition that such company would clear up any adverse claims against the government upon this quarter section and upon the further consideration that three other quarter sections which were put into the Naval Reserve should be surrendered to the government by all the locators or their successors in interest, and that, in consideration of the surrender of these three quarter sections, the government leased the quarter section above described to the oil company. This section is outside the Naval Reserve. It then became incumbent upon those who had claimed some interest, either as locators or subsequent transferees of the three quarter sections, to adjust their respective rights with the Associated Oil Company, which was done under the contract of April 2, 1921. By the terms of this contract, the government was to receive 20 per cent. royalty and other interests were to receive 5 per cent., leaving 75 per cent. of the net production to be divided between the oil company and the various locators on the three quarter sections.

It is claimed by appellant McEwen that, as there were twenty-four locators on these disputed three quarter sections, and each surrendered to the government the same quantity that each other person surrendered, they therefore surrendered ⅓ of each location considered as a separate surrender of each quarter section, or, considering the three quarter

sections as a unit, each surrendered $\frac{1}{24}$ of the three; that this is the respective relation that each locator stood to the other— $\frac{1}{8}$ of one, or $\frac{1}{24}$ of the three considered as a unit, and the royalty which the Associated Oil Company agreed to pay them was $\frac{1}{8}$ of 75 per cent. of the net production. One-eighth of the royalty divided by $\frac{1}{24}$ gives each person $\frac{1}{192}$ part of the royalty of 75 per cent. and the agreement specifically provided that this was the interest that each of the locators was entitled to thereunder. This agreement was signed by both Wilson and McEwen.

Prior to the entering into thereof, Wilson attempted to repudiate and deny that McEwen had any interest in the locations or the contract originally entered into with the Associated Oil Company. McEwen thereupon instituted suit against Wilson, joining the oil company, the Security Trust Company, and one William C. Davis, the latter having acquired from Wilson some interest in the property. The issues were joined, and, prior to the case going to trial, a certain stipulation was entered into by all the parties to said action to the effect that upon its final determination there would be paid to the person or persons to whom said royalty should be awarded, in such proportions as the court should determine. On January 10, 1923, judgment was duly made and entered, giving and granting to McEwen $\frac{1}{2}$ of all the interests acquired by Wilson under the locations made on and after January 10, 1910. It was also decreed that under the contracts of August 10, 1920, and April 2, 1921, above referred to, McEwen was entitled to $\frac{1}{2}$ of the interests acquired by reason of Wilson's locations and also $\frac{1}{2}$ of the compromise agreement made between the government of the United States and the Associated Oil Company under the contract of April 2, 1921. In other words, Wilson's and McEwen's interest collectively in the southeast quarter of section 26, township 30 south, range 24 east, was $\frac{1}{24}$ of the royalty or $\frac{1}{192}$ part of the 75 per cent., which would make their separate interest $\frac{1}{384}$ part of 75 per cent. of all production of oil, gas, and other substances obtained from the quarter section mentioned. Prior to the settlement of the controversy between McEwen and Wilson, the Security Trust Company, on September 21, 1921, entered into an agreement with certain of the locators who were entitled to a part of the royalty on the above-described quarter section, whereby the Associated Oil Company was to pay to the Security Trust Company the royalties, and the owners of such royalties were to receive from such trust company the distributive share to which each was entitled.

Thereafter W. S. Lierly brought the present action against the Security Trust Company to recover the royalties in its hands. This action set forth the trust agreement, and

then alleged the reception by the trust company of a certain sum of money from the oil company. The action was filed on March 20, 1923, subsequent to the rendition of the decree in *McEwen v. Wilson*. On application of the trust company an order was made permitting it to pay the amount into court, and certain of the royalty owners were then substituted as defendants in the action. As above recited, certain of these defendants filed pleadings. McEwen answered, denying any knowledge of the contract of September 21, 1921, with the trust company, and he also alleged that he was not a party to that contract. He then referred to his action against Wilson, wherein it was adjudged and decreed that he was the owner and entitled to the possession of $\frac{1}{384}$ part of 75 per cent. of the royalty due from the oil company under the agreement of April 2, 1921; that the judgment had become final. Wilson also filed an answer claiming a $\frac{1}{48}$ interest in the royalties. The action proceeded to trial before the court without a jury.

There was introduced in evidence a certain schedule prepared by W. W. Kaye, Esq., one of the attorneys for plaintiffs herein, which purported to show the proportionate interests of the various grantors and their successors in interest in the fund. This schedule adopts the number 5,120 as a common denominator or number of shares into which the entire fractional interests of the several locators and their successors in interest is to be divided. It recites that Wilson is entitled to 80 shares and McEwen to an equal number. Under this computation Wilson and McEwen would be entitled to $\frac{80}{5120}$, or reduced to its lowest terms, $\frac{1}{64}$ of $\frac{1}{8}$, or $\frac{1}{192}$ of the total royalties payable to each of the eight locators of one of the three quarter sections surrendered to the government; there being, as above pointed out, twenty-four locators on the three quarter sections surrendered. The trial court adopted the schedule as showing the interest that each party to the action owned in the fund and rendered judgment accordingly.

It is appellant McEwen's contention that he was in no manner bound by the agreement entered into on September 21, 1921, by certain of the locators with the Security Trust Company, as he was not a party to it, that his rights were fixed and determined under his contract with the oil company, and that, never having conveyed any of this interest, he was by reason of his judgment against Wilson entitled to $\frac{1}{2}$ of the $\frac{1}{192}$ part of 75 per cent. of the royalties obtained from the oil company, which would be $\frac{1}{384}$ of 75 per cent. This claim of appellant is not denied by respondents, but they take the position that, as appellant has been awarded a greater amount under the judgment than he prayed for, he is not injured and is therefore in no position to complain. Appellant, on the other hand, de-

nies that the judgment secures to him the portion to which he is entitled, and claims that it amounts to four times less than his rightful share. The record is not clear as to the manner in which Mr. Kaye determined the respective interests of the parties, and counsel have not enlightened us upon the subject. Under the position which counsel have taken, we do not feel that we are called upon to determine the arithmetical correctness of the involved schedule upon which the judgment is based. Appellant claims that he is entitled to $\frac{1}{384}$ part of 75 per cent. for the reasons above indicated. There is nothing in the record to show that McEwen has parted with any portion of this interest to which he is entitled under the contract with the oil company, and counsel for respondents have not pointed out in what manner this interest has in any manner been affected; their only claim being that the judgment awards appellant a greater amount, for which reason he should not be heard to complain. Whether this be true or not would require an analysis of the schedule to determine, a task we do not consider we are called upon to undertake. There being no question but that appellant is entitled to $\frac{1}{384}$ part of the total royalties under his contract with the oil company, he should have judgment for this amount.

This being so, judgment is reversed, with directions to the trial court to enter judgment accordingly.

We concur: KNIGHT, J.; CASHIN, J.

87 Cal. App. 371

McKEON v. LISSNER et al. (Civ. 6058.)★

District Court of Appeal, First District, Division 2, California. Dec. 8, 1927.

Rehearing Denied Jan. 5, 1928. Hearing Denied by Supreme Court Feb. 6, 1928.

1. Carriers ⇨318(1)—Evidence held to support jury's finding in effect that defendants were negligent in having apartment house hallway dark and in operating elevator.

In action by prospective tenant for injuries from fall into shaft of apartment house elevator, evidence held to sustain jury's finding in effect that defendants were negligent in having hallway near elevator dark, and in operating elevator with broken lock, and without proper inspection.

2. Carriers ⇨280(4)—Statute held not to take from owners power to provide competent elevator safety devices and efficient operation, or to affect measure of required care (St. 1917, p. 84).

St. 1917, p. 84, providing for state inspection of elevators, did not take from owners power to provide competent safety devices and efficient operation, and duty of care prescribed by law and owing to persons lawfully using elevators has not been diminished thereby.

3. Carriers ⇨293—Proprietors of apartment building held responsible for their agent's negligence in inspecting elevator (Civ. Code, § 2338; St. 1917, p. 84).

Fact that St. 1917, p. 84, required proprietors of apartment house to employ, for inspection of elevator, person holding certificate of competency from Industrial Accident Commission, did not relieve them of liability under Civ. Code, § 2338, for negligence of such person in inspecting elevator.

4. Carriers ⇨347(4)—Evidence as to negligence of prospective tenant falling into apartment house elevator shaft held to present jury question.

Evidence as to negligence of prospective tenant falling into apartment house elevator shaft held not to show contributory negligence as matter of law, but to present jury question.

5. Trial ⇨250—Refusal to instruct on issue not brought to jury by either pleading or evidence held proper.

In action for fall into apartment house elevator, refusal to instruct that, if third party left shaft door open, proprietors could not be charged with negligence, which issue was not brought to jury by either pleading or evidence, was proper.

Appeal from Superior Court, City and County of San Francisco; H. D. Burroughs, Judge.

Action by Alice T. McKeon against A. L. Lissner and another. From a judgment for plaintiff, defendants appeal. Affirmed.

See, also, 193 Cal. 297, 223 P. 965.

Redman & Alexander, of San Francisco, for appellants.

Ford, Johnson & Bourquin, of San Francisco, for respondent.

NOURSE, J. Plaintiff sued for damages caused by her fall through an open elevator shaft located in an apartment house conducted by defendants. The cause was tried before a jury and resulted in a verdict in the sum of \$5,000. From the judgment on the verdict the defendants have appealed on a bill of exceptions.

[1] The cause was previously tried, and resulted in a judgment for the plaintiff for \$4,000. An appeal was taken to the District Court of Appeal, which affirmed the judgment but, upon transfer to the Supreme Court, the judgment was reversed because of errors in the instructions to the jury. *McKeon v. Lissner*, 193 Cal. 297, 223 P. 965. The facts which were developed at the first trial are set forth at length in the opinion cited, and it is unnecessary to repeat them here. On the second trial no new evidence of importance was presented, except the evidence tending to show that the hallway on the first floor of the apartment house near the door of the elevator was dark and unlighted. This ele-

ment was urged by respondent on the first appeal, but the Supreme Court ruled that it could not be considered, because it had not been specifically pleaded. To meet this objection, the complaint was amended before the second trial. As evidence of defendants' negligence, the respondent now relies upon this darkened condition of the hallway and upon the negligent operation of the elevator with a broken lock and without proper inspection. The point is that, as plaintiff approached the elevator shaft, she found the door unlocked and partially open; that, being accustomed to use automatic elevators of this character she assumed that the cage must be level with the floor when she saw the door open, and that she stepped into the darkened space, thinking she was entering the elevator cage. The cage was, however, at the third floor of the building, and plaintiff fell to the basement of the shaft, suffering serious injuries from which she has not fully recovered. It appears that defendants had employed the Federal Elevator Company to care for and inspect the elevator, and that an inspection had been made two days previous to the accident. It is plaintiff's contention that this inspection was inadequately and carelessly made; that, after the accident, it appeared that the spring of the lock on this door had broken from crystallization; that the inspectors knew this was a condition which frequently occurred upon the particular kind of lock used; that the broken spring could be discovered only by removing the lock; and that this was not done.

Upon these facts the appellants now argue that there was no evidence of negligence on their part, and point out that all the evidence was controverted by witnesses called in their behalf. The darkened condition of the hallway was shown by the direct evidence of the respondent and of a police officer, who appeared upon the scene a very few minutes after the accident. The "conflicting" evidence is found in the testimony of the witnesses as to the *usual* condition of the hallway when the afternoon sun was shining through the windows. The respondent testified in no uncertain terms that the door to the elevator shaft was partially open when she approached it. She was contradicted by the testimony of the house manager, who said she stood on an upper floor of the building and heard respondent unlock the door. Further contradiction was made by a roomer, who testified that, while standing on the second floor, she heard the respondent on the first floor press the buzzer to call the elevator. It was for the jury to determine the facts, and, in view of the evidence, we cannot say they erred in their finding on either issue.

[2] Appellant argues at length concerning the poor judgment of the Legislature in enacting the statute providing for periodical state inspection of elevators. Stats. 1917, p.

84. It is argued that this act took from them the power to provide competent safety devices and efficient operation, but, in the former opinion, the Supreme Court clearly says that the act was intended merely for the purpose of providing additional safeguards, and that "the measure of the owner's care prescribed by the law and owing to persons lawfully using an elevator, has not been diminished in the slightest degree by said act." 193 Cal. 303, 223 P. 968.

[3] Appellants criticize the instruction given the jury holding them responsible for the negligence, if any, of the Federal Elevator Company in inspecting the elevator. The company was the agent of the appellants, appointed by them to perform this particular function. Their liability for negligence on the part of their agents is fixed by section 2338, Civil Code. Appellants insist that, because the statute of 1917 required them to employ for inspection purposes persons holding a certificate of competency from the Industrial Accident Commission, they were relieved of liability under the exception in section 2338, Civil Code, when the party is "required by or under the authority of law to employ that particular agent." But this statute does not require any one to employ a particular agent. It merely requires the employment of one certified to be competent. The provision of the statute is in line with all the recent legislation covering the licensing of particular professions and employments. It is directed to the benefit of the public at large—to insure, so far as possible, competent service. If appellants are correct in their position, it might as well be said that an employer will not be responsible for the negligence of his engineer or chauffeur, as they must be licensed by the state. It must be apparent that such a result was not contemplated by these statutes, particularly when no one of them discloses any intention of modifying the provisions of the Code section cited.

[4] Appellants argue that the respondent must be held guilty of contributory negligence as a matter of law. We have been unable to find any material difference in the evidence heard in the two trials on this issue, and must say, as was said by the Supreme Court, in the former appeal, that this issue was properly left with the jury. 193 Cal. 304, 223 P. 968.

[5] Appellants complain because the trial judge refused to instruct the jury that, if they found that a third party had left the shaft door open, the appellants could not be charged with negligence. This was an issue which had not been brought to the jury by either pleading or evidence, and the instruction was properly refused.

Judgment affirmed.

We concur: KOFORD, P. J.; STURTEVANT, J.

87 Cal. App. 320

BRYSON v. BYRER et al. (Civ. 5869.)

District Court of Appeals, Second District, Division 1, California. Dec. 7, 1927.

1. Appeal and error ⇨1039(13)—Where trial court's decision for plaintiff was unaffected by alleged failure to prove certain allegations, failure held immaterial.

Where trial court's decision for plaintiff was shown by findings to have been unaffected in any event by alleged failure to prove certain allegations of complaint, appellant's criticism in that respect held of no importance.

2. Deeds ⇨196(2)—In action to set aside wife's conveyance to husband, where deed was without consideration, defendants had burden of proving conveyance in good faith (Civ. Code, §§ 158, 2235).

Under Civ. Code, § 158, providing that transactions between husband and wife should be subject to rules controlling actions of persons occupying confidential relations with each other, and section 2235, providing that all transactions between trustee and beneficiary, by which trustee obtains any advantage from beneficiary, are presumed to be without sufficient consideration and under undue influence, in action to set aside wife's conveyance to husband, where deed was found to be without consideration, defendants held to have burden of showing affirmatively that husband acquired the property in good faith and in compliance with all equitable requirements.

3. Appeal and error ⇨1041(2)—Permitting amendment after taking of evidence had ceased, if error, held harmless, where two counts of complaint were substantially same as amendment.

Permitting plaintiff to amend his complaint after taking of evidence had ceased, in an action to set aside a conveyance from wife to husband, by alleging that, instead of community property, as originally alleged, conveyance was of wife's separate property, if error, held harmless, where two counts of the complaint contained allegations in substantially same language as that of the amendment.

Appeal from Superior Court, Los Angeles County; George H. Thompson, Judge.

Action by Frank Bryson, administrator of the estate of Anna England (sometimes known as Annie W. England), substituted for Anna England, against C. W. Byrer, as administrator of the estate of Isaac W. England (sometimes known as I. W. England), deceased, and others. Judgment for plaintiff, and defendants, except C. W. Byrer and Charles R. England, appeal. Affirmed.

Page, Nolan, Rohe & Freston and Hurt & Howard, all of Los Angeles (Howard F. Shepherd, Louis P. Pink, and J. A. McLaughlin, all of Los Angeles, of counsel), for appellants.

John J. McMahon, of Los Angeles, for respondent.

HOUSER, J. From the findings made by the trial court it appears that the basic facts upon which the judgment herein is predicated, and from which judgment the appeal herein is taken, are that one Isaac W. England and Anna England were husband and wife; that from their community funds they acquired certain real property, which, at the request and direction of the husband, was deeded to the wife; and that several years thereafter the wife deeded the property to the husband. The findings recite the further fact that the deed made by the wife to the husband "was delivered to said Isaac W. England without any consideration whatsoever, and solely by reason of undue influence exercised by said Isaac W. England over the said Anna England, * * * by which said deed and transaction said husband obtained an advantage over his wife and was thereby enriched to the extent of the value of said real property." Judgment was rendered in favor of plaintiff.

[1] One of the points made by appellants for reversal of the judgment is that on the trial of the action no evidence was offered by the plaintiff which proved or tended to prove any of the allegations of the complaint with reference to the execution of the deed in question. An examination of the pleading on the part of plaintiff discloses the fact that the allegations to which attention is thus directed in substance were that said deed was executed contemporaneously with another deed covering the identical property mentioned in the first deed, made by the husband to the wife; that each of said deeds was then placed in a safe-deposit box, to which each of the parties at all times had access, with the intent and purpose on the part of the wife that each of said deeds was to be delivered and become effective only in the event of and upon the death of the grantor thereof; but that, notwithstanding such situation of the parties with reference to such deeds, and in violation of the understanding thereof on the part of the wife, the husband caused the deed to him by the wife to be placed of record.

No specific finding with reference to such allegations was made by the trial court, but with regard thereto the trial court in substance did find that the husband never executed the deed to which such allegations referred. In such circumstances, the criticism of appellants in that connection becomes of no importance. The judgment of the court is based primarily upon the facts, as hereinbefore and in the findings set forth, that the deed of separate property of the wife made by her to the husband was without consideration, and that the husband "obtained an advantage over his wife and was thereby enriched to the extent of the value of said property," and the principal attack of appellants is directed to the conclusion of law and judg-

ment by the court arising from such finding that the deed in question should be "set aside and canceled, and declared invalid and of no force or effect whatsoever."

It is the contention of appellants that the mere fact that without consideration therefor a wife has deeded her separate property to the husband does not constitute a sufficient showing to justify a judgment for the cancellation of the deed on the ground that it was induced by undue influence of the husband. In reply, the respondent points to the provisions of sections 158 and 2235 of the Civil Code, which are as follows:

Section 158: "Either husband or wife may enter into any engagement or transaction with the other, or with any other person, respecting property, which either might if unmarried; subject, in transactions between themselves, to the general rules which control the actions of persons occupying confidential relations with each other, as defined by the title on trusts."

Section 2235: "All transactions between a trustee and his beneficiary during the existence of the trust, or while the influence acquired by the trustee remains, by which he obtains any advantage from his beneficiary, are presumed to be entered into by the latter without sufficient consideration, and under undue influence."

On the trial of the action the plaintiff introduced the deed in question, which on its face showed that the consideration for its execution was the sum of \$1. Plaintiff also showed that the value of the property covered by the deed was approximately \$15,000. Defendants offered no evidence relating either to the consideration paid for the property, or as affecting the general issue of "undue influence" in the execution of the deed.

[2] While some of the decisions of the Supreme Court of this state, notably *Dimond v. Sanderson*, 103 Cal. 97, 37 P. 189, *Tillaux v. Tillaux*, 115 Cal. 663, 47 P. 691, *McDougall v. McDougall*, 135 Cal. 316, 67 P. 778, *White v. Warren*, 120 Cal. 322, 49 P. 129, 52 P. 723, *Sheehan v. Sullivan*, 126 Cal. 189, 58 P. 543, and *Stiles v. Cain*, 134 Cal. 170, 66 P. 231, are strongly in favor of the contention of appellants to the effect that in the state of the evidence as presented by the plaintiff the burden was not cast upon the defendants to establish the fairness of the transaction between the parties, by what this court considers the weight of authority, it is held that, in circumstances such as were depicted by the evidence on the trial of the instant case, in order to overcome the statutory presumption of lack of sufficient consideration and undue influence arising from the transaction in question, it became and was the duty of defendants to show affirmatively that the husband acquired the property from the wife in the utmost good faith and in compliance with all equitable requirements. *Estate of Cover*, 188 Cal. 133, 143, 204 P. 583, and cases cited;

Schurman v. Look, 63 Cal. App. 347, 218 P. 624, and cases cited; *McKay v. McKay*, 184 Cal. 742, 746, 747, 195 P. 385, and cases cited; *Cox v. Schnerr*, 172 Cal. 371, 379, 156 P. 509; *Metropolis Trust & Sav. Bank v. Monnier*, 169 Cal. 592, 147 P. 265; *Bonifacio v. Stuart*, 52 Cal. App. 489, 199 P. 69; *Espinoso v. Stuart*, 52 Cal. App. 477, 199 P. 66; *Bouton v. Stuart*, 52 Cal. App. 484, 199 P. 71.

[3] Appellants also complain that in the course of the trial, and after the taking of evidence had ceased, over defendants' objection, plaintiff was permitted to amend his complaint by an allegation to the effect that, instead of the property in question having been the community property of husband and wife, as originally alleged, in fact it was the separate property of the wife. In that connection it should be noted that the complaint consisted of three counts, in the first and second of which the allegation was made in substance as in the language of the amendment which is here the subject of the criticism by appellants. Waiving any question of the discretion of the trial court to permit an amendment to conform to evidence, and without taking into consideration the rule allowing great liberality with reference thereto, it is apparent that in the circumstances the defendants were in no wise harmed by the action of the trial court.

The judgment is affirmed.

We concur: CONREY, P. J.; YORK, J.

87 Cal. App. 680

MASSA v. SHELDON. (Civ. 4550.)

District Court of Appeal, Second District, Division 2, California. Dec. 19, 1927.

Appeal and error $\Rightarrow$ 931(1)—Appellate court assumes that trial court gave to conflicting evidence construction which supports judgment.

Where evidence is conflicting, appellate court must assume that trial court gave it construction which supports judgment.

Appeal from Superior Court, Kern County; J. W. Mahon, Judge.

Action by Lawrence Massa against R. W. Sheldon. Judgment for plaintiff, and defendant appeals. Affirmed.

Wiley & Harvey, of Bakersfield, for appellant.

T. M. McNamara, of Taft, and Brittan & Brittan, of Bakersfield, for respondent.

STEPHENS, Justice pro tem. Judgment was had in this case in the sum of \$1,080.41, interest and costs, in favor of plaintiff, and defendant appeals. Through concessions in the briefs the sum in dispute is reduced to \$139. It is not thought necessary or useful to

detail the original issues of the case, since the only issue for us to decide consists of one point of fact.

Appellant relies upon a statement of account rendered to one of his customers. Against this the customer testifies that he believes the account to be incorrect and to show a sum greater than the true amount. He is not asked by either party as to particular items in error. If the trial court accepted the statement as correct, the judgment is for \$139 too much. If it rejected the statement as unreliable, the judgment is correct.

The judgment must be sustained. The evidence was conflicting, and it is our duty to assume that the trial court gave it that construction which supports the judgment.

Judgment affirmed.

We concur: WORKS, P. J.; CRAIG, J.

87 Cal. App. 707

BRANDENBURGER v. CHIPMAN. ★
(Civ. 3249.)

District Court of Appeal, Third District, California. Dec. 20, 1927.

Rehearing Denied Jan. 19, 1928. Hearing Denied by Supreme Court Feb. 16, 1928.

1. Bankruptcy ⇐161(1)—Payment by bankrupt to creditor more than four months before adjudication in bankruptcy was not void as permitting preference.

Payment by bankrupt to alleged creditor more than four months prior to adjudication in bankruptcy could not be declared to be void as permitting a preference to be given creditor.

2. Bankruptcy ⇐303(5)—Note, assignment of grain order, and receipt of money by defendant held, under evidence, fraudulent arrangement to place funds in defendant's hands to hold for bankrupts.

Where farming partnership on August 14, 1923, gave defendant order on grain company for \$1,500, which grain company accepted two days thereafter and was paid by grain company a few days before adjudication in bankruptcy on October 15, 1924, evidence held to sustain finding that note given defendant, assignment of order, and subsequent receipt of funds, was fraudulent transaction, arranged so as to place funds of bankrupt in defendant's hands to hold for bankrupts.

3. Fraud ⇐58(1)—Charge of fraud is usually made out solely from statements and acts of perpetrators.

The charge of fraud is usually made out solely from statements and acts of perpetrators of fraud.

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

Action by W. A. Brandenburger, as trustee of the estate of Charles Studarus & Son, a copartnership, bankrupt, against Eldon Chip-

man. From a judgment for plaintiff, defendant appeals. Affirmed.

Thomas B. Leeper, of Sacramento, for appellant.

Ralph H. Lewis and Hughes, Bradford, Cross & Prior, all of Sacramento, for respondent.

WEYAND, Justice pro tem. Charles C. Studarus and Charles C. Studarus, Jr., were copartners doing business as farmers, under the name of Charles Studarus & Son. On October 15, 1924, they filed their petition in bankruptcy in the United States District Court for the Northern District of California, and said partnership was on that day adjudicated a bankrupt. Their farming operations had, prior to the adjudication in bankruptcy been conducted in Sacramento and Yolo counties. The plaintiff above named, the trustee in bankruptcy, is the respondent herein, and he will be referred to hereafter as the trustee. Studarus & Son will be referred to as the bankrupts.

The trustee above named, by an amended complaint filed in the superior court of Sacramento county, on October 27, 1925, sought to recover from Eldon Chipman, the appellant, the sum of \$1,500 which sum was by the trustee averred to be property of the estate of the bankrupt partnership, and illegally held by the defendant, Eldon Chipman.

Judgment in the lower court was in favor of the trustee, and the defendant, Chipman, appeals to this court.

The complaint contains three causes of action. In the first cause of action it is alleged that the bankrupt firm paid the defendant, Chipman, the sum of \$1,500, on or about the 10th day of October, 1924, upon an indebtedness, "claimed" by the bankrupt partnership, to be due Chipman. By proper averments this is stated to be void, as it permitted a preference to be given Chipman. The second count states that for more than two years next preceding the 10th of October, 1924, the partnership was insolvent, and that defendant, Chipman, knew of that condition. It is then alleged that on or about August, 1923, this being more than a year before the adjudication in bankruptcy, Chipman, to aid the bankrupt partnership to conceal its property, accepted from the partnership an assignment of the sum of \$1,500 due to the partnership from a creditor of the partnership, and that defendant, Chipman, received that sum of money, the property of the partnership, upon an understanding that he (Chipman) was to hold the same for the partnership and thus conceal the same from the partnership creditors. The third cause of action in said complaint is upon the common count for money had and received by Chipman for the use and benefit of said copartnership.

The answer of defendant, Chipman, denies these allegations, in so far as any illegal or

improper conduct of Chipman is concerned. The defendant further answers to the effect that the \$1,500 received by him was reloaned to the partnership, and was, by the partnership, used in the production of a crop, which the trustee received, and that, even if Chipman's receipt of the \$1,500 was void as against creditors, yet the creditors got the benefit of the crop upon which it was spent, and therefore that sum should be allowed as an offset to the money paid Chipman. To further illustrate the force of this claim, we will here state that on January 1, 1923, as appellant contends, the partnership gave him a note for \$1,500, which was given to cover a number of small sums of money previously loaned by Chipman to the partnership. On August 14, 1923, the partnership did actually give Chipman an order on the Guernsey-Ames Grain Company for the sum of \$1,500, which order was by the grain company accepted two days thereafter, and which order was paid by the company a few days before the adjudication in bankruptcy, more than a year after it was given to Chipman. Chipman alleges he in turn reloaned this very sum to the partnership, and they used it to produce a certain crop, which the trustee in bankruptcy took over.

[1] We will eliminate from this case matters with which we need not concern ourselves. As to the first cause of action, we are of the opinion that the date of payment to Chipman was at latest August 14, 1923, when he received the order on the grain company. This was more than four months before the adjudication in bankruptcy. Therefore that cause of action should fail, as it is predicated upon a payment within four months before the adjudication.

As to the offset claimed by defendant, the decision of the lower court cannot be disturbed. This money was paid by the grain company to Chipman on the day before the adjudication. The defendant's bank account shows it was by Chipman deposited after the adjudication. It could not have been used for the benefit of the trustee. It is claimed by Chipman that the reloan was made to the wife of Studarus, Jr. However, the crop upon which Mrs. Charles C. Studarus, Jr., used \$1,000 of the money paid her by Chipman (according to Mrs. Studarus' testimony) failed to mature and therefore nothing was received therefrom. A loan of \$700, made to Mrs. Studarus by Chipman, was made in November, 1922, antedating even the note of \$1,500. The ruling of the trial court was correct upon this issue.

[2, 3] The main contention in this case, as we view it, is the one made by plaintiff's second cause of action and the denial thereto. As we view the testimony, the trial court was amply sustained by the evidence in its holding that the note, the assignment, and the subsequent receipt of the \$1,500 by Chipman

from the Guernsey-Ames Grain Company were all transactions fraudulently contrived and arranged so as to place \$1,500 of the partnership money into the hands of Chipman, to hold the said money for the partnership or for its members.

The transaction has upon its face nearly all the usual badges of fraud. The trial court heard the witnesses, and had occasion to observe their manner upon the stand. The charge of fraud is usually made out solely from statements and acts of the perpetrators of the fraud.

In this transaction there was secrecy by the parties. No person saw or participated in the alleged dealings excepting Charles C. Studarus, Jr., his wife, and defendant, Chipman. The dealings were apparently unknown by the elder Studarus. The transaction was wholly unusual. Studarus, Jr., testifies he never kept an itemized list of his small borrowings from Chipman, that in January, 1923, had reached the sum of \$1,500. Although Chipman had a bank account, these small loans were paid to Studarus, Jr., in cash, from Chipman's pocket. The assignment given to Chipman did not include the interest expressed in the note. In August, when this assignment was given, there was overdue interest from January 1, 1923, to the middle of August that year. Chipman testifies he never kept the dates of the small loans to Studarus, Jr. The testimony of Chipman is that the items of these small loans were kept in a small pocketbook, but he testifies the book was lost after the note was executed. At all the times, from before the execution of the note in January, 1923, until the adjudication in bankruptcy, Chipman knew of the financial straits of the partnership, yet no security for the note was taken.

An effort to give a transaction an appearance of fairness is frequently made. In the order of August, 1923, the first paper that came into the view of outsiders, an attempt is apparently made to give it a certificate of bona fides. After the wording of the order, in usual form, and the signature, an added paragraph says, "This sum is covered with a note dated January 1, 1923, due July 15, 1923." Another assignment, against the same fund, given by the bankrupts, at the same time, to pay another note due to a mercantile firm in Sacramento, does *not* mention a note.

Dealing in such manner with a party in financial difficulties of itself indicates how wholly irregular the instant matter was.

There are some other circumstances indicating fraud, but it is wholly unnecessary to go into all the circumstances. The testimony supports the findings and judgment of the trial court.

The judgment is affirmed.

We concur: HART, Acting P. J.; PLUMMER, J.

87 Cal. App. 636

(262 P.)

Ex parte GUNDELFINGER. (Cr. 1429.)

District Court of Appeal, First District, Division 1, California, Dec. 19, 1927.

1. Statutes $\Leftrightarrow$ 188—Words of statute must be interpreted according to their common acceptance, unless context shows they are used in technical sense.

One of the fundamental rules of statutory construction is that words of statute must be interpreted in their usual, ordinary, and popular sense, that is, according to their common acceptance, unless the context of the statute shows that they are used in a technical sense, and where words have a technical as well as a popular meaning, courts will accord to them their popular signification.

2. Licenses $\Leftrightarrow$ 19(3)—Exemption provision of charter conferring privilege on certain class of persons should be strictly construed.

Provision of city charter exempting from license tax any person selling or manufacturing goods, wares, or merchandise, being a privilege conferred on a certain class of persons, subject to change at any time by charter amendment without violating any right of such persons, should be strictly construed.

3. Statutes $\Leftrightarrow$ 245—If true meaning of phrase "goods, wares or merchandise" in taxation law is in doubt, it must be determined from context and purposes of act.

Though, where question of application of statute of frauds is involved, phrase "goods, wares or merchandise" is equivalent to term "personal property," where phrase is employed in taxation laws it may be used in different senses, and in case of doubt its true meaning must be determined from context and purposes of act wherein it is used.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Goods.]

4. Licenses $\Leftrightarrow$ 19(3)—City charter exempting from license tax persons engaged in selling "goods, wares or merchandise" held not to include business of selling stocks and bonds.

City charter exempting from license taxes persons selling or manufacturing "goods, wares or merchandise" held not to include business of selling stocks and bonds, and hence ordinance imposing license tax on such business does not conflict with charter and is not invalid.

Application by E. R. Gundelfinger for writ of habeas corpus, prayed to be directed to the Chief of Police of the City and County of San Francisco, to secure the release of petitioner from custody on a charge of violating provisions of a municipal ordinance. Writ discharged; petitioner remanded.

McKinstry, Haber & Firebaugh, of San Francisco, for petitioner.

Matthew Brady, Dist. Atty., I. M. Golden, Asst. Dist. Atty., John J. O'Toole, City Atty., and Henry Heidelberg, Deputy City Atty., all of San Francisco (J. A. Pritchard, of San Francisco, of counsel), for respondents.

KNIGHT, J. Petitioner was arrested for violating the provisions of a municipal ordinance, and seeks to be discharged from custody on a writ of habeas corpus.

[1, 2] The city and county of San Francisco maintains an ordinance imposing a license tax upon various classes of business conducted within its boundaries. Section 83 thereof reads as follows:

"Every person, firm, or corporation engaged in the business of buying or selling mining stocks, bonds, state, county or municipal stocks or bonds, or stocks of incorporated companies or evidences of indebtedness of private persons or of incorporated companies, directly or on margin, shall pay a license, * * * the amount of which varies from twelve to fifty-two dollars a quarter, according to the amount of commissions or gross profits earned by the business.

Section 90 declares a violation of any of the provisions of said ordinance to be a misdemeanor. The complaint herein charged that petitioner did willfully and unlawfully "engage in the business of buying and selling bonds, stocks, and evidences of indebtedness of private persons and of incorporated companies without having obtained the municipal license so to do," in violation of the provisions of sections 83 and 90 of said ordinance.

The charter of said city contains the following provision:

"Subject to the provisions, limitations and restrictions in this charter contained, the board of supervisors shall have power: (15) To impose license taxes and to provide for the collection thereof; *but no license taxes shall be imposed upon any person who, at any fixed place of business in the city and county, sells or manufactures goods, wares or merchandise, except such as require permits from the board of police commissioners as provided in this charter.*" Article 2, c. 2, § 1, subd. 15. (Italics ours.)

Petitioner contends that the phrase "goods, wares or merchandise" as used in the foregoing charter provision includes every species of personal property, that is, all property which is not real estate or freehold; and that therefore, since bonds, stocks, and evidences of indebtedness are deemed to be personal property, section 83 of the ordinance, which imposes a license tax upon the business of buying and selling such property, is violative of the italicized portion of the charter provision above quoted and consequently void.

We are of the opinion that the unlimited construction petitioner would have placed upon the phrase "goods, wares or merchandise" cannot be sustained. One of the fundamental rules of statutory construction is that the words of a statute must be interpreted in their usual, ordinary, and popular sense, that is, according to their common acceptance, unless the context of the statute shows that

they are used in a technical sense (*Quigley v. Gorham*, 5 Cal. 418, 63 Am. Dec. 139; *Farrell v. Board of Trustees*, 85 Cal. 408, 24 P. 868; *Directors of Fallbrook Irr. Dist. v. Abila*, 106 Cal. 355, 39 P. 794; *Ex parte Galivan*, 162 Cal. 331, 122 P. 961), and where words having a technical as well as a popular meaning are used, the courts will accord to them their popular signification (*Perrin v. Miller*, 35 Cal. App. 129, 169 P. 426). We are dealing here with the provisions of a municipal charter framed by a board of freeholders and approved by a vote of the people, and it is therefore only reasonable to assume that if it had been intended that all fixed places of business, selling or manufacturing any species of personal property, should be exempt from the operation of said license tax, the term "personal property" would have been used in the enactment of said exemption clause instead of the phrase "goods, wares or merchandise." Furthermore, the exemption provided being a privilege conferred upon a certain class of persons by the supreme lawmaking power of the city, which contains no element of contract and grants no vested rights, is subject to change at any time by charter amendment without violating any right of which such persons could be heard to complain; and therefore said exemption clause should be construed with strictness. *Ransome-Crummey v. Bennett*, 177 Cal. 560, 171 P. 304.

[3, 4] It is doubtless true that where the question of the application of the statute of frauds is involved, which is not the case here, it is held generally that the words constituting the phrase "goods, wares or merchandise" when taken together are equivalent to the term "personal property" (28 *Corpus Juris*. p. 726), but it is also held, as petitioner concedes, that where, as here, said phrase is employed in the enactment of taxation laws, it may be used in different senses, and in case of doubt that its true meaning must be determined from the context and purposes of the act wherein it is used. 28 *Corpus Juris*. 727; *New England, etc., Co. v. Commonwealth*, 195 Mass. 385, 81 N. E. 286, 11 Ann. Cas. 678. In any event, since a phrase of restricted meaning was employed in framing said exemption clause, it is not within the power of the courts to extend the scope and operation of said clause by judicially substituting in the place of such restricted phrase a term of unlimited meaning. Therefore, looking to the context and purposes of the charter provision containing said exemption clause rather than to the numerous conflicting cases upon the subject to be found in other jurisdictions, and interpreting said phrase "goods, wares or merchandise" according to its common acceptation and meaning, we are convinced that in the enactment of said exemption clause the framers of the charter did not intend to include within its scope those places of business like petitioner's dealing in intangible assets,

from which the city otherwise derives no revenue.

The decision rendered in *Re Dees*, 50 Cal. App. 11, 194 P. 717, upon which petitioner mainly relies in support of his theory, is not, in our opinion, controlling here, nor do we believe that it has the far-reaching effect petitioner claims for it. There the controversy related to the validity of section 70 of the license tax ordinance of said city and county, which made it unlawful for any person to engage in the business of selling theater tickets at any place other than at the office of the theater without first taking out a ticket peddler's license, which was fixed in the sum of \$300 a month. The facts appearing in the opinion show that petitioner therein was conducting a news stand in a hotel, selling various articles of goods, wares, and merchandise, and as a part of such business, for the convenience of the guests of said hotel and as a necessary prerequisite to the occupancy of said news stand, resold theater tickets, charging a premium thereon of 25c each. The gross sales from the entire news stand business amounted to no more than \$600 a month. It was held that said section 70 could not be upheld as a valid exercise of police power since it was not based upon any reasonable consideration of the public health, morals, or safety, nor of the cost of the police supervision; and that as a revenue measure it was invalid because the license tax of \$300 a month was not based upon any reasonable distinction; that the amount thereof was unfair and oppressive, if not in fact prohibitory; furthermore that under the city charter the board of supervisors, though vested with power to license ticket peddlers, was without power to exact a tax on those selling goods at a fixed place of business and could not enlarge upon its power by declaring persons as peddlers who were not such in fact. It will therefore be seen that the questions before the court there were essentially different from those presented here.

However, it having appeared that the resale of theater tickets was only a part of petitioner's main business of selling goods, wares, and merchandise at said news stand, the court, in the determination of the principal issues, quoted excerpts from several cases and cited others arising in foreign jurisdictions holding that the phrase "goods, wares or merchandise" included all species of movable property, from which the court in the *Dees Case* concluded that theater tickets might properly be included within the definition of "goods." But a fair analysis of the decision in the *Dees Case* shows, we think, especially in the light of the fact that all except two of the cases cited therein involved the application of the statute of frauds, that the excerpts quoted were invoked only in an argumentative sense in determining that the single item of property there under consider-

ation, namely, theater tickets, constituted "goods," and were not intended to constitute, as petitioner claims, an abstract adjudication that the phrase "goods, wares, or merchandise" as employed in said exemption clause includes every species of personal property. Said decision contains no express declaration to that effect, and acting upon the assumption that the law was not so declared, the city thereafter continued to and does now collect a large revenue from license taxes imposed upon the character of business now under consideration. For the reasons stated, we believe the construction petitioner would have placed upon the effect of the Dees Case is untenable, and we are therefore unable to adopt the same.

Nor do we consider that any of the cases which petitioner cites from other jurisdictions, notably the case of *Banta v. Chicago*, 172 Ill. 204, 50 N. E. 233, 40 L. R. A. 611, are decisive here. As petitioner concedes, in construing taxation laws "there is not a unanimity on the part of the courts in defining 'goods, wares or merchandise,'" for the reason that the phrase is used in different senses, and in case of doubt its meaning is ascertained from the context and purposes of the act. *New England, etc., Co. v. Commonwealth*, supra. It may therefore be fairly inferred that the decisions in the cases petitioner cites, as well as in those which may be found holding to the contrary, were grounded to some extent at least upon the contexts and purposes of the particular acts there considered.

Upon the grounds and for the reasons hereinabove set forth, we conclude that section 83 of said ordinance is not in conflict with the charter provision quoted, and consequently not invalid. The writ is therefore discharged and petitioner is remanded to the custody of the chief of police of said city.

We concur: TYLER, P. J.; CASHIN, J.

87 Cal. App. 753

HARTSHORN v. ELITE PRINTING CO.
(COUCH, Intervener). (Civ. 4749.)★

District Court of Appeal, Second District, Division 2, California. Dec. 22, 1927.

Rehearing Denied Jan. 20, 1928. Hearing Denied by Supreme Court Feb. 20, 1928.

1. Sales $\S$ 479(7)—Evidence held to support finding that unpaid balance on conditional sales contracts was satisfied by publication of advertising for plaintiffs as assignees.

Where plaintiffs paid balance due on conditional sales contract for operating plant of a newspaper, and took assignment thereof, in their action to replevy property, evidence held to sustain finding that publisher of newspaper had paid unpaid balance due on contracts in advertising which supported building of an All-American Canal which plaintiffs were advocating.

2. Appeal and error $\S$ 1010(1)—Findings of trial court, supported by evidence, will not be disturbed.

Findings of the trial court, supported by evidence, will not be disturbed by the Court of Appeals.

Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

Action by C. D. Hartshorn against the Elite Printing Company, in which F. M. Couch, trustee for Blake, Moffitt & Towne, intervened. From a judgment for the intervenor, and from order denying plaintiff's motion for new trial, plaintiff appeals. Affirmed.

Harry W. Horton, of El Centro, for appellant.

Jas. W. Glassford, of El Centro, for respondents.

VALENTINE, Justice pro tem. An action in replevin was commenced by the plaintiff and appellant June 27, 1921, against defendant for the recovery of the possession or value of the personal property involved in this proceeding. The appellant alleged ownership and right to possession. The defendant answered, claiming right to possession and ownership as purchasers of the property from F. M. Couch, as trustee. F. M. Couch, as trustee for Blake, Moffitt & Towne, intervened and claimed ownership to the property as purchaser from one E. F. Howe.

The property in question was originally purchased by E. F. Howe from the American Type Founders Company, under and by two conditional sales contracts. Howe was publishing a newspaper called the *Zanjero*, in the city of El Centro, and the property in question was practically the entire operating "plant" of this newspaper. Howe was in default, and other parties (the plaintiff's group) paid the balance due on these contracts to the American Type Founders Company to enable Howe to continue the publication of said newspaper for the purpose of advocating the completion of a certain irrigation canal, called the All-American Canal, which was deemed to be for the benefit, among others, of the parties arranging such payment. E. F. Howe continued the publication of the newspaper and to advertise and advocate the cause of the All-American Canal under a verbal agreement or understanding, as claimed by the intervenor, that certain members of "plaintiff's group" should pay to the American Type Founders Company the balance due on the two contracts, and that Howe should continue to so advertise to the extent of \$100 per month until such time as the total advertising amounted to a sufficient sum to "wipe out" such balance; the plaintiff's group taking an assignment in blank of the two conditional sales contracts

as security until E. F. Howe should repay them "by means of advertising and editorial service in said newspaper" as aforesaid, which the intervener claims was done.

The transactions were numerous and involved, but we believe this sufficiently states the facts and contentions of the parties material to the issue raised on this appeal.

The defendant, Elite Printing Company, appears to have abandoned its claim, and has filed no brief on this appeal.

[1] The trial court found for the intervenor, F. M. Couch, as trustee, and rendered judgment that said intervener, as trustee, have and recover from the plaintiff possession of said property, or, if delivery could not be had, for the sum of \$3,441.58, the admitted value. From this judgment and an order denying appellant's motion for a new trial plaintiff appeals upon the ground that the evidence does not support the trial court's findings and judgment.

It will only be necessary to consider appellant's specifications of error designated (a) and (b), as their determination disposes of the others:

"(a) That there was no evidence to support the finding of the court that there was any contract or agreement between the plaintiff and any of the parties for whom the plaintiff took the assignment of said contracts as trustee, by the terms of which any services rendered, or to be rendered, by Mr. Howe or his newspaper, the Zanjero, were in any way to be in payment for or to satisfy the contract so assigned to the plaintiff as trustee or the payments due thereon, or that any such services were to be in payment of the obligations on the Rehkopf note.

"(b) That the evidence is insufficient to support the finding and decision to the effect that any contract or agreement between the Imperial Laguna Water Company and Mr. Howe or his paper, the Zanjero, was in effect and fact a contract and agreement between the plaintiff and the persons he represented as trustee."

The trial court's finding IV is as follows:

"That on the 19th day of March, 1918, the said Edgar F. Howe entered into an agreement whereby the following named persons agreed to pay to the American Type Founders Company the unpaid balance on the two conditional contracts of sale between the said Type Founders Company as vendors and Edgar F. Howe, as vendee, to wit: Ed R. Gorman; T. A. Stevens; C. L. Gillett; D. W. Weist; Ernest Poston; C. D. Hartshorn; C. M. Berry; T. P. Banta; and L. R. Bonstiele. That in accordance with said agreement the said persons paid all of the unpaid purchase price as stipulated in said contracts of sale, and took from the said Founders Company an assignment of said contracts in blank as security for the repayment of the said parties by the said Edgar F. Howe of the amount so advanced and paid by said parties to the said Type Founders Company as the unpaid balance on said conditional sales contract. It was further agreed and understood between the said parties and Edgar F. Howe that said unpaid balance should be paid by Howe by means of advertising and editorial service in the newspaper

then owned by Howe, named the Zanjero, and the said Howe did supply such advertising, publicity, and editorial service in conformity with said agreement to such an extent as to fully pay and satisfy the whole amount of the unpaid balance then due and owing on said conditional contracts of sale, and which had been advanced by said parties heretofore named. That said conditional contracts of sale were assigned to C. D. Hartshorn as trustee for the use and benefit of the above-named parties."

The evidence is voluminous and conflicting. C. N. Berry, one of plaintiff's witnesses (and one of "plaintiff's group"), although denying any knowledge of a contract, admits writing Howe:

"I note with much pleasure that the contract has been ratified by the people at the polls by a vote of nearly three to one. This result was obtained, and I give you full credit for it, largely thro' your increasing advocacy of the project."

He also testified that the payment of the money and the taking the assignments "might have been to the individual interest of every man who supported the All-American Canal"; and that "the object in paying off the balance due on the contracts and taking the assignment was that they, with others, were ardent supporters in support of the All-American Canal issue"; that Howe's newspaper, the Zanjero, was supporting the All-American Canal issue; that "the individuals wished to see it continue"; that "it was understood that Howe would have to pay the balance due for the machinery before he would get it"; that "the understanding was made with Mr. Howe as editor of the Zanjero by the persons whose names were on the Rehkopf note (the plaintiff's group); that Howe would proceed as he had in the past to defend the policies with reference to the All-American Canal, and that we were not to pay him anything for it"; "we had been paying him all the time for this purpose."

Mark M. Rose, another of plaintiff's witnesses (and also of "plaintiff's group"), testified that the company had been paying Mr. Howe \$100 a month "in order to keep his paper going," but was "not bound to pay it"; that "Mr. Howe was entitled to the support and respect of every 100 per cent. American in the Imperial Valley."

E. R. Gorman (another of "plaintiff's group"), plaintiff's witness, testified that he "understood that the Imperial Laguna Water Company" ("plaintiff's group" were officers and stockholders of this company) "was to take care of the Rehkopf note by payments of \$100 per month; that he so represented to the other men signing the note with him."

Howe's testimony is voluminous, but, on the question of this contract or agreement, is consistently to the effect that he went ahead in good faith as editor and publisher of the paper, relying upon his understanding that

his advertising and supporting the idea of the All-American Canal was to continue at the rate of \$100 per month until the amount of the unpaid balance on the conditional sales contracts was "wiped out," and that this was done.

We think a further detailed consideration of the evidence is unnecessary. A careful examination of the transcript shows that there was sufficient evidence to support the findings of the trial court.

[2] The principle that under these circumstances this court will not disturb the findings of the trial court is so well established that we will emulate the commendable course pursued by counsel for both sides on this appeal, and cite no unnecessary authorities.

In the final analysis it may fairly be said that the evidence on both sides disclosed that it is not disputed that a contract or understanding existed between the plaintiff and Howe that the latter should continue, through his paper the *Zanjero*, to advertise and support the cause of the All-American Canal as he had been doing until the amount which plaintiff and his group had borrowed from Rehkopf to pay the balance due on the two conditional sales contracts had been repaid, and that the real issue was and is whether this amount should be repaid in cash as claimed by plaintiff and appellant, or by advertising and support by Howe in his paper of the All-American Canal as claimed by intervenor and his witnesses.

Believing the latter, as he did, the trial court could not have found for plaintiff and appellant. To have done so would have been in violation of the principle laid down in *Blood v. La Serena Land & Water Co.*, 134 Cal. 361, 66 P. 317:

"The law does not allow a corporation to retain the benefits which it has received from the contract, and escape liability upon it."

Judgment affirmed.

We concur: WORKS, P. J.; THOMPSON, J.

87 Cal. App. 652

SIMPSON v. INDUSTRIAL ACCIDENT COMMISSION et al. (Civ. 5756.)

District Court of Appeal, Second District, Division 1, California. Dec. 19, 1927.

1. Master and servant $\S$ 391 $\frac{1}{4}$ —Payments awarded under Workmen's Compensation Act may properly bear interest at 7 per cent. from date of award or date payment becomes due.

In proceeding under Workmen's Compensation Act (St. 1917, p. 831, as amended), it is proper to order that all payments awarded shall bear interest at rate of 7 per cent. until paid, beginning with date of award or date thereafter at which payment becomes due, and objec-

tion to rate of interest is merely objection to law.

2. Master and servant $\S$ 417(7)—Industrial Accident Commission's findings on evidence are conclusive.

In proceeding under Workmen's Compensation Act (St. 1917, p. 831, as amended), in which there is any evidence to support findings and award of commission, reviewing court is powerless to intervene to weigh evidence or disregard portions of it.

Application by John Simpson, an individual, doing business under the name and style of John Simpson & Co., for certiorari to review an order of the Industrial Accident Commission awarding compensation for injuries. Award affirmed.

Henry M. Lee, of Los Angeles, for petitioner.

G. C. Faulkner, of San Francisco, for respondent Industrial Accident Commission.

YORK, J. On petition for writ of review.

The undisputed evidence in this case shows that the injured employee received his injury when a tower on which he was working toppled over and at the time the tower so fell it was not guyed in accordance with safety order No. 1113 (h) of the general construction safety orders of the Industrial Accident Commission, which had been served upon the employer. There is no merit in the claim that such tower did not have to be guyed at all until completed. From then on the record discloses a conflict as to practically all material points to be considered on the hearing of this writ, but the fact remains that in the voluminous transcript filed in connection with the return to the writ for review there is sufficient evidence to support each conclusion found by the commission. It is true that a great many of the findings are in general form, but nevertheless are in such form as has been approved heretofore by the Supreme Court of this state.

It may be that the evidence would have justified a finding that the employers were not guilty of serious and willful misconduct. But the commission has passed upon this matter, upon sufficient evidence, and it is not for us to disturb their finding or the allowance of additional compensation on account of the finding by them that the employer was guilty of willful and serious misconduct.

[1] The objection to the rate of interest is merely an objection to the law, in accordance with which the award did set forth:

"It is hereby ordered that all payments herein awarded shall bear interest at the rate of seven per cent. per annum until paid, beginning with the date of this award or the date thereafter at which payment becomes due."

[2] The briefs of the petitioner seem to request this court to weigh the evidence and to

disregard certain portions of the evidence. Any of such argument and the questions so raised by petitioner will not be discussed in this opinion, as it has always been held that where there is any evidence to support the findings and award of the commission, that this court is powerless to intervene.

The award is affirmed.

We concur: CONREY, P. J.; HOUSER, J.

CAVANAGH et al. v. KEPLINGER et al.★
(Civ. 5382.)

District Court of Appeal, First District, Division 2, California. Dec. 17, 1927.

Hearing Granted by Supreme Court Feb. 15, 1928.

1. Mechanics' Liens $\S$ 281(4)—Evidence held not to warrant findings that owners were indebted to builders under cost plus contract for extras in excess of agreed maximum cost.

Evidence that contractors had received from owners \$18,639.20 for constructing buildings, maximum cost of which was limited to \$16,000, held not to sustain finding that owners were indebted to contractors for extras in sum of \$1,878.44, although there were some changes in specifications, both by addition and subtraction.

2. Contracts $\S$ 143—Courts do not make over contracts for parties or strike out portions written therein.

It is not function of court to make over contracts for parties or to strike out portions clearly written therein.

Appeal from Superior Court, San Mateo County; George H. Buck, Judge.

Action by Thomas A. Cavanagh and another, copartners doing business under the name and style of Cavanagh Bros., against Martha Q. Keplinger and another. From a judgment for plaintiffs, defendants appeal. Reversed.

Knight, Boland & Christin, of San Francisco, for appellants.

J. E. McCurdy, of San Mateo, for respondents.

STURTEVANT, J. The plaintiffs commenced an action against the defendants to foreclose a mechanic's lien. The defendants appeared and answered and a trial was had before the trial court sitting without a jury. The trial court made findings in favor of the plaintiffs, and from a judgment entered thereon the defendants have appealed under section 953a of the Code of Civil Procedure.

The plaintiffs were the original contractors. They were given a written contract to construct a dwelling and a garage for the defendants. In their complaint they attempted to plead a common count for the balance due on an account for goods sold, etc., and the

facts showing that they were entitled to a lien therefor. In their answer the defendants, among other things, denied that there was any balance due or unpaid. On the trial of the case it transpired that after the contract was executed the parties made many changes therein, the defendants ordered many extras, and the parties agreed to omit certain features contained in the original contract. The plaintiffs claimed that they had built the residence and the garage, and that in addition to the structure called for in the original plans and specifications the plaintiffs had furnished 73 items which they claimed as extras, consisting of materials and labor. The defendants conceded that they had ordered some extras, but they asserted that some things, claimed to be extras, were included in the original contract and the trial court so held as to eighteen items.

[1] At this time the defendants make several points, but it will not be necessary to consider but one of the points. The defendants assert that the evidence is insufficient to support the decision. We think that the assertion is well founded. In their complaint the plaintiffs claimed that the balance due them was \$3,089.26. After hearing the evidence the trial court fixed the amount at \$1,878.44. The essence of the objection of the defendants is that the evidence introduced does not show that any balance was due the plaintiffs. It was admitted that the defendants had paid to the plaintiffs \$18,639.20. There was no evidence that the payments so made did not fully discharge the obligations of the defendants. Some of the passages contained in the contract are as follows:

"2. * * * Other changes may be made in said plans and specifications, but only upon and in accordance with written consent first obtained from the said architect, approved by owner.
* * * 4. It is agreed that the maximum cost of said building shall be fourteen thousand five hundred dollars (\$14,500), which shall include everything in connection with the construction of said building, excepting * * * your fees, and the architect's fees. Any cost in excess of this amount is to be borne by you. If the actual cost as above specified shall be less than said sum, then any saving is to inure to my benefit.
* * * I agree to pay you in addition to the above amount the sum of fifteen hundred dollars (\$1,500.00) as and for your total compensation for supervising and directing the construction of the building, and all other services that may be rendered by you pursuant to this contract. This amount of payment is to be regardless of the cost of the building, except that if the cost of the building exceeds the maximum herein specified, I reserve the right to withhold such excess out of your commission, and if such commission be not sufficient to carry the whole excess, then it is agreed that you will pay any additional amount over to me on demand.
5. The said price hereinabove provided for is to include everything necessary for the completion of said building, except as mentioned herein, as

called for by the plans and specifications, and no expense for extra work is to be incurred by me or charged to me unless you have first procured the architect's consent in writing, carrying my approval, with an agreement on the price of the extra work or charges, which in no instance is to exceed cost plus 10 per cent. 6. Payments are to be made by me on the 10th day of each month. Said payments are to cover the amounts of moneys actually paid out by you upon said building as shown by receipted bills and time cards to be delivered to me; and a certificate from my architect that the amount is properly due. You agree, before the final payment to submit to me a complete statement of the actual cost of said work set forth in this agreement and to submit all pay rolls, receipts, bills and vouchers for same. * * *

It is quite clear that if the building, set forth in the written contract and the plans and specifications, cost \$16,000 (that is, \$14,500 plus \$1,500), or more, the owners would not be liable to the contractor in excess of the total just named. If it cost a less sum they were entitled to an allowance accordingly. The contract provided that before an extra was incurred that the price thereof should be agreed upon, but in no instance was it to exceed cost plus 10 per cent. The contractor agreed to pay all bills for labor and materials. The owners agreed to pay on the 10th of each month. Those payments were to cover actual outlays as shown by receipted bills. That covenant was that the receipted bills would be delivered to the owners. Before receiving the final payment the contractor agreed to submit to the owners "a complete statement of the actual cost of said work and to submit all pay rolls, receipts, bills and vouchers for same." It is thus made clear that the contractor under his contract was entitled to receive from the owner (1) the net cost of the buildings as specified not exceeding \$16,000; (2) the net cost of the extras; and (3) 10 per cent. on the extras. There is nothing in the record from which we can compute separately any one of the factors just enumerated nor all together. The record discloses that, although often requested, the contractor never furnished "a complete statement of the actual cost, * * *" nor any statement. It also discloses that neither before nor during the trial did he exhibit "all payrolls, receipts * * *" but that he did exhibit some payrolls and some receipts. Before the contractor was entitled to \$14,500 he was bound to show that the buildings, as specified, had cost that sum. If they had not, he was bound to deduct accordingly. Before he was entitled to receive the \$1,500, or any part thereof, he was bound to show that the cost of the building, less extras, had not exceeded \$14,500. Before he was entitled to pay for an alleged extra, he was bound to show (1) that the alleged extra was in fact an extra; (2) that there was an initial

agreement therefor; and (3) that the charge did not exceed actual cost plus 10 per cent. The claims for extras were not established by any evidence as to the third element just stated. It was established and the trial court found what in fact were extras. During the trial there was a great deal of controversy over whether the contractor obtained an authorization before executing each extra. That controversy has been abandoned by the defendants. It may now be assumed that the authorizations were obtained.

As the record stands, it is admitted that the plaintiffs have received from the defendants \$18,639.20 and that they built some buildings for the defendants on which the maximum cost to defendants was limited to \$16,000. It also appears that there were some changes of addition and some of subtraction. But there is not a particle of evidence to show that, at this time, the defendants owe the plaintiffs any balance. It follows that the finding as to a balance of \$1,878.44 is not sustained by the evidence.

[2] In reading the record we notice that the claim is made that it is impossible to make a segregation of the cost of each extra as distinguished from the cost of the building as specified. We are not unmindful of difficulties, but a most cursory reading discloses that it is not impossible to make the segregation. Moreover, the parties made the contract and it is no function of the courts to make over contracts for parties or to strike out portions clearly written therein.

The judgment is reversed.

We concur: KOFORD, P. J.; NOURSE, J.

87 Cal. App. 766

CLARKE et al. v. INDUSTRIAL ACCIDENT COMMISSION et al. (Civ. 5781.) ★

District Court of Appeal, Second District, Division 1, California. Dec. 23, 1927.

Hearing Denied by Supreme Court Feb. 20, 1928.

1. Master and servant ☞417(7)—Industrial Accident Commission's findings of fact on substantial evidence are conclusive.

As to questions of fact in compensation proceeding, where any substantial evidence is introduced in support thereof, the findings by the Industrial Accident Commission are conclusive.

2. Master and servant ☞417(7)—Industrial Accident Commission's finding of employers' serious and willful misconduct constitutes finding of fact.

A conclusion by the Industrial Accident Commission as to serious and willful misconduct of employers constitutes a finding of fact, not subject to review, if supported by substantial evidence.

3. Master and servant ☞387—"Serious and willful misconduct" of employers is conduct likely to jeopardize employee's safety, with reckless disregard for safety (Workmen's Compensation, Insurance, and Safety Act, § 6 [a] [4], as amended).

"Serious and willful misconduct" of employers, within meaning of Workmen's Compensation, Insurance, and Safety Act (St. 1917, p. 834) § 6 (a) (4), as amended by St. 1919, p. 912, § 2, and St. 1923, p. 375, authorizing extra compensation to employee injured by reason thereof, is any conduct which employers either knew or ought to have known was likely to jeopardize safety of employee with reckless disregard for employee's safety and willingness to inflict injury.

4. Master and servant ☞405(6)—Finding that employee's death was caused by serious and willful misconduct of employers held supported by evidence.

Finding by the Industrial Accident Commission that death of employee from slide of earth on a cut on a hillside, where employee was digging a retaining wall, was caused by serious and willful misconduct of employers and managing representatives, *held* supported by substantial evidence.

5. Master and servant ☞416—Industrial Accident Commission need not set forth minor facts leading to determination of ultimate fact.

Industrial Accident Commission, on finding of ultimate fact, need not set forth the several minor facts which, taken together, lead to determination of such ultimate fact.

6. Master and servant ☞347—Law providing for extra compensation for injuries through serious and willful misconduct of employers held constitutional (Workmen's Compensation, Insurance, and Safety Act, § 6 [a] [4] as amended).

Workmen's Compensation, Insurance, and Safety Act (St. 1917, p. 834) § 6 (a) (4), as amended by St. 1919, p. 912, § 2, and St. 1923, p. 375, providing for extra compensation to employee, where injury was caused by serious and willful misconduct of employers, *held* constitutional.

Certiorari to Review an Order of the Industrial Accident Commission.

Proceeding under the Workmen's Compensation, Insurance, and Safety Act by Ruth M. Ross for the death of her husband, opposed by H. O. Clarke and another, copartners doing business under the firm name of H. O. Clarke Company, and another. Order of Industrial Accident Commission, awarding compensation, and the employers bring certiorari. Affirmed.

W. C. Flynn, of Los Angeles, and Frank J. Creede, of San Francisco, for petitioners.

G. C. Faulkner, of San Francisco, for respondent Industrial Accident Commission.

HOUSER, J. Briefly, the facts appear to be that an employee of petitioners was killed

by a slide of earth on a cut on a hillside at a point where the employee was engaged in shoveling soil from a trench preparatory to the construction of a retaining wall. At the hearing of the application by the widow of the employee for compensation arising from his death, among other things, the respondent commission found:

"Said injury was caused by reason of the serious and willful misconduct of the employers and/or their managing representative. The applicant is entitled to have the amount of compensation otherwise recoverable for said injury increased one-half."

Petitioners contend, first, that there was no evidence to support such finding, and consequently that the respondent commission acted in excess of its powers. The following facts were in evidence:

That petitioners herein were general contractors, who at the time of the accident were engaged in the preliminary work incident to the construction of a 10-foot reinforced concrete wall, which was proposed to be built as a retaining wall against or adjacent to a cut which had been made on the side of a hill. In the preparation for the construction of the wall, it became necessary to dig a ditch of about two feet in depth and of equal width, in addition to the cut on the hillside, which had been made before the contractors for the construction of the wall itself had become connected with the work. That the wall might have a more secure foundation, and in order to allow for a footing of the retaining wall, the cut had been undercut "about one foot." As was stated by one witness, "it varied from a foot to eighteen inches on a horizontal plane." Although practically the upper one-fourth of the soil in the side of the hill to be retained was composed of adobe loam, the lower three-fourths portion thereof was composed of "aluminum of silicate which was bredpated" and which had a tendency to admit a great deal of water. It was also shown that the hill "was saturated with spring water and surface water, which was evident in the soil in the face of the bank cut and in the seepage to the surface in numerous places. *The bank was not held by shoring or bracing.* The bottom of the trench contained running spring water." Under such conditions a cave-in or slide of earth of the hillside occurred at the point where the cut was made, which resulted in the death of the employee.

As hereinbefore indicated, at the time of the accident the employee was engaged in shoveling loose soil from the bottom of the trench. One witness testified that a short time prior thereto several "slight slides" occurred within from 30 to 40 feet of the place where the employee was killed. It was also shown that each of the contractors, as well as their foreman on the job, was experienced

in the work of building retaining walls, and knew, or at least should have known, the dangers incident thereto. In part, the foreman testified that in the location in which the accident occurred a cave-in was not anticipated, because "the peculiarity in our line—dirt don't slump down; it sort of chips off." A construction engineer in the employ of the safety department of the respondent commission testified in substance that, from his observation of the cut, it would appear to a person reasonably familiar with work of the character of that proposed to be done, the bank or cut was dangerous, and that the danger would be "perceptible to a man working on that kind of construction"; that previous to the time when the slide in question occurred, and located within approximately 18 feet thereof on a cut which ran at right angles to the cut here under consideration, another cave-in had taken place.

The objection of petitioners to the finding which is the subject of their criticism is directed to that part thereof which indicates that the accident which caused the death of the employee was "caused by the serious and willful misconduct of the employers and/or their managing representative."

[1, 2] At the outset it should be remembered that, as to questions of fact, where any substantial evidence is introduced in support thereof, the findings by the commission are conclusive. 27 Cal. Jur. p. 582, and cases there cited. With so much in mind, it becomes advisable to inquire whether a conclusion by the commission as to "serious and willful misconduct" constitutes a finding of fact. A definition of "serious misconduct," as well as of "willful misconduct," may be found in the language used by the Supreme Court of this state in the case of *E. Clemens Horst Co. v. Industrial Accident Commission*, 184 Cal. 180, 188, 189, 193 P. 105, 108, 16 A. L. R. 611, as follows:

"The first question presented is, then: Was the commission justified in finding that the petitioner was guilty of 'serious misconduct'? There is no statutory definition of this term. In this connection we may again quote from Beven, p. 401: 'To constitute "serious misconduct," it is probable that the Legislature intended to signify conduct that an average workman in being guilty of, either would know, or ought to know, if he turned his mind to consider the matter, to be conduct likely to jeopardize his own and his fellow workman's safety.' In our opinion the serious misconduct of an employer under our statute may be similarly defined. There should be no difference in principle between the degree of care required of an employer and that exacted from an employee. 'Serious misconduct' of an employer must therefore be taken to mean conduct which the employer either knew, or ought to have known, if he had turned his mind to the matter, to be conduct likely to jeopardize the safety of his employees. * * * Next, as to whether such serious misconduct was 'willful.' It has frequently been said that willful misconduct in-

volves the *knowledge* of the person that the thing which he is doing is wrong. *Lewis v. Great Western Ry. Co.*, L. R. 3 Q. B. Div. 195; *In re Burns*, 218 Mass. 8, 105 N. E. 601, Ann. Cas. 1916A, 787; *Riley v. Standard Acc. Ins. Co.*, 227 Mass. 55, 116 N. E. 259; *Beckles' Case*, 230 Mass. 272, 119 N. E. 653. Conceding that knowledge is required, it seems to us that, in order to prove the requisite knowledge, it is not necessary for the evidence to show positively that the person was notified of the unsafe condition of his premises, but that it is sufficient if it appears that the circumstances surrounding the act of commission or omission are such as 'evinced a reckless disregard for the safety of others and a willingness to inflict the injury complained of.' *Louisville, etc., Ry. Co. v. Bryan*, 107 Ind. 51, 7 N. E. 807. See, also, *Pittsburgh, C. C. & St. L. Ry. Co. v. Judd*, 10 Ind. App. 213, 36 N. E. 779."

And the opinion therein also indicates that a conclusion on the issue of serious and willful misconduct was a finding of fact within the province of the Industrial Accident Commission. But direct authority, where the question was necessarily involved, is contained in the case of *Myers v. Industrial Accident Commission*, 191 Cal. 673, 677, 678, 218 P. 11. It is there said:

"When injured, the applicant was a common laborer, 23 years of age. It was for the commission to determine the facts from all the surroundings and attendant circumstances as they existed at the time of the injury. Whether the action of the employee amounted to willful misconduct, as used in the act, and as defined in *Great Western Power Co. v. Pillsbury*, 170 Cal. 180, 186, 149 P. 35, or whether it did not amount to that, was for the commission to determine. * * *

In the case of *Cunningham Construction Co. v. Morgan* (Ind. App.) 156 N. E. 524, it was said that "the question [of willful misconduct] was one of fact for the Industrial Board."

[3, 4] Considering that any conduct which the employers either knew or ought to have known was likely to jeopardize the safety of the employee constituted serious misconduct, and that willful misconduct is manifested by a reckless disregard for the safety of the employee and a willingness to inflict the injury of which complaint is made (*Horst Co. v. Industrial Acc. Com.*, 184 Cal. 180, 188, 189, 193 P. 105, 16 A. L. R. 611; *Blue Diamond Plaster Co. v. Ind. Acc. Com.*, 188 Cal. 403, 205 P. 678), and that (assuming the existence of substantial evidence in support thereof) the question of whether such conditions exist is one solely for the determination of the Industrial Accident Commission (*Myers v. Industrial Acc. Com.*, 191 Cal. 673, 218 P. 11) from the facts adduced in evidence, as hereinbefore set forth, it becomes clear that the respondent commission had before it at least substantial evidence relating to the issue and therefore was acting within its powers in reaching the conclusion that "said injury was

caused by reason of the serious and willful misconduct of the employers and their managing representative." It follows that the objection of petitioners herein with reference to such finding cannot be sustained.

[5] It is next urged by petitioners that the respondent commission failed to make findings of fact which would show upon what its conclusion of serious and willful misconduct on the part of the contractors was predicated. But assuming, as we must, that the finding of serious and willful misconduct was that of an ultimate fact, it follows that it was unnecessary to set forth the several minor facts which taken together led to the determination of the ultimate fact. In the case of *Frankfort G. I. Co. v. Pillsbury*, 173 Cal. 56, 60, 159 P. 150, 152, it is said:

"The commission found the ultimate facts in controversy. It was not required to make specific findings upon probative matters. *Western Indemnity Co. v. Pillsbury*, 170 Cal. 686, 705, 151 P. 398."

And see, also, *Harlan v. Industrial Acc. Com.*, 194 Cal. 352, 356, 228 P. 654; *Smith v. Industrial Acc. Com.*, 26 Cal. App. 560, 563, 147 P. 600.

[6] Petitioners finally contend that that part of section 6 (a) (4) of the Workmen's Compensation, Insurance, and Safety Act (St. 1917, p. 831), as amended (St. 1919, p. 912, St. 1923, p. 375), which provides for extra compensation to the employee where his injury was caused by the serious and willful misconduct of the employer, is unconstitutional. In that connection it need only be said that the precise point made by petitioners was ruled adversely to their contention in the case of *E. Clemens Horst Co. v. Industrial Accident Commission*, 184 Cal. 180, 192, 193 P. 105, 16 A. L. R. 611.

The award is affirmed.

We concur: CONREY, P. J.; YORK, J.

87 Cal. App. 393

Ex parte MARTINSON. (Cr. 1006.)★

District Court of Appeal, Third District, California. Dec. 8, 1927.

Hearing Denied by Supreme Court Jan. 9, 1928.

1. Criminal law §1084—Amendment by which order to stay execution, pending appeal from conviction, is placed within sole discretion of trial court held mere change of method of procedure (St. 1927, p. 1062; Pen. Code, § 1243).

St. 1927, p. 1062, providing that granting or refusal of order staying an execution on appeal from judgment of conviction shall rest in sole discretion of trial court, merely changes form or method of procedure for staying execution provided by Pen. Code, § 1243, which the 1927 enactment amends.

2. Statutes §161(1)—Repeal by implication is effected only where both acts relate to same subject-matter.

Where repeal is had by implication, both former and later statute must relate to same subject-matter.

3. Statutes §231—Court, in construing Code, should ascertain legislative intent.

In construing different sections of the Code, court should ascertain, if possible, intent of Legislature at time of their enactment.

4. Statutes §231—Interpretation which gives all sections of Code practical effect is preferred over that which leads to absurd result.

In interpreting statute, if one interpretation leads to absurdity, while another will give practical effect to all sections of the Code, latter interpretation is to be preferred.

5. Bail §42—Statute giving right to bail on appeal in misdemeanor cases held not repealed by act denying stay of execution except by order of trial court (Pen. Code, § 1272, subd. 2; St. 1927, p. 1062, amending Pen. Code, § 1243).

Pen. Code, § 1272, subd. 2, granting bail as matter of right when appeal is from a judgment imposing imprisonment in cases of misdemeanor, held not repealed by St. 1927, p. 1062, amending Pen. Code, § 1243, which denies stay of execution on judgments after conviction unless trial court shall so order, since amended section 1243 is found in Pen. Code, pt. 2, tit. 9, c. 1, relating to appeals, whereas section 1272 is contained in part 2, tit. 10, c. 1, art. 1, relating to subject of bail.

6. Bail §51—Court is guided somewhat by extent of penalty imposed, in fixing bail on appeal from conviction for misdemeanor (Pen. Code, § 1272, subd. 2).

In fixing amount of bail, under Pen. Code, § 1272, subd. 2, allowing bail as matter of right on appeal from conviction for misdemeanor, court is guided to some extent by penalty imposed.

Application by O. A. Martinson for writ of habeas corpus, prayed to be directed to the sheriff of Sonoma county, to secure the petitioner's release from custody on bail pending appeal from a conviction for a misdemeanor. Petitioner ordered admitted to bail pending appeal.

W. F. Cowan and John O. Kroyer, both of Santa Rosa, for petitioner.

Carl Barnard, Dist. Atty., of Santa Rosa, and E. J. Dole, Asst. Dist. Atty., of Petaluma, for respondent.

PLUMMER, J. The petitioner was tried and convicted of a misdemeanor as provided for in section 21 of the Juvenile Court Law (see Deering's General Laws 1923, Act No. 3966, p. 1568), and was sentenced to pay a fine of \$750, and also to be imprisoned in the county jail of the county of Sonoma for the

period of 6 months. From this judgment the petitioner has appealed to this court and applied to the trial court for admission to bail pending the determination of such appeal. This application was denied by the trial court, and the petitioner is here asking that he be admitted to bail pending such appeal.

[1] Unless the second subdivision of section 1272 of the Penal Code has been repealed or modified by the amendment made to section 1243 of the Penal Code by the act of the Legislature approved May 19 (Statutes 1927, p. 1062), it is conceded that the petitioner is entitled to bail. Prior to the approval of the act just referred to, section 1243 of the Penal Code read as follows:

"An appeal to the Supreme Court from a judgment of conviction stays the execution of the judgment in all capital cases, and in all other cases, upon filing with the clerk of the court in which the conviction was had, a certificate of the judge of such court, or of a justice of the Supreme Court, that, in his opinion, there is probable cause for the appeal, but not otherwise."

As amended, said section now reads:

"An appeal to the Supreme Court or to a District Court of Appeal from a judgment of conviction stays the execution of the judgment in all cases where sentence of death has been imposed, but does not stay the execution of the judgment in any other case unless the trial court shall so order. The granting or refusal of such order shall rest in the sole discretion of the trial court. If such order is made, the clerk of the court shall issue a certificate stating that such order has been made. In cases where the defendant has been sentenced to death or life imprisonment he shall be confined in a state prison pending the decision upon his appeal."

By the amended section the law is really changed only in matters of procedure. The granting to an appellant of a stay of execution prior to the amendment rested in the trial court, in the District Court of Appeal, and the Supreme Court, as to whether a writ of probable cause should be issued. It was not a matter of absolute right one way or the other. The exercise of the discretion as to whether such a writ should issue was placed in the courts above mentioned. While the section of the Code did not, in terms, give the District Court of Appeal the authority to issue such a writ, the constitutional provision under which such court was created provided therefor. As amended, the right of the Supreme Court and of the District Court of Appeal to issue such a writ is eliminated. There is no provision in the amended section for the issuance of a writ of probable cause. Whether execution shall be stayed, which really means whether the defendant in a felony case shall remain in the county jail in the county where conviction has been had, or shall be taken to the state's prison, other than in the two excepted cases, is vested solely in the

trial court. Section 1243 of the Penal Code, as it read prior to the passage of the amendatory act in 1927, and since, has to do only with the stay of execution. The form or method of procedure by which execution may be stayed, and the court vested with power to stay such execution, is the only change wrought by the amendment. The title of the act amending section 1243 of the Penal Code, passed by the Legislature and approved May 19, 1927, as above stated, reads as follows:

"An act to amend section 1243 of the Penal Code, relating to stay of execution pending appeal in criminal cases."

The subject-matter of the title is staying execution, which is the substantive law of the section as it stood both before and after the 1927 amendment or revision. Section 1243 is found in chapter 1 of title 9, pt. 2, relating to appeals to the Supreme Court, which, under the Constitution, also relates to appeals to the District Court of Appeal. There is nothing in any one of the sections contained in chapter 1 of title 9, pt. 2, relating to any subject other than that of appeals and the effect thereof. The subtitle, as it appears in the Codes, indicates the entire subject-matter, to wit:

"Appeals, when allowed and how taken, and the effect thereof."

By reference to the title employed by the Legislature in passing the amendatory act of 1927, it is readily perceived that the Legislature had in mind just one subject; i. e., the staying of execution pending appeal, and who should be vested with authority to issue such order. Nothing else is included in the title, and nothing further appears in the amended section.

[2] Subdivision 2 of section 1272 of the Penal Code, relating to bail as a matter of right, as it now reads and has read since the amendment in 1909, is as follows:

"As a matter of right, when the appeal is from a judgment imposing imprisonment in cases of misdemeanor."

Prior to 1909 this subdivision was not included in the section. Section 1272 of the Penal Code is found in article 1, chapter 1, title 10, pt. 2, of the Penal Code under the title:

"In what cases the defendant may be admitted to bail."

The article has to do exclusively with the subject of admitting a defendant to bail, both before and after conviction; specifies in what cases it is a matter of discretion and in what cases it is a matter of right. There is nothing contained in any of the sections found in article 1 of chapter 1, title 10, pt. 2, of the Penal Code, relating to the staying of executions. The proposition before us may be stated more succinctly in this way: Chapter 1, of title 9,

pt. 2, has to do with appeals and executions. Article 1 of chapter 1 of title 10, pt. 2, has to do exclusively with the subject of bail. Neither one contains a section referring to any subject-matter contained in the other. Notwithstanding this, it is contended by the respondent that section 1243 of the Penal Code, by implication, repeals subdivision 2 of section 1272 of the same Code in so far as bail in misdemeanor cases is made a matter of right. This contention overlooks the essential fact that where repeal is had by implication, the essential requisite is that both acts must relate to the same subject-matter. This is clearly set forth in section 85 of 23 Cal. Jur. 697, as follows:

"In order that one act may repeal another by implication, it seems clear that both must deal with the same subject-matter. An act is not repealed by a subsequent act relating to another matter, nor is a section repealed by a subsequent section if the subjects of the two sections are distinct and separate and in no wise conflict with each other."

Again, as said in the case of *People v. Pacific Improvement Co.*, 130 Cal. 442, 62 P. 739:

"It is the established rule of construction that the law does not favor a repeal by implication, but that where there are two or more provisions relating to the same subject-matter they must, if possible, be construed so as to maintain the integrity of both."

See, also, the case of *California Highway Commission v. Ballard as County Auditor*, 247 P. 527, where the subject of repeal by implication was considered by this court.

To the same effect is the case of *Banks v. Yolo County*, 104 Cal. 258, 37 P. 900, where the court said:

"Repeals by implication are not favored; and the repugnancy between two statutes should be very clear to warrant a court holding that the later in time repeals the other, when it does not, in terms, purport to do so."

As shown by the sections as set forth herein, there is nothing in the act of the Legislature of 1927 amending section 1243 of the Penal Code which refers in terms to anything whatever contained in section 1272 of the Penal Code or to any of the sections of the title in which said section is found.

[3] Again, in construing different sections of the Code, it is helpful to ascertain, if possible, the intent of the Legislature at the time of their enactment. In this particular we have before us the report of the commission for the reform of criminal procedure, submitted to the Legislature in 1927, and which led to the enactment of section 1243 of the Penal Code in its present form. This report shows that nothing outside of the subject-matter of said section was being considered. As to said section 1243, the report upon which the Legislature acted reads:

"It is recommended that this section be amended to provide that the granting of a stay of execution on appeal shall rest in the sole discretion of the judge of the trial court. The evident intent of the Legislature in adopting the section as it now stands was to make the issuance of such certificate a matter of discretion. This intent has, to a large extent, been nullified by judicial decision. The proposed amendment will restore it. It is felt that this discretion should rest with the judge of the trial court rather than with the Justices of the Supreme or appellate courts, who can have no personal familiarity with the case."

Reading further in the report we find that the same commission recommended to the Legislature amendments to certain sections of the Penal Code relating to the admission of bail, a reading of which shows that the commission did not have in view the recommending of any limitation being placed upon the statutory right to bail in misdemeanor cases. A quotation from the report will best explain what the commission had in thought:

"As a result of the study of the present system and its practical application, several changes are recommended. The present system has been, and is subject to a number of very serious abuses. Perhaps first among these is the so-called straw bail evil; that is, the giving of bonds which are not collectible. Another serious abuse has grown up in connection with the bail bond business; that is, the business of giving bail bonds for pay."

The commission then recommended certain amendments to sections of the Penal Code found in article 2, c. 1, title 10, pt. 2, providing for a closer scrutiny as to the financial responsibility of sureties upon bail bonds.

[4-6] Another principle must also be held in thought when interpreting statutes. If one interpretation leads to an absurdity, while another will give practical effect to all the sections of the Code, the latter is to be preferred. Section 1272 of the Penal Code, as we have stated, gives the defendant in misdemeanor cases an absolute right to bail pending appeal. If the construction contended for by the people should be given to section 1243 of the same Code, and the court should hold that this section, as amended in 1927, repeals, by implication, the right given by section 1272, the Legislature would be placed in the position of having granted a defendant the right of appeal in a misdemeanor case, and at the same time opened the door to take away every possible benefit that could be derived from such an appeal. This will clearly appear by the following illustration: The law allows the reporter in a criminal case 20 days from the time of notice being given in which to write up the testimony in a criminal case. Settlement of the transcript may be had by the clerk giving notice to the respective parties to appear before the trial judge at a certain date, 10 days being allowed for this. Assuming that the cause is placed upon the cal-

endar of the appellate court to which the cause is appealed, the statute allows 30 days before the same needs to be heard, assuming that the court complies therewith and the cause is placed upon the calendar for hearing. After the hearing is had, the statute allows 90 days within which the appellate court may render a decision. After the decision has been rendered 60 days must elapse before the remittitur of the appellate court goes down to the trial court from which the cause was appealed. Thus, under the provisions of the statute, where a defendant in a misdemeanor case is sentenced to imprisonment for 6 months or 180 days under the same Penal Code, 210 days might be lawfully taken under the Codes before rendering a decision. In other words, if a defendant, under such circumstances, has presented a meritorious cause on appeal and secured a reversal of a sentence imposing 6 months' imprisonment in the county jail, he would have served his time and been at liberty 30 days before the decision in his case would, under the law, become final. We assume that 6 months' period would cover, or perhaps more than cover, the average sentence in misdemeanor cases. We do not think the Legislature intended any such result, and there seems to us no escape from the conclusion that the Legislature had no thought of taking away the statutory right to bail in misdemeanor cases, and that the Legislature did not, by the amendment of section 1243 of the Penal Code by the Act of May 19, 1927, limit such statutory right. The statutory right to bail pending appeal in misdemeanor cases being in full force and effect, we have only to fix the amount or sum that should be exacted as security for the defendant's appearance, to render himself in execution. In doing this we are guided somewhat by the extent of the penalty imposed in this case. It is therefore ordered that the petitioner be admitted to bail, pending appeal, upon giving a bond in the sum of \$1,500, with sureties approved by a judge of the superior court of Sonoma county.

We concur: FINCH, P. J.; HART, J.

87 Cal. App. 795

In the Matter of the Application of Ione MARTINSON for a Writ of Habeas Corpus.
(No. 1007.)

District Court of Appeal, Third District, California. Dec. 8, 1927.

Application for writ of habeas corpus prayed to be directed to the sheriff of Sonoma county to secure the release of petitioner from custody on bail pending appeal. Writ granted.

W. F. Cowan, of Santa Rosa, and John O. Kroyer, of Santa Rosa, for petitioner.

Carl Barnard, Dist. Atty., of Santa Rosa, and E. J. Dole, Asst. Dist. Atty., of Petaluma, for respondent.

PER CURIAM. The defendant in this case was convicted of a misdemeanor under the Juvenile Court Law of the state of California (Deering's Gen. Laws 1923, Act No. 3966), and has appealed to this court from such judgment of conviction. Bail, upon appeal, was denied in the trial court.

This case, in all particulars, is identical with that of *In re O. A. Martinson*, 262 P. 474, on petition for writ of habeas corpus, this day decided. Upon the authority of that case the petitioner herein is admitted to bail, pending appeal, upon giving a bond in the sum of \$1,500 with sureties approved by a judge of the superior court of Sonoma county.

87 Cal. App. 796

In the Matter of the Application of C. PERFETTI for a Writ of Habeas Corpus.
(No. 1008.)

District Court of Appeal, Third District, California. Dec. 8, 1927.

Application for writ of habeas corpus prayed to be directed to the sheriff of Sonoma county to secure the release of petitioner from custody on bail pending appeal. Writ granted.

W. F. Cowan, of Santa Rosa, and John O. Kroyer, of Santa Rosa, for petitioner.

Carl Barnard, Dist. Atty., of Santa Rosa, and E. J. Dole, Asst. Dist. Atty., of Petaluma, for respondent.

PER CURIAM. The petitioner above named was convicted of a misdemeanor for an offense committed against the Juvenile Court Law of the state of California (Deering's Gen. Laws 1923, Act No. 3966), and has appealed to this court from such conviction. Bail, pending appeal, was denied by the superior court. Every legal question involved in this proceeding is identical with those considered in the case of *In re O. A. Martinson*, 262 P. 474, this day decided. Upon the authority in that case the petitioner is admitted to bail, pending appeal, upon giving a bond in the sum of \$1,500, with sureties approved by a judge of the superior court of Sonoma county.

87 Cal. App. 594

BLEUEL v. CITY OF OAKLAND et al.
(Civ. 5867.)

District Court of Appeal, First District, Division 2, California. Dec. 15, 1927.

1. Certiorari ⚡22—Discretionary action of board given authority to determine facts is not reviewable except by review analogous to certiorari.

When Legislature has given board discretion to determine facts, board's decision is not reviewable except in some way substantially the same as upon writ of certiorari.

2. Mandamus ⚡87—Mandamus held proper remedy for alleged abuse of discretion by city council refusing permit for riding academy.

Mandamus held proper remedy to review alleged abuse of discretionary power by city council in refusing to issue permit for riding academy under ordinance requiring permit from council.

3. Mandamus ☞187(9)—City council appealing from judgment granting mandamus has burden of showing error.

On appeal from judgment granting mandamus to control action of city council, burden of showing error is upon city council as appellant as in other cases.

4. Trial ☞375—Action of trial court in visiting premises of proposed riding academy, previously viewed by city council, was not error in mandamus action to compel issuance of permit for its maintenance.

Action of trial court in viewing premises where proposed riding academy was to be conducted, and in viewing premises of rival riding academy which had been licensed, *held* not error in mandamus action to compel city council to issue permit, where members of council had also visited premises.

5. Mandamus ☞174—Trial court has jurisdiction to hear and determine allegations of complaint (Code Civ. Proc. § 1090).

Trial court has jurisdiction to hear and determine allegations of complaint under Code Civ. Proc. § 1090, and determines whether allegations are proved.

6. Mandamus ☞174—Whether allegations of petition were proved and whether there was any legal cause justifying denial of permit to maintain riding academy held questions for trial court (Code Civ. Proc. § 1090).

In mandamus action to compel city council to issue permit for maintaining riding academy, whether allegations of petition were proved and whether there was any legal cause justifying the council in rejecting plaintiff's application were questions for determination of trial court, under Code Civ. Proc. § 1090.

7. Mandamus ☞168(4)—Finding that city council abused discretion in refusing permit for riding academy, thought to be objectionable at some future time, held proper under evidence.

Finding that city council abused discretion given under ordinance in refusing permit to conduct riding academy and was therefore subject to mandamus *held* sustained by evidence showing proposed academy was located in sparsely-settled neighborhood and that ground of refusal was that neighborhood would ultimately become residential district in which presence of academy would be objectionable.

Appeal from Superior Court, Alameda County; Raglan Tuttle, Judge.

Action by Davida S. Bleucl against the City of Oakland and others. From a judgment for plaintiff, defendants appeal. Affirmed.

C. Stanley Wood, Acting City Atty., George O. Perkins, Deputy City Atty., Preston Higgins, City Atty., and Homer W. Buckley, Deputy City Atty., all of Oakland, for appellants.

John Jewett Earle, of Oakland, for respondent.

STURTEVANT, J. The plaintiff applied to the trial court for a writ of mandamus.

The defendants appeared and answered. A trial was had before the trial court, sitting without a jury, and the trial court made findings in favor of the plaintiff. From a judgment entered thereon the defendants have appealed and have brought up a bill of exceptions.

The plaintiff had commenced the construction of a building for the purpose of conducting a riding academy near the corner of Daisy street and Davenport avenue in the city of Oakland. Thereafter the individual defendants, acting as the council of the city of Oakland, passed and enacted Ordinance 3183 regulating the erection and maintenance of riding academies; among other things the ordinance provided that before any one commenced the operation of a riding academy he should apply to the council for a permit; the plaintiff applied for a permit, the permit was refused, and she commenced this proceeding. On the presentation of her application before the council there were several hearings and many witnesses were called and examined. Many documents were produced and offered in evidence. Several members of the council went to the property owned by the plaintiff and made a personal examination of the property and the territory immediately contiguous thereto. On the trial of the action before the trial court similar proceedings were had. Three of the councilmen were called as witnesses and were examined as to the proceedings had before the council. Upon request of counsel the trial court visited the plaintiff's property and made an examination thereof and of the territory immediately contiguous.

The record is long, and we will not attempt to recite all of the evidence introduced in the trial court. Some of it follows: About the time that the defendants refused a permit to the plaintiff they granted a permit to one Hayford to maintain a riding academy in the same general neighborhood. The defendants did not consider that no riding academy should be allowed in the neighborhood. Both before the council and also before the trial court there was evidence that the plaintiff's building was constructed in the manner required by law, and there was no evidence that the building, as such, was objectionable in any respect; that the plaintiff's building was properly maintained and there was no evidence that it was improperly maintained; that the plaintiff's building and Hayford's building are in the same general neighborhood; that neither building was a fire risk; that both buildings are situated in a rural community where the roads are unpaved and where there are numerous cowpaths; that some of the property in the neighborhood is used for pasturing goats and some is used for poultry raising; that the Hayford building is located on lower ground than is the build-

ing of the plaintiff; that the Hayford building is in a more thickly settled community, and if there is any menace there is more of a menace to health by reason of the Hayford building than in the building of the plaintiff; that the distance between the two buildings is but a few blocks; that within a radius of 500 feet around the plaintiff's property there are five buildings; that within a radius of 1000 feet there are many more homes around the Hayford property than around plaintiff's property; that within 500 feet of the Hayford property is an orphanage sheltering over 100 small children; that the orphanage is much closer to the Hayford property than to the plaintiff's property; that the sanitary inspector, pursuant to the request of the defendants, made an examination and report to the defendants regarding the plaintiff's property; and that in his report he stated that he had made an investigation and he found it to be in an excellent locality, out in the country where homes will not be built up around it for a good many years, and that he recommended that a permit be granted as the place complies with all the health regulations. Standing over against the foregoing evidence, it should be stated that some of the councilmen testified that it had been the plan and intention of the council to reserve the foothills for residences and to confine places of business to the level territory and to the main thoroughfares; that the territory where the Hayford building is located is a potential business district, and that the territory where the plaintiff's property is located is a potential residence district. In this same connection it should be stated that by section 11 of Ordinance 3183 it is provided: " * * * when the public health, safety, or general welfare should require, or for other cause, the council shall have power to revoke any permit previously granted. * * * "

[1, 2] 1. The defendants contend that mandamus is not the proper form of remedy under the circumstances of this case. In this connection they call to our attention that the city council under the ordinance was clothed with discretionary power. The ordinance does not lay down predetermined rules or conditions by which a citizen may know in advance whether or not he will be granted a permit. Such legislation has been sustained by our Supreme Court upon the theory, expressed in 2 Dillon's *Municipal Corporations* (5th Ed.) § 598, and quoted in *Gaylord v. City of Pasadena*, 175 Cal. 433, 440, 166 P. 348, that such discretionary power is justified in respect to certain businesses on account of the great difficulty of defining in advance the rules and conditions upon which a permit would or would not be given. It has also been sustained upon the broader ground that the reservation of such broad discretionary power is justified in respect to all businesses which are subject to police regulation either on account of their tendency to become a nuisance or on account of their tendency to become a nuisance

or on account of their tendency to become a nuisance if conducted in a certain locality or in a certain manner. *Parker v. Colburn*, 196 Cal. 169, 177, 178, 236 P. 921.

Previous to the time of the last-cited opinion, the court had occasion, in several instances, to deal with the contention that such discretionary power would result in arbitrary discrimination and would be inimical to our system of law, which requires all rules of action to be predetermined and predeclared. For example, in *Re Holmes*, 187 Cal. 640, 203 P. 398, the court quoted *Gaylord v. City of Pasadena*, 175 Cal. 433, 166 P. 348, which in turn quoted in *re Flaherty*, 105 Cal. 558, 38 P. 981, 27 L. R. A. 529, and, at page 647 (203 P. 400) it is said:

"Laws are not made upon the theory of the total depravity of those who are elected to administer them; and the presumption is that municipal officers will not use these small powers villainously or for purposes of oppression or mischief." If this petitioner had applied for a permit under the requirement of the section of the charter above quoted, and been either whimsically or arbitrarily refused such permit, he might then, as is shown in *Gaylord v. City of Pasadena*, supra, have had recourse to the courts for relief from such unjust and arbitrary action."

Other authorities upholding the issuance of the writ when the discretionary powers of the inferior board have been abused are: *Tulare Water Co. v. State Water Com.*, 187 Cal. 533, 202 P. 874; *Keller v. Hewitt*, 109 Cal. 146, 148, 149, 41 P. 871; *Raisch v. Board of Education*, 81 Cal. 542, 22 P. 890; *Levin v. Board of Medical Examiners*, 74 Cal. App. 104, 109, 239 P. 410. The appellants rely upon *Chambers v. Board of Supervisors*, 57 Cal. App. 401, 207 P. 288, to the effect that discretion will not be controlled by mandamus. But in that case the court had no discretion to grant or deny the petition in any sense which is comparable to the discretion defined in the ordinance involved in the instant case. In the *Chambers Case* the board of supervisors had the power to determine the truth or existence of certain prescribed allegations of fact set forth in the applicant's petition to the board. In case these facts were found to exist the board had no discretion but to grant the petition which was in the nature of a permit. Whatever the nature and extent of the discretion the board may be said to have had in that case, it was a discretion to determine certain allegations of fact. The Legislature having given to the board the power to determine those facts, the board's decision could not be reviewed except in a way substantially the same as upon a writ of certiorari. Some of these distinctions can be seen in the case of *Tulare Water Co. v. State Water Com.*, 187 Cal. 533, 202 P. 874.

While contending that mandamus is not the proper remedy, respondent has not indicated any other remedy available where

such wide discretion is wrongly exercised by the city council. It certainly cannot be the intention of our courts to sustain ordinances vesting such broad discretionary powers in the city council, and justify the same with the statement that if such discretion is abused a remedy is available, and yet refuse to hold available the writ of mandamus, which seems to be the only appropriate writ. We conclude, therefore, that it may not properly be said that a writ of mandamus is not a proper remedy to control an alleged abuse of discretion.

[3, 4] 2. It is next contended that the trial court had no jurisdiction to consider any evidence other than the evidence produced at the hearing before the city council on petitioner's application for a permit to conduct and maintain a riding academy. In this connection appellants complain particularly of the action of the court in viewing the premises where the petitioner proposed to conduct a riding academy and also in viewing the premises of the Hayford riding academy for the conduct of which a license had been previously granted. This seems to have been an important part of the evidence in the opinion of the trial judge. In taking this evidence, however, the trial court was not taking evidence which was not also taken by the city council, for the members of the council also visited the two premises in question and made other outside investigations which influenced them in arriving at their conclusion. The burden of showing error in this case is upon appellants as in other cases. Appellants have not shown affirmatively that the court heard or considered any evidence other than the evidence produced at the hearing before the city council.

[5-7] 3. The third point made by the defendants is that the evidence is insufficient; and this point is subdivided into attacks on seven findings. The trial court made findings in which it held that the defendants abused their discretion in denying a permit to the plaintiff. In making those findings it followed the wording of the petition of the plaintiff. In doing so it used many different adjectives, adverbs and phrases which were synonymous with abuse of discretion. We think the attack on the findings is without merit. The following is a fair statement:

"In accordance with elementary rules, mandamus is a proper remedy to compel municipal officers or boards to take action and exercise their discretion in respect of matters properly presented to them and within their jurisdiction; but it will not lie to control or review the exercise of this discretion, or compel the boards or

officers to act in a particular way; * * * but the courts will relieve against an abuse of discretion * * * of these officers or boards." 38 C. J. 689, § 258.

In her petition the plaintiff pleaded the facts bringing her within the latter portion of the rule. The jurisdiction to hear and determine the allegations of the plaintiff's complaint rested in the trial court. Code Civ. Proc. § 1090. Whether the allegations of her petition were proved and whether there was any legal cause justifying the council in rejecting the plaintiff's application for a permit, were all questions which the trial court was bound to hear and determine. In *Raisch v. Board of Education*, 81 Cal. 542, at page 546, 22 P. 890, 891, the court said:

"And whether there was a semblance of cause for rejecting the claim or not was a question which might be and was properly tried in the court below."

The question then arises as to whether any evidence was introduced in the trial court supporting or tending to support its findings that there was an abuse of discretion. We think there was, and we have set forth above some portions of it.

There were no conflicts in the evidence. The territory including plaintiff's property has not been zoned so far as the record discloses. The only question of fact before the trial court was reduced to this: Will plaintiff's riding academy conflict with the plans of the council as set forth above in the statement of facts? It is not claimed that it does now conflict. The argument is that in the opinion of the council it will so conflict at some time in the future. But that contingency is provided for by section 11, Ordinance 3183, *supra*. Whenever the time arrives that there is any cause for doing so the council retains the power to revoke the permit.

The legal effect of the judgment of the trial court was to hold that the plaintiff presented to the defendants, as the council of Oakland, a *prima facie* case showing that she was entitled to a permit as of the date of the presentation of her application and that the council abused its discretion in refusing the permit on the ground that, in the opinion of the council, at some future date the location of the riding academy would be a residence district and the presence of the academy would be objectionable to the general welfare of the public at such future date.

We find no error in the record. The judgment is affirmed.

We concur: KOFORD, P. J.; NOURSE, J.

87 Cal. App. 563

WONG KIT v. CRESCENT CREAMERY CO.
(Civ. 3368.)

District Court of Appeal, Third District, California. Dec. 14, 1927.

1. Death $\hookrightarrow$ 103(3)—Whether father of child killed by truck was negligent in authorizing boy to use street on way to school held for jury.

In action for damages for death of plaintiff's minor son alleged to have been killed by defendant's truck when crossing street on way to school, question of plaintiff's contributory negligence in permitting 9 year old boy to use streets where accident occurred on his way to school unattended held for jury.

2. Appeal and error $\hookrightarrow$ 999(3)—Jury's conclusion, under evidence, that father's negligence was not responsible for son's death by truck while crossing street, was conclusive.

Under evidence in action for damages for death of plaintiff's minor son, who was killed by truck while crossing street unattended on way to school, jury's conclusion that there was no ground for imputing to plaintiff culpable blame for accident in permitting son to use street where accident occurred was conclusive on reviewing court.

3. Death $\hookrightarrow$ 24—Father watching son killed while crossing street had right to assume truck driver saw boy and would slacken speed.

Father watching son killed by truck while crossing street on way to school had right to assume that truck driver, about 40 steps from boy and having clear view, would see boy and slacken speed of truck before reaching point where boy was walking.

4. Municipal corporations $\hookrightarrow$ 706(7)—Contributory negligence of boy struck by truck while crossing street on way to school held for jury.

In action for damages for death of plaintiff's minor son, who was struck by defendant's truck while crossing street on way to school, contributory negligence of boy held for jury.

5. Municipal corporations $\hookrightarrow$ 706(5)—Evidence warranted jury's finding that truck driver, striking boy crossing street from left, was guilty of negligence.

In action for damages for death of plaintiff's minor son, who was struck by truck while crossing street, on way to school, from truck driver's left, evidence warranted jury's finding that truck driver was guilty of negligence.

6. Municipal corporations $\hookrightarrow$ 705(3)—Boy pedestrian struck by truck had equal right with truck driver to use street for legitimate purpose.

Boy pedestrian struck by truck while crossing street on way to school had right equal to that of truck driver to use street for any legitimate purpose for which public streets and roads are maintained.

7. Municipal corporations $\hookrightarrow$ 705(2)—Pedestrian, as well as motorist, must exercise reasonable care in using streets.

A pedestrian, as well as motorist, must exercise such reasonable care in using streets as will protect him from injury.

8. Municipal corporations $\hookrightarrow$ 706(5)—Evidence justified jury's finding that boy struck by truck while crossing street exercised proper care.

In action for damages for death of plaintiff's minor son struck by truck while crossing street on way to school, evidence justified jury's finding that boy in attempting to cross street exercised proper care for his own safety.

9. Municipal corporations $\hookrightarrow$ 705(3)—Truck driver could not assume boy crossing street would make crossing before truck reached him.

Driver of truck which struck boy while crossing street from driver's left had no right to act upon assumption that boy would make crossing or get beyond path of truck before it reached him, since neither pedestrian nor truck had superior right of way.

10. Municipal corporations $\hookrightarrow$ 705(5)—Truck driver traveling 12 miles per hour was not necessarily immune from liability for injuries to pedestrian crossing street.

Driver of truck which struck boy crossing street from his left was not necessarily immune from liability by showing that at time of accident he was running at speed of 12 miles per hour.

11. Death $\hookrightarrow$ 87—Parent may recover, as damages for death of child, loss parent might probably suffer after minor attained majority.

Basis of pecuniary loss suffered by parent from negligent killing of minor child includes any such loss which such parent might probably suffer after such minor would have attained his majority.

12. Death $\hookrightarrow$ 104(3)—Instruction on expectancy of life of parent suing for son's death held not erroneous because mortality tables were not introduced.

In action for death of plaintiff's minor son, instruction that jury could consider probable length of life of parent and probability that child even after its majority might aid in support of parent held not erroneous because mortality tables or other proofs of expectancy were not introduced other than showing that plaintiff was 59 years of age and deceased 9½ years of age, since expectation of life is a matter of which courts take judicial notice.

13. Death $\hookrightarrow$ 104(5)—Instruction on damages for child's death, requiring jury to consider present worth of dollar payable in future, held proper.

In action for damages for death of plaintiff's minor son, instruction that jury in considering question of present and future loss should bear in mind that present worth of dollar payable in future was less than dollar paid to-day held not erroneous, since it merely laid down

proposition that jury in estimating and assessing damages to which plaintiff might be entitled by reason of pecuniary loss he has suffered now and will suffer in future from killing of minor child should consider only present worth of dollar, which is proper statement of rule.

Appeal from Superior Court, Los Angeles County; Victor R. McLucas, Judge.

Action for damages for the death of a minor child by Wong Kit against the Crescent Creamery Company. From a judgment for plaintiff, defendant appeals. Affirmed.

W. I. Gilbert, of Los Angeles, for appellant.

Harry M. Irwin, of Los Angeles, for respondent.

HART, J. This is an action for damages in the sum of \$25,000 for the death of plaintiff's minor son, Wong Fook Sam, who, it is alleged, was killed through and by the negligent act of an employee of the defendant. By their verdict, the jury by whom the case was tried awarded plaintiff damages in the sum of \$5,500, for which amount judgment was entered in his favor.

The appeal, supported by a bill of exceptions, is by the defendant from the judgment so entered.

At the time of the accident resulting in the death of the child, the defendant was engaged in the creamery business in the city of Los Angeles.

The salient allegations of the complaint are:

"That on September 25, 1922, the defendant, in the conduct of its business as aforesaid, maintained and operated an auto delivery truck upon and along Los Angeles street, near Ferguson alley, in said city of Los Angeles. That on September 25, 1922, while so operating said auto delivery truck toward the north upon and along said Los Angeles street across and near the intersection of said Los Angeles street with said Ferguson alley, defendant so negligently and carelessly managed and operated said truck at said time and place that said truck violently ran against, struck, knocked down, mortally injured, and killed said Wong Fook Sam, said minor son of plaintiff, and that, by reason of the negligence, carelessness and violence of defendant as aforesaid and as the proximate result thereof, said Wong Fook Sam was struck, knocked down, mortally injured and killed by defendant at said time and place.

"That at the time of the killing and death of said Wong Fook Sam, said minor son of plaintiff, as aforesaid, said Wong Fook Sam was of the age of nine years and two months, * * * was strong, healthy and robust, and was a source of great comfort, cheer and assistance to plaintiff, and that, by reason of the killing and death of said Wong Fook Sam as aforesaid, plaintiff has been totally and forever deprived of the society, comfort, protection, and services of his said minor son, and has been required to pay and has paid more than \$175 for

the funeral and burial expenses of said minor son. * * * That at all times herein mentioned said Los Angeles street and said Ferguson alley, at all the places herein mentioned, were and each of them was a public highway, used and occupied by the public in passing and repassing thereon with automobiles, horses, wagons and other conveyances, and on foot."

The answer denies the material averments of the complaint and pleads contributory negligence upon the part of the deceased and also on the part of the plaintiff, the father of the deceased. As to the charge that the deceased was guilty of contributory negligence which, it is alleged, was the proximate cause of the accident in which the minor lost his life, the answer avers that he (said minor) "did not exercise ordinary care or any care at and about the time and place of the accident, did not look for approaching vehicles, or do any other act to protect himself or his person from injury." The claimed negligence of the plaintiff, which it is also alleged contributed to the accident and its very serious consequences, and which, it is further charged, constituted the proximate cause of the death of the boy, consisted in the negligent failure of the plaintiff, as father of the deceased, to "exercise ordinary care or any care in keeping said minor out of places of danger," the thoroughfare upon which the accident occurred being, as in the present connection the answer alleges, "a public street, traveled at all times in the day and night with automobiles, automobile trucks, and all character of commercial conveyances."

The points made for a reversal, as they are specifically set forth in the brief of the defendant, are: (1) That the evidence does not show that the defendant's employee (the operator of the truck which collided with the boy) was guilty of negligence; (2) that, assuming that said "employee was negligent, then the evidence disclosed that the deceased contributed to his own injuries in attempting to cross the street by running in front of the appellant's truck"; (3) that, even if the evidence showed that the defendant's employee was negligent, the plaintiff himself was guilty of contributory negligence which proximately caused the injuries which caused the death of the minor "by permitting his son to attempt to cross the street running in front of the moving truck driven by appellant's employee"; (4) errors in the instructions.

It is perhaps well first to describe more specifically than it appears to be explained in the complaint the exact location of the point at which the accident happened. Los Angeles street, in the city of Los Angeles, runs in a northerly and southerly direction. Plaza street (running in an easterly and westerly direction) connects with Los Angeles street at the western line thereof. For a short distance Plaza street is substantially bordered by a small park or plaza, from which, pre-

sumably, said street derived its name. Ferguson alley (running in an easterly and westerly direction) intersects Los Angeles street at the east line thereof, and is directly east of Plaza street and is the passageway for those traveling east on Plaza street towards Los Angeles street who may choose to enter the street paralleling Los Angeles street on the east without turning either south or north on the last-named street to do so, and also for those desiring to pass from the street paralleling Los Angeles street on the east across the last-named street to Plaza street without "going around the block."

The accident in which the boy lost his life happened, as the complaint alleges, on the 25th day of September, 1922, about (as the evidence shows) 2 o'clock p. m., on the street and at the place stated in the complaint. The lad, then of the age of 9½ years, was a pupil in both the American and the Chinese schools of the city of Los Angeles, his attendance at the first-named school being in the forenoon and his attendance at the Chinese school in the afternoon of each day. At the time of the accident the deceased was on his way to the regular afternoon session of the Chinese school. When struck by defendant's truck, the boy was in the act of crossing Los Angeles street from the west side thereof, or from Plaza street, towards Ferguson alley. At the same time, the truck was being operated by defendant's employee in a northerly direction on Los Angeles street. The plaintiff who, as the complaint states, was the father of the deceased, was, at the time of the accident, employed in a Chinese store conducted under the name of the "Far East Company." This store was located on or near the corner of Los Angeles street and Ferguson alley.

Strangely as it may seem after reading the statement of the several points urged here by the defendant for a reversal and enumerated above, the opening brief of its counsel contains the following admission:

"The disputed facts of the case resolve themselves into the question of whether the deceased himself heedlessly attempted to cross the street by running in front of the automobile and placing himself in a position of danger, without any negligence on the part of appellant's employee. Also, whether, notwithstanding any negligence on the part of appellant's employee, the deceased himself was guilty of contributory negligence; and the further disputed fact as to whether or not the deceased's father was guilty of contributory negligence."

Upon the foregoing statement in the brief, we might warrantably waive all consideration herein of the evidence, in so far as it affects the points made here by the defendant that the evidence shows that the accident was directly occasioned by the boy's own negligence and that of his father, and that it fails to show that the driver of the truck was negligent, but, assuming that it does, such

negligence was not the direct or efficient cause of the fatal injuries to the boy. But the discussion in defendant's brief has led us to the conclusion that its counsel went farther in said statement than he intended to go, and we will therefore consider herein the question whether we can properly say, as a matter of law, that the argument of counsel that the verdict cannot stand because there is no evidence to support it for any of the reasons urged by counsel for the defendant after making the statement referred to is or is not maintainable.

This appeal is the culmination of a second trial of this action.

The section of Los Angeles street in which the truck driver was operating the truck is a business street and ordinarily characterized by a heavy automotive traffic. At the time, however, that the truck driver was approaching the point where the accident occurred and at the very time of the accident, there was no other automobile traveling over the street in either direction in that particular section, nor was there then any other person using the street in any manner, in that immediate vicinity. All the witnesses that saw the collision, including the driver of the truck himself, so testified; nor, as the same witnesses and the operator of the truck testified, was there any obstruction of any character between the driver of the truck and the boy, as the former was approaching the latter as he was crossing Los Angeles street, for a distance of over 100 steps from the truck to the point at which the accident happened. All the witnesses are as one upon the fact that the boy, proceeding easterly across Los Angeles street from Plaza street, had traversed a distance approximately of 40 feet, or to be more explicit, had reached a point a short distance beyond the center line of Los Angeles street, going east, when he was struck by the truck. There is testimony (uncontradicted) that the truck, just before and when it struck the child, was traveling northward and to the right or east of the center line of Los Angeles street. The deceased at the time was, therefore, proceeding towards the point at which the collision took place from the left of the truck driver. The boy was struck by the right fender of the truck.

The plaintiff testified that, knowing that his child daily passed the store at which he (plaintiff) was employed in the afternoon, about 2 o'clock, on his way to the Chinese school, he always looked or watched for the boy's appearance at or near the store at the hour stated of each day. On the day the fatal injuries were received by the child, and as the hour of two o'clock p. m. was in near approach, he now and then would look through a window of the store from the inside thereof towards Plaza street where it intersects Los Angeles street, and, at the usual time, would see his son at the corner of the two streets just named. On the day

of the accident, the plaintiff, looking through the window at the usual time, observed the boy as he reached the intersection of the two streets referred to, and he thereupon stepped out to the sidewalk from which he saw the boy as he left the curbing on the west side of Los Angeles street, and watched him as he was proceeding across said street towards the store on Ferguson alley. Plaintiff further testified that the boy was walking at his usual gait until he arrived at a point a little beyond the center of Los Angeles street, when he (the boy) increased his speed; that is, to use the language of the witness, the boy "stepped over the street about 2 or 3 fast steps," when the truck struck him. "The automobile," said the plaintiff, "was about 10 steps away (or between 28 and 30 feet) from the boy at the time he (the boy) commenced to take those 2 or 3 fast steps. * * * The right wheel on the right side hit the boy." The plaintiff said if the boy "had been able to get up one step further, he would have been clear past the machine." He further testified that he did not holla at the boy to warn him of the approach of the truck because the truck was then a considerable distance south of where the child was crossing the street, "and that the truck was then the only vehicle in said street." Plaintiff testified that the operator of the truck at no time sounded the horn attached to the truck or gave any other signal of his approach as he was proceeding towards the point at which the accident occurred. He further testified that he knew that Los Angeles street "was a very heavily traveled street up there, so far as trucks and automobiles are concerned," and that he had warned his boy "to watch for the cars and not pass when a car was coming. In other words," continued the plaintiff, "I told him about the danger from these cars and he said he understood that." Plaintiff also stated that he had instructed the boy "to come to my place" when he (the boy) was on his way to the Chinese school.

One Chan Jin testified: That he witnessed the accident, having just prior thereto stepped out of his place of employment, situated near the point of the collision, to the sidewalk. He saw the boy as he started across the street in the direction of Ferguson alley. That he observed the truck traveling from the south toward the point where deceased was crossing the street, and that, when the truck was about 24 feet from the boy, he noticed that the latter started to run, going east or towards the alley referred to. The truck, said the witness, "sounded like a truck going with a big noise. There was no horn or whistle blown by the truck." The witness stated that, after the boy started to "run fast," there was no diminution in his speed until he was struck.

A Chinese named Wong Hing saw the accident. He was at the time walking along the

sidewalk on the north side of Ferguson alley, east of Los Angeles street, and near the intersection of said alley with said street. That he first observed the boy walking east and in about the center of Los Angeles street. That he also saw the truck traveling from the south towards the point where the boy was then walking. That, "when the truck was about ten steps from the boy, the latter was coming here (to the east sidewalk) from the middle of the street, and the boy was in front of the machine, and he started fast steps. And finally the boy got struck at the left, on the right side. * * * When I first saw the boy, he was walking the ordinary way, in ordinary walk." Cross-examination: "In the danger time the boy run fast. When the boy started to run from the middle of the street he stepped off about three or four steps." (Witness indicating, it being stipulated by counsel that as indicated the boy, when he started to run, or "step fast," was at a point about half way from the center of the street to the sidewalk on the east side.) The boy," proceeded the witness, on cross-examination, "ran one or two steps. The truck then went about 24 to 27 feet, while the boy was running two feet and a half. After it hit the boy it stopped about twenty footsteps."

The defendant's witness J. L. Firebaugh testified that he witnessed the accident; that, when he first noticed the boy, he (witness) was approximately 75 yards from the boy, the latter then being on the west side of Los Angeles street; that he did not see the boy when he stepped off the sidewalk; that the boy was running east across Los Angeles street, "at a fairly good clip"; that "the boy was looking over his shoulder, back toward the plaza over his left shoulder. That," said the witness, "is why I particularly noticed that boy. * * * He did not stop running until the truck hit him. * * * From the time I first saw the boy until the automobile struck him, he had run past the center of the street." On cross-examination, the witness admitted that at the coroner's inquisition into the circumstances of the killing of the deceased, held within a few days after the fatal accident, and "while the facts were still fresh in his memory," he testified that he "only saw him (the deceased) run two or three steps"; that when he first saw said deceased, the latter was "in front of the truck" and "within three or four steps of where the truck hit him." The witness testified that the testimony given by him at the coroner's inquest and contained in the transcript of the proceedings before that officer constituted a correct description of the circumstances of the accident.

W. H. Atwood, operator of the truck at the time it struck the boy, testified:

That he was route foreman of the defendant and that the accident happened about 2 o'clock

in the afternoon. "I was driving north on Los Angeles street," he said; "I do not remember how far from the curb I was—well, I was to the right of the middle of the street, I know that. I first saw the boy when he was about 6 feet, 4 or 6 feet, right somewhere in front of the radiator cap of the machine. That was when I first saw him. As soon as I saw him, I swung the truck to the left and grabbed for the brakes, trying to miss him. I struck him with the right fender. I did stop my car just as soon as possible. I was not over one or two truck lengths, I don't think. * * * I was traveling about 12 miles an hour. * * * When the boy was first seen by me, he seemed to be running, kind of looking back. He seemed to be looking over his right shoulder. That was not towards me; he was not looking toward me with (over?) his left shoulder."

Cross-examination:

"I had driven an automobile many times before this accident up and down Los Angeles street, in that vicinity. I passed there several times a day in my business. I knew that that was a very busy street. I had reason to expect at any time there a great deal of traffic, both of automobiles and on foot. As I passed up this street, on this particular day, from the time I passed this hay market until I reached that corner, there was nothing very close in the way of traffic. As far as I remember there wasn't any automobile or other person in the street from this point in the vicinity of the hay market or substation until I reached that corner. There was nothing in the street, of any kind, so far as I remember, to attract my attention away from the operation of my machine. I was coming along there about 12 miles an hour. The first I saw of the boy was when my radiator cap was within 4 to 6 feet of the boy; I never saw him before at any time, up until that time. There was nothing the matter with my eyes at that time; I have good eyesight. Operating my truck at the rate of 12 miles an hour, I don't know how quickly I could have stopped it under ordinary conditions; not as quick as I did then, I know. I don't hardly think I could have stopped it in 8 or 10 feet, with a loaded truck. I could have slowed it down. I don't know that I could have brought it to a standstill in that distance, but I think I could have slowed it down to at least half of the speed or more, within that distance. I don't know how fast the boy was running. I can't say that I remember now whether he seemed to be gaining speed or to be starting up faster during that small intermission of time that I saw him there before the truck hit him. I testified at the coroner's inquest within two or three days of this accident. I did testify as follows: 'Q. Did the child make any effort to get out of the way? A. He was going toward the sidewalk. Q. Did he hurry his steps any when you were 6 feet from him? A. He seemed to start a little faster. Q. When you struck him, was he walking or running? A. He seemed to be running. Q. He seemed to quicken his steps at that time? A. He must have heard the machine coming.' * * * I don't remember to have said anything, about the boy having his head turned away from the machine, at the coroner's inquest, or at the other trial of this case.

"Mr. Gilbert (Attorney for Defendant): I don't think he was asked about it at all, as far as I recall. I don't remember it.

"Mr. Irwin (Attorney for Plaintiff): I will stipulate that he was not asked, and that he did not say anything about it. That may be taken in place of reading the whole testimony?

"Mr. Gilbert: Yes.

"Q. (By Mr. Irwin): There is no reason that you can assign now why you failed to see the boy before you got to that point, within 4 to 6 feet from him, is there? A. No, sir. * * * As far as I remember there was nothing in that street between me and the boy from the time I left this place down at the hay market up to the time I struck him. My machine continued at the same rate of speed, as far as I can tell, from the time I left the hay market until I got within 4 to 6 feet of the boy. When within 4 to 6 feet of the boy is when I put on my brakes for the first time."

Called in rebuttal by the plaintiff, Chan Jin testified that he at no time saw the deceased turn his "head back over his shoulder to look toward the west"; that, as he stated when testifying for plaintiff when first called in the case as a witness, he first saw the deceased "in the street, on the other (west) side, and he was still walking."

[1-3] The foregoing embraces a statement in substance of all the facts to which the witnesses both for the plaintiff and the defendant testified. It is clear that, under the testimony, the alleged contributory negligence of the plaintiff and the asserted like negligence of the deceased were questions for the jury to determine. It is perfectly clear that the jury's conclusion that there was no ground for imputing to the plaintiff culpable blame for the accident is conclusive upon a reviewing court. The basis, and, so far as we are able to discern from the record, the only basis for attributing to plaintiff responsibility for the accident, rests in the fact that the plaintiff permitted the boy to walk along and on the public streets unattended by some older person who was able to protect the child from the constantly menacing hazards incident to the heavy automotive traffic of such thoroughfares. But the uncontradicted evidence discloses that the deceased was not only physically robust, healthy, and active, but was intelligent and of excellent judgment for one of his years. The boy, at the time that he was fatally injured, was on his way to school, which, unattended, he had previously been accustomed to doing, and generally, as may be implied from the evidence, taking the same route and always, as the plaintiff instructed him to do, passing the store in which his father was employed; that the latter had warned the boy to be careful in passing over and along the streets, particularly Los Angeles street, because of the unusual automotive traffic always on said street; and that the boy in effect said to his father in answer to such warning that he (the boy) understood the situation with re-

spect to the hazards to a pedestrian of such traffic. Moreover, the plaintiff testified that, when the boy started to "step fast" or run, he then being, as plaintiff also testified, approximately 11 or 12 feet from the curbing on the east side of the street, the truck was about 40 steps from the boy. Under those circumstances, there being nothing to prevent the driver from seeing the deceased had he looked ahead of him, the plaintiff had the right to assume that the operator of the truck did see the boy and would slacken the speed of the truck before reaching the point where the boy was walking. It may here be added that, although the record is silent as to the location of the Chinese school attended by the boy, it may properly be assumed from the fact that, in going to said school, it was his daily custom to pass along Plaza street and thence across Los Angeles street, past the Far East store, that the route thus taken by the deceased was the nearest or most convenient one for him to follow to get to said school. But, however that may be, as in effect before stated, it was not negligence per se on the part of the plaintiff to permit or even authorize the boy to use the streets mentioned to get to his school, and it is clear that the record furnishes no ground justifying the declaration by this court that the jury arrived at an erroneous conclusion in finding from the evidence that the plaintiff was not guilty of culpable negligence in doing so.

[4] As stated, the alleged contributory negligence of the deceased presented a question for the jury's solution. As to this, the claim is that the boy, without looking either north or south while crossing Los Angeles street to see whether any vehicle was from either direction approaching the point where he undertook to cross said street, ran in front or "entered the path" of the truck. There is, as seen, evidence from which the jury was authorized to conclude that the boy started to walk from the west to the east side of the street and, on reaching a point near the center line of the street, suddenly quickened his steps, some of the witnesses saying that "he ran" and some that "he walked fast." Undoubtedly, the act of accelerating his speed when he arrived at the center line of the street was caused by some reason or some purpose which suddenly occurred to him, and clearly the jury could very properly have concluded from all the circumstances that the act of increasing his speed was due either to his seeing the truck or hearing the noise of the machine as it was nearing him, and that the deceased conceived and believed that, under the circumstances, that was the best and safest course he could take to protect himself against being run into or struck by the truck. What is said in the following excerpt from the opinion in *Varcoe v. Lee*, 180 Cal. 338, 340, 341, 181 P. 223, 224, in which the party fatally injured was a

child, and the facts as shown by the evidence were very similar to those of this case, applies with equal force to this.

"The claim that the child was guilty of contributory negligence is based on the fact that she ran across the street instead of walking and was looking the other way when she got in front of the car. There was testimony that she was seen waiting on the left-hand side of the street, with relation to the chauffeur, for some wagons and a street car going north to pass, and that as soon as they passed she started to run across the street. Not improbably she ran across thinking it the safest way to get across. Certainly, there is nothing to justify taking from the jury the question as to whether or not her conduct amounted to contributory negligence, particularly in view of her youth."

In the present case there is at least a conflict in the evidence upon the question whether the boy, as he started to run and did run while he was crossing the street, was looking over his left shoulder and in an opposite direction from that in which the truck was going, or whether he looked back at all. The question was for the jury to determine.

[5-9] We now reach the question of the alleged negligence of the defendant's employee, the driver of the truck. All the witnesses, as seen, testified that immediately prior to and at the time of the accident, the street in the section of Los Angeles street where the disaster happened was absolutely free from obstructions of any character; that, when the truck was approaching the point where the deceased attempted to cross the street, there was no automobile or other vehicle or person between the truck and the boy; that, in other words, it is shown that the vision of the driver of the truck, for a distance of several hundred feet from the point where the boy was in the act of crossing the street, was wholly unobstructed. Indeed, the operator of the truck himself, in response to a question propounded by the attorney for plaintiff, frankly stated that he could give or assign no reason why he did not see or should not have seen the boy long before he arrived at the point where first he observed the child in the street, to wit, a distance of from 4 to 6 feet from the latter. There is evidence, uncontradicted, that the driver at no time sounded a horn or gave any other warning of his approach towards the deceased.

It is not further necessary analytically to discuss the testimony to justify the acceptance by this court of the result arrived at by the jury. The defendant out of his own mouth convicted himself of negligence in failing to avoid striking the boy; for, whether he did not, under the circumstances as shown by the evidence, observe the boy in the act of crossing the street at a sufficient distance to have stopped his truck before reaching the point at which the collision occurred or, seeing the boy at such a distance and all the time up to the moment that the latter was

struck, proceeded on the assumption that the deceased would pass the path of the truck before it reached him, in either case he was guilty of negligence and the jury were warranted in so finding. The deceased, as is the right of all pedestrians, had a right equal to that of motorists to use the street for any legitimate purpose for which public streets and roads are maintained. Of course, it is the law that a pedestrian, as well as a motorist must exercise such reasonable care in using the streets as will protect him from injury. As has been stated, the jury were apparently amply justified in finding that the deceased in attempting to cross the street exercised proper care for his own safety. Manifestly, the driver of the truck had no right to act upon the assumption (and, as declared, the jury could well have found and impliedly did find that he did so assume) that the boy would make the crossing or get beyond the path of the truck before it reached him. The principle of law pertinent to a case such as we have here is thus stated in the case of *Burgesser v. Bullock's*, 190 Cal. 673, 675, 214 P. 649, 650:

"The opinion of the trial court in granting the motion for the instructed verdict is incorporated in the transcript and it appears that the trial judge was of the opinion that the decedent, having observed the approaching automobile before he entered its path, and having continually observed it thereafter, and having apparently misjudged its speed, was therefore guilty of contributory negligence. The fallacy of the conclusion reached by the trial court results from the assumption that the automobile had the right of way and that it was the duty of the pedestrian to assume that the automobile would continue in its direction without diminishing its speed or yielding to the pedestrian. The law is that neither the pedestrian nor the automobile has a superior right of way, and that each is entitled to use the highway and that the conduct of both must be regulated with reference to this fundamental rule."

[10] Nor is the driver of an automobile necessarily immune from liability for injuries to other persons occurring in a public street by merely showing that at the time of the accident he was running at a rate of speed of twelve miles per hour. As is said in *Reaugh v. Cudahy Packing Co.*, 189 Cal. 335-340, 208 P. 125, 127:

"He still remains bound to anticipate that he may meet persons at any point of the street, and he must, in order to avoid a charge of negligence, keep a proper lookout for them and keep his machine under such control as will enable him to avoid a collision with another person using proper care and caution, and if the situation requires he must slow up and stop."

The defendant complains of the following language of an instruction embraced within the court's charge to the jury:

"*You are not confined, however, in your estimate of the monetary loss to the parent to the period of minority of the child, for the relation*

of parent and child of course does not terminate when the child reaches its majority and thereafter there remain certain legal obligations of support that are recognized in the laws and are enforceable by appropriate legal proceedings. For 'it is the duty of the father and mother, and the children of any poor person who is unable to maintain himself by work, to maintain such person to the extent of their ability.' You have a right to take into consideration the probable length of life of the parent and the probability, if such you find from the evidence, that the child even after its majority might do that which the law did not require, namely, aid in the support of the parent."

It is the parts in italics which the defendant particularly stresses as being erroneous and prejudicial.

The specific criticism of the above language, as an instruction to the jury, is: (1) That the probable earnings of the child after reaching the age of majority and the benefits from which the father would be legally and morally entitled to receive do not constitute an element in the legal basis upon which compensatory relief may be awarded in cases of this character; (2) that, the instruction being based upon the probable length of plaintiff's life, there was introduced no mortality tables or other evidence other than the showing that the plaintiff was 59 years of age and the deceased 9½ years of age, upon which the jury could form a just conclusion as to the "probable length of the life of either of these parents."

[11] That the basis of the pecuniary loss suffered by a parent from the negligent killing of a minor child includes any such loss as such parent might probably suffer, after such minor would have attained his majority, is a proposition in law thoroughly settled. This rule of law is, with great clearness, considered and approved as sound in an opinion by former Chief Justice Shaw in *Bond v. United Railroads*, 159 Cal. 270, 113 P. 366, 48 L. R. A. (N. S.) 687, Ann. Cas. 1912C, 50. The action in that case, as here, was by a parent for the negligent killing of her minor child, and, as here, was founded on sections 376 and 377 of the Code of Civil Procedure. The last clause of section 377 provides:

"In every action under this and the preceding section (section 376, authorizing an action by a parent for the injury or death of a minor child), such damages may be given as, under all the circumstances of the case, may be just."

Speaking of the measure of damages in actions under either of said sections, the court said:

"It would seem to follow from this rule absolutely limiting the damages in every case to the pecuniary loss occasioned by the death, and upon a consideration of that justice which the statute itself invokes, that this pecuniary loss should be extended to, and should include, all pecuniary loss of every kind which the circumstances of the particular case establish with reasonable certainty will be suffered by the bene-

fiary of the statute in the future, because of the death of the victim. Nothing less would be a just compensation for the injury, and anything more, or anything in the realm of improbability, conjecture or mere fancy, would be beyond the purview of the statute and unjust to the defendant. In many cases where the minor is near majority, the certainty of pecuniary loss from his death, to the parent, accruing after his minority, would be as great as the certainty of such loss during minority, and the expectation of benefits for many years thereafter would be as well established as in the case of the death of an adult. In other cases, where the child is a mere infant, the expectation of pecuniary benefits to accrue in the years following its arrival at majority would be so remote that it could not justly be made the basis for a large addition to the damages. So in the case of some adults such benefits would be exceedingly improbable. But the statute prescribes but one rule for all cases: "Such damages may be given as under all the circumstances of the case, may be just." The manifest effect of this language is that in all cases to which the rule applies it is to be left to the jury to say, upon a consideration of the facts, what amount is a just compensation for the financial loss which the evidence shows will probably be directly or proximately caused by the death of the victim."

In *Sneed v. Marysville, etc., Co.*, 149 Cal. 710, 87 P. 379, cited approvingly in *Bond v. United Railroads*, the court said:

"This pecuniary loss may be either a loss arising from the deprivation of something to which such heirs would have been legally entitled if the person had lived, or a loss arising from a deprivation of benefits which, from all the circumstances of the particular case, it could be reasonably expected such heirs would have received from the deceased had his life not been taken, although the obligation resting on him to bestow such benefits on them may have been a moral obligation only."

See, also, *Peluso v. City Taxi Co.*, 41 Cal. App. 297, 302, 182 P. 808; *Redfield v. Oakland, etc., Co.*, 110 Cal. 277, 42 P. 822, 1063; *Hillebrand v. Standard Biscuit Co.*, 139 Cal. 236, 73 P. 163; *Johnson v. S. P. Co.*, 154 Cal. 298, 97 P. 520; *Beeson v. Green M. G. M. Co.*, 57 Cal. 37; *Ruppel v. United Railroads*, 1 Cal. App. 666, 82 P. 1073; *Valente v. Sierra R. R. Co.*, 158 Cal. 412, 111 P. 95.

[12] There is no legal force to the point that the instruction is obnoxious to the objection that, where mortality tables in common use are not received in evidence, there can be no basis for a just consideration and fair adjustment of the element of "the present value of the reasonable benefit which the" plaintiff "would probably have received after his [the child's] majority and during the period of" his (the plaintiff's) "common expectancy of life." *Peluso v. City Taxi Co.*, 41 Cal. App. 297-300, 182 P. 808. In that case it is said: "As to the expectation of life, that is a matter of which the courts take judicial notice"—citing 20 Am. & Eng. Ency. of Law (2d Ed.) page 886; *Valente v. Sierra Ry. Co.*, 151 Cal. 534, 91 P. 481.

In *Dickinson v. S. P. Co.*, 172 Cal. 727-730, 158 P. 183, 184, the rule is thus stated:

"There was no evidence offered to show the expectancy of life of a man of Dickinson's age. The courts may, however, take judicial notice of mortality tables in common use."

Again in *Dallas v. De Yoe*, 53 Cal. App. 452-457, 200 P. 361, 363, the court announced the rule as follows:

"Appellant urges that there was no evidence as to the expectancy of life of Mrs. Dallas or as to the condition of her health. Mortality tables are admissible in such cases but not essential. * * * It is presumed that a person is in average normal health, in the absence of evidence to the contrary."

See, also, 17 C. J. 1366.

[13] The defendant, further assailing the charge of the court to the jury, insists that the following language contained in a certain other instruction, the subject-matter of which is cognate to the proposition dealt with in the instruction first hereinabove considered, expresses an erroneous statement of the law and was prejudicial:

"In considering the question of present and future loss you should bear in mind that a verdict rendered by you is payable forthwith and that the present worth of a dollar payable or receivable at a distant future time is much less than a dollar paid to-day."

Construing that language, the counsel for the defendant declares that "the vice of the instruction," or of the language thereof just quoted herein, lies in the fact that the court thereby told the jury "that the present dollar would be worth less in the future than it would be to-day," or, in other words, that the court thereby charged "the jury that the earning powers of the deceased should be more in the future for the reason that the future purchasing power of the dollar would be less and the cost of living greater than that of to-day"; that, "therefore, the said court (by said language) in effect instructed the jury to enhance the damages in favor of respondent relative to elements of damages based upon future losses." The learned counsel has not read the instruction correctly. The instruction, stated concisely, merely laid down the proposition that the jury, in estimating and assessing the damages to which plaintiff might be entitled by reason of the pecuniary loss he has suffered now and will suffer in the future from the killing of his minor child, should consider only the "present worth" of the dollar. This was a proper statement of the rule. In embracing in effect in the instruction the warning that the jury in estimating and assessing any damages to which the plaintiff might be entitled for present and future pecuniary loss, the jury should keep in mind the proposition that the "present worth of a dollar payable at a distant future time is much less than a dollar paid to-day," the court stated what is obvious-

ly true. The real purport of that language of the instruction, reduced to a simple form, involved only a statement to the jury that, in determining what they might satisfactorily be persuaded by the evidence that the plaintiff was entitled to by way of damages as measured in dollars and cents, they were to consider only "the present worth" of the dollar, and this is clearly what it was their duty to do. The principle underlying the proposition that the instruction was intended to submit to the jury is stated and applied in the case of *Peluso v. City Taxi Co.*, *supra*, where it is said:

"The recovery was not limited, of course, to the earning capacity of the son during his minority, but it included the present value of the reasonable benefit which the parents would probably have received after his majority and during the period of their common expectancy of life. *Bond v. United Railroads*, *supra*."

It may be added that the instruction, as so construed, appears to be favorable rather than unfavorable to the defendant. And, further, may it be suggested that the jury, in appraising or admeasuring the compensatory relief which their verdict evidences, acted with a marked degree of moderation, considering the circumstances of the case and the deprecable result of the accident.

The judgment is affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

ORTON v. PRIVETT et al. ^{202 Cal. 754}
(L. A. 8581.) *

Supreme Court of California. Dec. 23, 1927.

Rehearing Denied Jan. 19, 1928.

1. Principal and agent ⇨85—Complaint alleging defendants' failure to furnish inner tubes under exclusive sales right held to state cause of action for recovery of amount paid for right.

Complaint alleging that plaintiff paid defendants for exclusive sales right, in certain territory, of compression inner tubes for automobile tires, that defendants were to furnish him at agreed price specified number of tubes per day, and that defendants refused and neglected, notwithstanding demand, to furnish tubes according to agreement, rendering sales right utterly valueless, and that plaintiff had notified defendants of rescission for failure of consideration *held* to state cause of action for recovery of amount paid.

2. Principal and agent ⇨85—Plaintiff held entitled to recover full amount paid for exclusive sales right on defendants' failure to furnish product as agreed, notwithstanding sales right was undisturbed.

Plaintiff, who paid sum for exclusive right to sell inner tubes for automobile tires within particular territory under agreement of defendants to furnish specified quantity, could recover full consideration paid on defendants' failure to furnish any tubes, notwithstanding sales right which defendants' violation of contract rendered worthless was otherwise undisturbed.

3. Contracts ⇨271—Plaintiff suing for total failure of consideration need not give prior notice of rescission.

Total failure of consideration renders it unnecessary to give notice of rescission before bringing action to recover money paid on the contract.

4. Money received ⇨6(4)—Action on common count lies to recover money paid under rescinded contract.

Where contract is rescinded, plaintiff may sue on common count to recover money paid or property delivered thereunder.

⇨For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

★Rehearing denied.

5. Action $\S$ 48(3)—In suit to recover payment for exclusive sales agency, causes of action for rescission, failure of consideration, and money paid held properly joined.

Causes of action based on rescission of contract, total failure of consideration, and common count for money paid, alleged in three separate counts in complaint, held properly joined where they arose out of same transaction, which involved question of plaintiff's right to recover amount paid for exclusive sales agency on defendants' failure to furnish sales product.

Department 2.

Appeal from Superior Court, Los Angeles County; William C. Doran, Judge.

Action by Morris Orton against C. R. Privett and another. Judgment for plaintiff, and defendants appeal. Affirmed.

Meserve & Meserve, of Los Angeles, for appellants.

G. M. Spicer, Ray Meacham, and Bruce Mason, all of Long Beach, for respondent.

LANGDON, J. Defendants have appealed from a judgment against them for \$7,200. The action was brought to recover the amount of money paid by plaintiff under an agreement whereby the defendants were to transfer to him the exclusive sales right, in certain territory, of a patented compression inner tube for automobile tires, and to furnish him, at an agreed price, twelve inner tubes a day, to be manufactured and delivered either from a factor to be completed at Burbank, Cal., "or from some other factory." The complaint, after alleging the facts with reference to the contract, sets out that the defendants have neglected and refused at all times, and do now fail, neglect, and refuse, although demand therefor has often been made, to furnish and deliver to said plaintiff said inner tubes, according to the terms of said agreement; that the \$7,200 was paid to defendants upon the sole consideration of the sale to plaintiff of said exclusive sales right and the furnishing and delivery to said plaintiff of said inner tubes; and that said sales right is utterly useless and without value unless there be delivered and furnished to plaintiff said inner tubes, etc. It is alleged, further, that plaintiff has notified defendants that he rescinded said contract because of the failure of consideration in a material respect and has offered to restore to defendants everything of value which he received under said agreement, upon condition that defendants restore the \$7,200 to plaintiff, and that no part of said \$7,200 has ever been paid to plaintiff.

[1, 2] The second cause of action contains substantially the same allegations, but proceeds upon the theory of a total failure of

consideration. The third cause of action is for money had and received. A general demurrer was interposed to each cause of action and also a demurrer for improper joinder of causes of action. The demurrers were overruled, and answers were filed denying the allegations of the complaint. Findings were made in favor of plaintiff, and, upon appeal, defendants contend that their demurrers were improperly overruled. At great length, they argue many technical matters with relation to plaintiff's pleading. We shall not consider these objections in detail. We are of the opinion that the complaint states a cause of action, and that the first count thereof is not open to the objection that plaintiff was not entitled to recover all the money he had paid because he had enjoyed the exclusive sales right for the patent in certain territory for over a year. It is alleged and found that this right to sell was utterly valueless without something to sell, and that defendants had at all times failed and refused to furnish to plaintiff the product to be sold under the exclusive right. That right, standing alone, being of no value, should not preclude plaintiff from recovering the full consideration paid by him for the contract obligations of defendants.

[3] It is objected that the second count does not allege that plaintiff has given defendants notice of rescission. As we have stated, this count is framed upon the theory that there was a total failure of consideration for the payment of the money by plaintiff. "A total failure of consideration makes it unnecessary to give notice of rescission before bringing an action." 6 Cal. Jur. 392. See, also, *Field v. Austin*, 131 Cal. 379, 63 P. 692; *Richter v. Union Land & Stock Co.*, 129 Cal. 367, 62 P. 39; *Russ Lumber & Mill Co. v. Muscupiabe Land & Water Co.*, 120 Cal. 521, 52 P. 995, 65 Am. St. Rep. 186.

[4] The third cause of action is likewise good against demurrer. It was said in *Macowsky v. Irvine*, 71 Cal. App. 77, 234 P. 839:

"The contract being rescinded the plaintiff could sue on common count to recover money paid or property delivered thereunder."

[5] With reference to the question raised by the special demurrer, we are of the opinion that the three causes of action were properly joined, as they all arose out of the same transaction.

The findings amply sustain the judgment, and we agree with the construction which the trial court placed upon the contract between the parties, which was made a part of the pleadings herein.

The judgment is affirmed.

We concur: RICHARDS, J.; SHENK, J.

202 Cal. 624

HAMMOND LUMBER CO. v. PILE et al.
(L. A. 8901.)★

Supreme Court of California. Dec. 14, 1927.

Rehearing Denied Jan. 12, 1928.

1. Appeal and error §1011(1)—Finding on conflicting evidence that contractor used materials elsewhere and materialman represented he would not assert lien, sustained by evidence, is conclusive.

In suit to foreclose a mechanic's lien, finding on conflicting evidence that materials delivered to contractor were used by him for other construction work than on defendants' building and that materialman had represented to defendants it would not assert lien on their premises, if sustained by evidence, is conclusive on appeal.

2. Mechanics' lien §281(4)—Materialman could not assert lien for materials of uncertain value and amount.

In suit to foreclose a mechanic's lien, where trial court found that it was impossible to estimate amount of material which had been diverted from defendants' property to other uses by the contractor, materialman could not assert lien for materials used on defendants' building, since they were of uncertain value and amount.

Department 2.

Appeal from Superior Court, Orange County; R. Y. Williams, Judge.

Action by the Hammond Lumber Company against J. E. Pile and others. From a judgment for defendants, plaintiff appeals. Affirmed.

R. L. Horton, of Los Angeles, for appellant.

Scarborough, Forgy & Reinhaus and Carl M. Heim, all of Santa Ana, for respondents.

Walter J. Hartzell, of Redlands, for W. J. Bill, etc.

LANGDON, J. Appeal by plaintiff from a judgment against it in an action to foreclose a mechanic's lien upon property belonging to defendant J. W. Kennedy. It is alleged that plaintiff delivered to defendant Pile, a building contractor, certain lumber and other building materials to be used in the erection of a dwelling house on real property in Orange county, Cal., which was owned by defendant J. W. Kennedy, and that there remains due thereon the sum of \$1,944.42.

[1] Two defenses were set up in the answer: (1) That the materials were delivered to defendant Pile for general use in his contracting business and not for the construction of Kennedy's house, and that a large part of the materials were used by Pile in other construction work; (2) that the plaintiff was estopped from asserting a lien for said materials, because it had represented to defendants that it would not assert such a

lien, and had also represented to defendants that the purchase price of the materials had been charged to defendant Pile personally, and that plaintiff had requested defendant Kennedy to pay the contractor for the house, upon the assurance that no lien or claim would be asserted against the house, and that Kennedy had relied upon such assertion and promise and had paid the contractor for his work.

Upon both defenses, the trial court found the facts as alleged by defendants. An attack is made by appellant upon these findings. The evidence is in conflict, but the record contains testimony supporting the findings made. It is unnecessary to set forth the evidence here, but the portion thereof relied upon by respondents is set forth in their brief filed on appeal. If either of these findings is supported by the evidence, the judgment for defendants is a proper one, and we think they are both so supported.

[2] The only other matter to be noticed is the claim of appellant that even though a portion of the materials was used on buildings other than Kennedy's house, the lien should be enforced for the value of the materials used on Kennedy's house. This contention is answered by the finding of the trial court that it is impossible to estimate the amount of material which has been diverted to other uses. Plaintiff therefore could not assert a lien for materials of uncertain value and amount, even though he were not precluded from doing so by reason of having misled the defendants to their damage in asserting that credit was given solely to the contractor and that no attempt would be made to establish or enforce a mechanic's lien.

Judgment affirmed.

We concur: **RICHARDS, J.; SHENK, J.**

202 Cal. 711

MOORE v. WHITWORTH et al. (L. A. 8845.)★

Supreme Court of California. Dec. 20, 1927.

Rehearing Denied Jan. 19, 1928.

1. Municipal corporations §800(1)—Defendants dedicating strip along street and constructing curbing, leaving culvert in original street with abutments injuring motorist held not negligent.

Defendants dedicating strip along public street for public street purposes and constructing concrete curbing and sidewalk on strip dedicated, leaving concrete culvert with abutments in original street without guides, lights, or other warning, held not negligent where motorist traveling in original street, struck abutment of culvert when turning out to pass automobile.

2. Municipal corporations §806(4)—Motorist traveling at night striking abutment of culvert left in original street when street was widened held guilty of contributory negligence.

Where defendants dedicated strip along street for street purposes and constructed curb-

ing and sidewalk on same, but concrete culvert with abutments in original street was left there without light or other warning, motorist traveling on original street, striking abutment when turning out to pass car, *held* guilty of contributory negligence.

Department 2.

Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

Action for damages for personal injuries by Owen Moore against Alfred H. Whitworth and others. From a judgment of nonsuit, plaintiff appeals. Affirmed.

Zach Lamar Cobb and Earl A. Littlejohns, both of Los Angeles, for appellant.

Joe Crider, Jr., Clarence Runkle, and Chandler, Wright & Ward, all of Los Angeles (H. W. Kidd, W. O. Schell, and Gerald F. H. Delamer, all of Los Angeles, of counsel), for respondents.

SHENK, J. The defendants were the owners of certain real property abutting on Preuss road, a public thoroughfare along the boundary line between the cities of Los Angeles and Beverly Hills. The defendant owners subdivided the acreage and dedicated for public street purposes a strip of land 10 feet in width along the easterly side of the thoroughfare, which had the effect of widening the same from 60 to 70 feet. On the strip so dedicated, through the medium of the defendant contractor, they constructed a concrete curbing and sidewalk. In the original right of way was a concrete culvert at right angles to the highway with abutments on either side 29 feet apart and about 21 feet long. The plaintiff alleged that the defendants carelessly and negligently left this said culvert in the street with the wooden railings approaching the same projecting into the road at the end of a steep grade and failed and neglected to place any warning of the danger by means of guides, barriers or lights; that they were cognizant of the dangerous condition of this section of the highway. While he was driving his automobile at night on Preuss road, the plaintiff collided with one of these alleged obstructions in the highway and was seriously injured. The accident occurred while the plaintiff was passing another automobile on the central traveled portion of the roadway. His own car struck the end of the railing and was overturned.

[1, 2] The trial court granted a motion for a nonsuit, stating in ruling on the motion "that the defendants had not the slightest thing to do with either putting" the culvert where it was "or leaving it there." While the reasons stated by the court for granting the motion may not have been full justification for the ruling, we think the record itself furnishes sufficient reason for the granting of

the motion. It was not shown that the grading and improvement of the newly dedicated portion of the right of way caused the plaintiff to use the highway or handle his car in any other way than he would have done if the grading and improvement had not taken place. Furthermore, assuming that a reasonable inference of negligence on the part of the defendants might have drawn from the evidence, it is clear from the undisputed evidence that the plaintiff was guilty of contributory negligence as a matter of law. The paved portion of the highway was not disturbed by the defendants and was readily distinguishable from the unpaved portion. As the plaintiff approached the culvert and its abutments and railings he was traveling on the paved surface. His headlights were functioning properly and his view was not obstructed, nor did the lights from the car approaching him obscure his view. He was traveling at a moderate rate of speed, and no reason appears why in the exercise of ordinary care he could not have crossed the culvert without difficulty or injury to himself. Accepting as true the evidence on behalf of the plaintiff and according to the same every favorable inference and presumption, it is apparent that the action of the trial court was justified on the theory that on the evidence presented no negligence was brought home to the defendants as the proximate cause of the injury, and that, in any event, the plaintiff was guilty of contributory negligence as a matter of law.

The judgment is affirmed.

We concur: **RICHARDS, J.; LANGDON, J.**

202 Cal. 650

WARSON v. TALPEY-ARNOLD SYNDICATE et al. (L. A. 8908.)★

Supreme Court of California. Dec. 16, 1927.

Rehearing Denied Jan. 12, 1928.

Specific performance — 31—Preliminary contract for oil acreage could not be specifically enforced, where details to be embodied in supplementary agreement were never agreed on.

Preliminary contract to put down test well for which plaintiff was to be given oil leases and acreage on other structures could not be enforced in suit for specific performance, where it provided only that actual choosing of acreage should finally be made at main office and descriptions thereof be embodied in supplementary agreement, details of which supplementary agreement parties never agreed on.

Department 2.

Appeal from Superior Court, Los Angeles County; Charles Burnell, Judge.

Action by G. L. Warson, trustee, against the Talpey-Arnold Syndicate and others.

From a judgment for defendants, plaintiff appeals. Affirmed.

Chas. S. Wheeler and Chas. S. Wheeler, Jr., both of San Francisco (Henry F. May, of San Francisco, of counsel), for appellant.

R. L. Alderman and E. S. Williams, both of Los Angeles, and Nolan, Rohe & Freston, of Los Angeles, for respondents.

LANGDON, J. Appeal by plaintiff from a judgment against him in an action in which he sought specific performance of a contract with reference to oil and gas leases upon land in Canada, with a prayer for incidental and alternative relief.

The plaintiff acted as the trustee or agent of a syndicate known as the Underwriters of the Consolidated Petroleum Company in making the contract involved herein, and sues in such capacity. The defendant syndicate was a general partnership, composed of the other named defendants, organized and existing for the purpose of acquiring and operating oil and gas lands in the United States and Canada. The contract involved in this case, which was attached to the complaint, provided that the plaintiff should drill a test well on certain property leased to defendants, known as "No. 2 Structure," on Pakowki Lake, and in consideration of such work should be given "leases or acreage on some or all of the various other structures, Nos. 1 to 16," which are numbered and named in the contract. Plaintiff was to receive leases covering 5,200 acres on the said Pakowki Lake structure and an additional 10,000 acres of Canadian government oil and gas leases, distributed among the other structures named. It was provided, further, "that the actual choosing and designation of said acreage shall finally be made at the office of said first party (defendant herein) in Calgary, Alta., and such descriptions embodied in a supplementary agreement." Other provisions, of no materiality here, are then embodied in the contract, after which the following appears:

"It is understood that this is a preliminary contract, being exact only as to the spirit of the undertaking of both parties, and final details shall be embodied in said supplementary agreement herein referred to and to be made at the time of the determination of specific leases."

No supplementary agreement is set forth in the pleading of plaintiff, although it is alleged by him that he and the agent for the defendant syndicate thereafter "did select and designate the lands upon which leases were to be assigned, pursuant to the provisions of said contract, which selection said Talpey agreed were fair and equitable to both parties; and plaintiff did then and there promptly notify the said syndicate, in writing, through the said J. R. Talpey, of such selections and requested him and said syndi-

cate to deposit in escrow in some bank in said Calgary the leases covering the lands so selected."

It appears from the complaint that the defendant failed and refused to place the leases covering the lands so selected, or any of them, in escrow, claiming and alleging that the greater part of said leases had been disposed of by the syndicate to other parties, and promising to try to secure them from such other parties. The plaintiff alleged that he was able, ready, and willing to complete the drilling to be done by him.

It is alleged that the defendant made efforts to recover the leases, and, later, notified plaintiff that they were unable to recover some of them, and confirmed the other selections made by plaintiff and suggested that new selections be made for the remaining acreage and that the drilling be done upon land other than that originally selected for that purpose. To this suggestion, plaintiff alleges, he agreed. Plaintiff alleges that he "offered to agree upon other tracts in place of the drilling tract of 5,200 acres and upon structures in which leases had already been chosen and agreed upon and suggested and offered and attempted to agree upon such tracts to make up the complete acreage in the various structures to which plaintiff for himself and his associates was and is entitled; but that said syndicate and its members have refused and still refuse to come to any agreement as to such acreage or to carry out the terms of said contract or agreement, or any part thereof, and have so notified plaintiff."

Among other prayers for relief, plaintiff asks that defendants "be required to come to some agreement in the matter of the selection of the parts of the 5,200 acres which it and they claimed they were unable to furnish" on certain designated structures, and "to that end, either to agree to tracts in lieu thereof suggested by plaintiff, or to suggest tracts, on their behalf for his consideration, pursuant to the suggestion and request made by them," etc. Plaintiff also offers to waive the further selection of acreage as part of his consideration under the contract and offers to perform, upon consideration of the transfer of the leases to the tracts which were designated by him, and which he alleges were accepted by the defendant.

The complaint was attacked by general demurrers by the several defendants, which demurrers were sustained, and, plaintiff having failed to amend his complaint, judgment was entered in favor of defendants.

The contract appears to be, and it expressly recites that it is, a preliminary agreement, embodying only the spirit of a contemplated supplementary contract to be entered into by the parties, and it is perfectly clear, from the facts alleged in the complaint, that the minds of the parties never met upon the details of such supplementary agreement.

No question arises as to the power of the court to give either equitable relief by specific performance or legal relief by damages for breach of contract, for the contract pleaded, upon its face, gives no right of action upon any theory, without a definite supplementary agreement such as was contemplated by the parties. The instrument pleaded shows on its face that it was not intended to form the basis of contract rights, and it expressly recites this fact.

We think the demurrers were properly sustained. The judgment appealed from is affirmed.

We concur: RICHARDS, J.; SHENK, J.

202 Cal. 698

NAGEL v. DORRINGTON et al. (L. A. 8902.)

Supreme Court of California. Dec. 19, 1927.

1. Nuisance $\S$ 3(11)—Gasoline filling station and garage is not nuisance per se.

A gasoline filling station and garage is not a nuisance per se.

2. Nuisance $\S$ 3(11)—Unless operation of gasoline station and garage is nuisance, representative of public or individual specially affected cannot sue for its suppression.

Since a gasoline service station and garage is not a nuisance per se, unless it is operated in some extraordinary manner so as to be a nuisance, it cannot be suppressed as public nuisance at suit of representative of public generally or of individual specially affected.

3. Municipal corporations $\S$ 692—Obstruction of street is "nuisance."

An obstruction of a public street is a "nuisance."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Nuisance.]

4. Municipal corporations $\S$ 697(4)—Complaint to enjoin erection of gasoline service station and garage at street intersection was properly dismissed, where it showed no street obstruction.

Complaint, in action to enjoin erection and operation of a gasoline service station and garage on land owned by city at intersection of public streets, was properly dismissed, where it did not show obstruction of streets, but, on contrary, showed streets surrounding plot of ground were open and accessible.

Department 2.

Appeal from Superior Court, Los Angeles County; Frank R. Willis, Judge.

Action by Peter Nagel against Clinton E. Dorrington and another. From a judgment for defendants, plaintiff appeals. Affirmed.

Kenneth K. Scott, T. L. Foley, and Chas. Mitschrich, all of Los Angeles, for appellant.

Horace S. Wilson and Constan Jensen, both of Los Angeles, for respondents.

LANGDON, J. Appeal by plaintiff from a judgment against him in an action in which he sought to enjoin the defendant Dorrington from erecting and operating a "gasoline service station and garage" upon a triangular plot of ground "at the center of the intersection of Irena, Jaspar, and Opal streets in the city of Redondo Beach, Los Angeles county, Cal."

Plaintiff alleged that he is the owner of certain lots and real property which "run from Opal street to Jaspar street, at the intersection of said streets with Irena street and front on said Irena street."

It is alleged, also, that plaintiff's lots are residence lots, and that the view from them will be impaired by the filling station, and that the free access thereto will be cut off; that the filling station will attract automobiles which will create noise and annoyance to plaintiff, etc. The plaintiff alleges that this triangular strip was parked by the city, and has been maintained by said city as a park from and after the time the tract of land designated as the townsite of Redondo Beach was platted into lots, streets, and parks and alleys in a map duly filed by the owner of said tract of land and recorded, together with a certificate of dedication, setting apart for the use of the public all the streets and parks and parkways as shown and delineated upon said map; that the city accepted Opal, Jaspar, and Irena streets and its intersections as delineated upon said map; that the city has caused a lease to be made to defendant Dorrington of said triangular strip of ground for use as a filling station, and Dorrington is proceeding to put the property to such use. It is alleged that the said lease was an ultra vires act on the part of the city, and is illegal and void, and that Dorrington is a trespasser.

The city was never served with a copy of the complaint, and the action proceeded against defendant Dorrington alone. He filed a general and special demurrer, attacking the complaint in over 35 different particulars. Amendments to the complaint were made from time to time, and finally, after the demurrer to the fifth amended complaint had been sustained, plaintiff declined to amend further, and judgment went against him.

[1, 2] Plaintiff's position is that the filling station is a public nuisance, and that he, as a member of the public, is specially injured, entitling him to sue. The first position is not sustained by any authority and it is apparent that a "gasoline filling station and garage" is not a nuisance per se. It was not in operation at the time the complaint was filed, and, unless it is operated in some extraordinary manner so as to be a nuisance because of such operation, this court cannot say that it is a nuisance requiring suppression at the suit of the representative of the public gen-

erally or at the suit of an individual specially affected.

[3, 4] The questions concerning the legality of the lease to defendant Dorrington are not involved in this action to enjoin Dorrington from proceeding with his building. Plaintiff claims no title to the strip of ground occupied by Dorrington, and has no rights, unless the erection of this structure is a nuisance. It is settled that an obstruction of a public street is a nuisance, and the authorities cited by plaintiff and appellant all deal with situations where a public street was obstructed, but the complaint herein does not show the obstruction of a public street, but, on the contrary, shows that the streets completely surrounding this plot of ground are open and accessible.

It is unnecessary to go into all the questions raised by the demurrer. Upon the merits, plaintiff has not stated a cause of action and the demurrer was properly sustained.

The judgment is affirmed.

We concur: RICHARDS, J.; SHENK, J.

202 Cal. 681

HYNES v. JACQUELIN et al. (CALIFORNIA TRUST CO., Intervener). (L. A. 8927.)

Supreme Court of California. Dec. 17, 1927.

1. Deeds ⇨207—Evidence held to prove deed, under which widower claimed fee of property willed to him by wife for life, to be a forgery (Civ. Code, §§ 1195, 1196).

Deed under which relict husband claimed fee ownership of property willed to him for life only by his wife, and which he claimed to have found, after unsuccessful effort to probate alleged later wills of wife giving him fee estate, and to establish execution by subscribing witness, under Civ. Code, §§ 1195, 1196, and whose signature as transcribed thereon witness denied, held, under remaining evidence, to be a forgery.

2. New trial ⇨99—Refusal of new trial for newly discovered evidence, cumulative in effect and within defendant's knowledge before trial, held not abuse of discretion.

Refusal of new trial for alleged newly discovered evidence, which was cumulative in effect merely and within defendant's knowledge months before trial, and which, if accepted as true, would not change result, was not an abuse of discretion.

3. Appeal and error ⇨981—Trial court's ruling on motion for new trial for newly discovered evidence will not be disturbed, unless discretion is abused.

Trial courts have broad discretion in ruling on motions for new trial for alleged newly discovered evidence, and their ruling thereon will not be disturbed, unless discretion is abused.

Department 1.

Appeal from Superior Court, Los Angeles County; John L. Fleming, Judge.

Action by Wilma J. Hynes against Sydney S. Jacquelin and another, in which the California Trust Company, as administrator, intervened. From a judgment for plaintiff, defendant Jacquelin appeals. Affirmed.

James McLachlan and Paul Barksdale D'Orr, both of Los Angeles, for appellant.

Asa V. Call and J. Wiseman Macdonald, both of Los Angeles, for respondents.

SEAWELL, J. This appeal was taken from a judgment decreeing a deed purporting to convey valuable property, wherein appellant was the grantee and his wife, Jean Way Jacquelin, since deceased, was the grantor, to be a forged instrument, for an accounting of rents, issues, and profits, and quieting title to said property described in said forged instrument.

[1] Decedent, Jean Way Jacquelin, a resident of the city of Los Angeles, died in the city of Paris, France, on August 30, 1920. By her last will and testament, executed February 16, 1918, she disposed of an estate of considerable value, consisting of real and personal property, situate in this state and in the state of Illinois. Appellant was the husband of said decedent, and respondent Wilma J. Hynes was an adopted daughter of decedent. Said will was admitted to probate in the superior court of the county of Los Angeles on October 20, 1920, and by its provisions the property which is the subject of this proceeding, known as the home property of decedent, and located at 1019 Beacon street, and which comprised the bulk of said estate and was estimated to exceed \$50,000 in value and yielded \$5,000 per annum in rentals, was devised to said Sydney S. Jacquelin, appellant, for and during the term of his natural life, with remainder to said Wilma J. Hynes, respondent. Numerous other bequests and legacies were made by the testatrix, which are not material to any issue involved in the action. By a codicil to said will, executed February 7, 1919, more than four months after the signing and delivery of the deed found by the court to be a forged instrument, the testatrix referred to the specific devise and bequest made to her adopted daughter, and ratified and confirmed her will, which devised the fee of the property described in said forged deed to respondent, her daughter. All the rest, residue, and remainder of her said estate, including her real estate situate in the state of Illinois, was devised and bequeathed to her executor and trustee, with full power to sell, transfer, and convert the same into money as he might be advised, and with instructions to distribute the net proceeds to those certain persons named by said testatrix in her will. Her brother-in-law, Robert A. Burton, of Chicago, Ill., was appointed by her as executor and trustee of her said will and estate, with the provision that, in case of his death, the

Chicago Title & Trust Company, a corporation organized and existing under and by virtue of the laws of the state of Illinois, should succeed to said trust. Robert A. Burton died pending the administration of his trust, and said corporation was, by an order subsequently made by the superior court of the county of Los Angeles, appointed to succeed as executor and trustee of said trust. Subsequent to the death of said Robert A. Burton, the California Trust Company was appointed special administrator of the estate of said decedent, with general powers to prosecute and defend actions necessary for the preservation and protection of said estate. Said corporation, therefore, intervened, joining forces with respondent Wilma J. Hynes in the prosecution of this action to obtain a decree invalidating and canceling of record said deed, purporting to have been executed by said decedent and conveying to appellant said Beacon street property, for an accounting for the rents, issues, and profits thereof, and for other relief.

Appellant is a licensed physician and claimed to have given some attention to the study of the law. Decedent was the widow of the late Judge William J. Hynes. Respondent Wilma J. Hynes was the adopted daughter of Judge and Mrs. Hynes. Judge Hynes died in 1915, leaving to his wife all the property of which she died seized. During the year following the demise of Judge Hynes, his widow, who was then 69 or 70 years of age, and appellant, who was then 43 years of age, intermarried. The family, as then constituted, continued to reside at the family residence, the title of which constitutes the subject-matter of this action, until June, 1920, when decedent accompanied her husband on a trip to Paris, France, where she died approximately 2 months thereafter. It was the persistent effort of appellant to defeat the provisions of the will dated February 16, 1918, whereby he was devised a life estate in the said Beacon street property, with remainder over to decedent's adopted daughter, Wilma J. Hynes. Soon after said will was admitted to probate, he filed a petition to revoke said will, and offered for probate a purported unattested will, by the terms of which he was devised the Beacon street property in fee simple. In this proceeding he listed the Beacon street property, to which he lays claim by virtue of the deed which he sought to establish by this latest proceeding, as property of the decedent. His petition in said probate matter was in all respects denied. On December 1, 1920, appellant filed and offered for probate another alleged will, which purported to have been executed by decedent at New York City, while she was sojourning there en route to Paris. This purported will bore the formalities of attestation, but, upon being put to the test, it was found by the court to be a forged instrument.

By his petition to probate said will appel-

lant again listed said Beacon street property as property belonging to said estate. Defeated in his attempts to establish as the will of decedent any of said offered papers which he claimed to be testamentary in character, appellant petitioned the probate court to set aside to him as a homestead said Beacon street property. His petition was denied. The several attempts made by appellant to defeat the provisions of said will devising said property to Wilma J. Hynes, and to acquire it for himself by the methods above pointed out, are absolutely inconsistent with a well-grounded conviction or belief on his part that he held title absolute to said property by any deed of conveyance executed by decedent and delivered to him. The claim of title under said deed is the latest effort of appellant to establish in himself absolute ownership in said property. His story, briefly told, is that on the 1st day of October, 1918, his wife handed him the deed and said: "Here is a little present for you." She suggested that he have it typewritten. In response to her suggestion, he put it into typewritten form, and, at the request of decedent, he called Miss Avery, who had been decedent's secretary for some time past, to witness decedent's signature. Decedent sat down and very slowly and deliberately signed the deed, and Miss Avery signed as a witness. Three or four weeks thereafter appellant and his wife went to the office of George H. Seward, a notary public, and had him attach his certificate of acknowledgment. Appellant then placed the deed in a desk with his private papers. In May, 1920, appellant became aware that the deed was lost. It is the testimony of appellant that he and decedent searched frantically for two or three weeks for the deed, but were unable to find it. On August 4, 1921, something like a year and three months thereafter, he informed Miss Avery of the loss, and she suggested to him that it might be in a little lacquered Japanese box. The box was discovered by him in the attic or storeroom, locked, and the key to it was lost. Appellant took the box to a locksmith, who opened it. Upon discovering the deed as a part of the contents of the box, appellant testified that in his excited state of mind he exclaimed, "Good Heavens; there is the deed that my wife gave me in 1918, which I thought was lost." Upon the discovery of the deed in the manner as related, it was found that it did not contain the notary's certificate, and there was no evidence of an impress of said notary's seal upon the instrument. Appellant was unable to account for the absence of a notarial certificate, except upon the theory that the impress of the seal was made only upon the certificate and it had in some way become detached from the deed.

It then became necessary to establish the execution of the instrument with the aid of the alleged subscribing witness. Sections 1195, 1196, Civ. Code. This appellant set

about to do. A few days thereafter, accompanied by a second notary public, he visited Miss Avery and informed her that he had found the deed in the little box which he had examined upon her suggestion, and he requested her to make oath to the genuineness of her own and decedent's signatures, which, he claimed, she did, and said second notary thereupon attached his certificate of acknowledgment thereto. The notary public corroborated appellant to the extent that Miss Avery identified Mrs. Jacquelin's signature as the grantor and her own signature as a witness to be genuine. When called as a witness, however, she denied that she had identified her name which appeared as a witness to the execution of the deed, or that the subject-matter had ever been brought to her attention. She admitted that the signature in some respects resembled her handwriting, but denied that she ever knowingly affixed her name to a deed whereby Mrs. Jacquelin conveyed any property to appellant. She also testified that the signature purporting to have been subscribed by Mrs. Jacquelin did not resemble her signature, nor was the name affixed to the deed as the grantor therein the name which Mrs. Jacquelin was in the habit of using in signing documents. It was her habit to subscribe herself "Jean Way Jacquelin." The name affixed to the deed was "Jennie M. Jacquelin." Upon the stand the witness absolutely repudiated the genuineness of both signatures to the deed. Her testimony is in sharp contradiction of appellant's claim that she took any part in the procurement of the deed as a witness or otherwise. She also claimed that appellant, in the company of the notary whom he produced to take her acknowledgment, insisted that she identify said signatures as genuine, but she refused to do so. In addition to the very important testimony given by this witness, which tended to establish the fraudulent character of the deed, four or five other witnesses called by the respondents testified that the signature purporting to be the signature of Mrs. Jacquelin was clearly a forgery. Among this number, one was a professional handwriting expert, and four were officials connected with various Los Angeles banking houses. The reasons assigned for their opinions are quite convincing.

The purposes and intentions of decedent, as shown by her expressed wishes and conduct, tend strongly to rebut the claim of appellant that decedent intended that he should become the absolute owner of the residence property, to the exclusion of any right of ownership whatsoever in her adopted daughter. Such a conclusion is not only inconsistent

with the testimony, but with the logic of the situation. It is a fact that the appellant himself admitted that the signature to the deed did not resemble ordinarily Mrs. Jacquelin's signature, and he would be unable to identify it as hers, except for the fact that he was a witness to it. The handwriting expert called by appellant weakened considerably the value of his testimony by stating that Mrs. Jacquelin's signature had the appearance of having been "drawn," rather than written by a free-hand motion. It is true that appellant produced witnesses who testified to matters which, if credited by the court, had a tendency to establish the genuineness of the deed; but this evidence was, in the opinion of the court, overcome by evidence more convincing and satisfactory.

[2, 3] Two affidavits, one by appellant, and the second by Adelaide Day Shorb, were presented on motion for a new trial. It is claimed that these affidavits set forth newly discovered evidence sufficient in probative effect to have compelled the granting of a new trial. The matters therein set out are cumulative in effect merely. Besides this, the alleged newly discovered evidence was, according to the averments of affiants, facts which were within the knowledge of affiants months before the trial of the case. The excuse urged for failure to present Adelaide Day Shorb as a witness at the trial is that the matters which she and appellant had discussed several months prior to the trial had passed out of his mind. Trial courts are granted a broad discretion in passing upon motions for new trial based upon affidavit alleging newly discovered evidence, and their action will not be disturbed, unless a plain abuse of discretion is made to appear. No such showing is made here. A conclusive answer to appellant's motion is that the testimony of the absent witness, if accepted as true, would have no weight whatever in overturning the findings of the court that the deed was a forged instrument. As to the genuineness of the signatures which appeared upon the paper which she claims to have seen, she expresses no opinion, and, if she did, it would simply be cumulative evidence addressed to a disputed fact.

The instant case is one of evidence solely, and the trial court was the judge of the credibility of the witnesses, and of the weight, effect, and sufficiency of the evidence adduced. It being sufficient to sustain the judgment, this court would not be warranted in disturbing it.

Judgment affirmed.

We concur: PRESTON, J.; CURTIS, J.

202 Cal. 766

OMNES et al. v. CRAWFORD. (S. F. 11659.)

Supreme Court of California. Dec. 28, 1927.

Waters and water courses **§87**—Judgment enjoining interference with flow of sufficient water down creek for plaintiffs' domestic use held not fatally uncertain in not specifying amount.

Judgment enjoining maintenance of any dam or artificial obstruction which would interfere with flow of sufficient water down creek to lands of plaintiffs for their household and domestic use held not fatally uncertain because failing to adjudicate amount of water to which each party was entitled, where there was no allegation or proof on subject nor any request or suggestion from either litigant that court determine this matter, especially since gravamen of action was to determine plaintiffs' riparian status and defendant's right to divert all water from stream.

In Bank.

Appeal from Superior Court, Santa Cruz County; Benjamin K. Knight, Judge.

Action by Santos Omnes and others against A. B. Crawford. From a judgment in favor of plaintiffs, defendant appeals. Affirmed.

Charles B. Younger, of Santa Cruz, for appellant.

W. M. Gardner, of Santa Cruz, for respondents.

SHENK, J. This is an appeal from a judgment enjoining the defendant from maintaining a dam or artificial obstruction in the channel of Logan creek, sometimes called Rodgers creek, in Santa Cruz county. It was alleged by the plaintiffs and found on sufficient evidence that the plaintiffs Santos Omnes and Elsie Omnes, his wife, are the owners of lands riparian to said stream and have been such owners and have resided on said land since 1906; that said plaintiffs have no other water for domestic purposes than the waters of said stream, and that such waters are necessary for their domestic and household purposes; that the defendant is the owner of lands bordering on said stream above the lands of the plaintiffs; that within 90 days prior to the commencement of this action the defendant constructed and now maintains a dam in the bed of and across said stream at a point above the lands of the plaintiffs thereby completely shutting off the flow of the waters of said stream and preventing the same from flowing in its natural channel down to the lands of the plaintiffs, thus wrongfully and entirely depriving the plaintiffs of the use of said waters to their irreparable damage and injury. The court further found that the defendant "is diverting much of the impounded waters of said stream to lands not riparian to said stream, and that if such waters were not so diverted, there would be sufficient water pass over the lands of the

plaintiffs to supply plaintiffs' demands." The judgment ordered that the defendant be "perpetually enjoined and restrained from maintaining, erecting, having, or keeping, in the channel of the stream, * * * at any point above the lands of the plaintiffs, any dam or artificial obstruction of any kind which will prevent, or otherwise interfere with the flow of sufficient water down said stream to the lands of plaintiffs for their household and domestic use."

It is the contention of the defendant: (1) That plaintiffs did not establish their right to the use of any of the waters of the stream; and (2) that the judgment is fatally uncertain in that it does not adjudicate the amount of water to which the parties are, or either of them is, entitled.

As to the first point the evidence was conflicting as to whether the lands of the plaintiffs are riparian to the stream, and while it was shown that the said lands bordered on the stream only to a small extent, the extent to which they so bordered was sufficient upon which to establish riparian proprietorship in the plaintiffs and to support the finding to that effect.

In support of the second point it is urged that as the court found and determined only that the plaintiffs are entitled to the flow of sufficient water down the stream for their household and domestic uses and did not find or determine the specific amount to which the parties were or either of them was entitled, the judgment is fatally uncertain, can serve no purpose other than to furnish the basis of further litigation and therefore must be reversed on the authority of *Steinberger v. Meyer*, 130 Cal. 156, 62 P. 483; *Rogers v. Overacker*, 4 Cal. App. 333, 87 P. 1107; and *Powers v. Perry*, 12 Cal. App. 77, 106 P. 595. The foregoing cases undoubtedly support the contention of the defendant that it is desirable and in proper cases essential, in order to constitute an estoppel and prevent further litigation, that the judgment define the rights of the parties with such certainty as to enable them to understand what they are to do or not to do under its terms, and said cases are illustrative of those instances wherein such certainty will be required. But it is not in every controversy involving rights to the use of water that the adjudication of the particular amount of water to which the parties are entitled is essential to the validity of the judgment. The circumstances of each case must be considered in order to determine the question. In the present case the plaintiffs by the allegations of their complaint and their proof endeavored to and did establish their status as riparian owners and their right to enjoin the diversion away from the stream of all of its water by an upper riparian owner. The amount of water to which the plaintiffs claimed to be entitled

was neither alleged nor proved by the plaintiffs. In his answer the defendant denied that the lands of the plaintiffs were riparian to the stream and sought unsuccessfully to prove that they were not riparian. He denied all right in the plaintiffs to the use of any of the waters of the stream. He asked for no affirmative relief, made no mention in his pleadings or proofs as to the amount of water to which he claimed to be entitled as against the plaintiffs, and prayed merely that plaintiffs take nothing, and for costs. It may be assumed that under the prayer of the plaintiffs for general relief the court would have been justified in receiving proof and ascertaining therefrom the specific amount of water to which each party was entitled and render judgment accordingly. Nevertheless we think the court was not bound to do so in the absence of any allegation or proof on the subject and in the absence of any request or suggestion from either litigant that such course be taken by the court. This would seem especially to be true when the gravamen of the action was to determine first the status of riparian proprietors on the part of the plaintiffs, and, secondly, the right to maintain the dam and divert all the water from the stream on the part of the defendant. This case therefore properly falls within the doctrine announced in such cases as *Strong v. Baldwin*, 154 Cal. 150, 163, 97 P. 178, 129 Am. St. Rep. 149, and *Bigelow v. Merz*, 57 Cal. App. 613, 208 P. 128, wherein it was held that if a controversy should arise as to the specific amount of water to which the parties are entitled in the exercise of the rights adjudicated by the judgment, such controversy might well abide the result of a future determination. In the present case it is fair to assume that since the status of riparian owner is established in the plaintiffs herein and the wrongfulness of the maintenance of the dam by the defendant for the diversion of waters to lands not riparian to the stream is also determined, a compliance with the judgment by the defendant will obviate further litigation.

The judgment is affirmed.

We concur: WASTE, C. J.; RICHARDS, J.; CURTIS, J.; LANGDON, J.; PRESTON, J.; SEAWELL, J.

202 Cal. 622

ADAMS v. ADAMS et ux. (L. A. 8841.)

Supreme Court of California. Dec. 14, 1927.

1. Landlord and tenant § 18(3)—Evidence as to agreement to put defendants on land for remainder of plaintiff's life held to authorize finding of a tenancy terminable on notice duly given.

In action to quiet title, evidence of defendants that plaintiff offered in writing to put them

on land for remainder of plaintiff's life, and that they accepted offer, and plaintiff was to have one-half crops and devise land to defendants, held to authorize finding of tenancy at will, or from year to year, at rental of one-half crops, and terminable by notice duly given.

2. Wills § 66—Agreement to devise realty held not breached by termination of promisee's tenancy for indefinite term.

No breach of agreement to devise realty is shown by termination of promisee's tenancy at will, or from year to year, where parties are still living, and there is no evidence of owner's attempt to divest himself of property.

Department 2.

Appeal from Superior Court, Riverside County; G. R. Freeman, Judge.

Action by Robert Adams against William R. Adams and wife. From a judgment for plaintiff, defendants appeal. Affirmed.

C. W. Benshoof, of Riverside, for appellants.

Frank L. Miller, of Banning, for respondent.

SHENK, J. In this action to quiet title the plaintiff had judgment, from which the defendants appeal.

The defendants contend that plaintiff offered in writing to put the defendant William R. Adams and his family on the land in question for the remainder of plaintiff's life, that the defendants accepted the offer, and that under this agreement the plaintiff was to have one-half of the crops raised on the land and was to devise the property to the defendants. The defendants urge that the trial court erred in denying their motion for a new trial on the ground that the decision is against law, and that the court failed to find on all the material issues made by the pleadings. The material evidence is contained in letters which passed between the two brothers, the plaintiff and the defendant William R. Adams. The plaintiff was a resident of Beaumont, in this state. The defendant and his wife and family were residents of Glasgow, Scotland. In the correspondence between the two brothers in 1921, the plaintiff made a proposition to his defendant brother that, if the latter would come to California with his family, the plaintiff would place him and his family on a 40-acre fruit ranch near Beaumont and give him one-half of all the crops grown on the ranch; the defendants to have the five-room house rent free and to pay one-half of the expense of producing the crops.

[1, 2] Giving all proper weight to the testimony on behalf of the defendants, the trial court was justified in finding that the tenancy was a tenancy at will, or a tenancy from year to year, at a rental of one-half of the crops produced, which tenancy could be terminated, and was terminated, by notice duly

given. Whatever may be said otherwise as to the alleged agreement to make a will, it is enough to say that there is no evidence in the record of a breach of such an agreement, or of an attempt on the part of plaintiff to divest himself of the property. The parties are still in being, and no interest in the title to the land appears to have been conveyed by any of the correspondence in question. From an examination of the record, we are satisfied that the court found on all the ultimate facts presented by the pleadings essential to a proper determination of the controversy.

The judgment is therefore affirmed.

We concur: RICHARDS, J.; LANGDON, J.

202 Cal. 717

MOJAVE RIVER IRR. DIST. v. SUPERIOR COURT OF STATE OF CALIFORNIA, in and for SAN BERNARDINO COUNTY et al. (L. A. 9943.)★

Supreme Court of California. Dec. 21, 1927.

Rehearing Denied Jan. 19, 1928.

1. Waters and water courses ⇨133—Powers of water commission as to permits to appropriate water are "administrative," not "judicial" (Water Commission Act 1913, as amended).

Powers of state water commission as to issuance or denial of permits for appropriation of water, granted by Water Commission Act 1913 (St. 1913, p. 1012), as amended, are wholly "administrative" and not "judicial."

[Ed. Note.—For other definitions, see Words and Phrases, First Series, Administrative; First and Second Series, Judicial.]

2. Certiorari ⇨24—Courts cannot review acts of water commission by writ of review (Water Commission Act 1913, as amended; Code Civ. Proc. § 1067 et seq.).

Courts have no power to review acts of state water commission or of any of its departments, under Water Commission Act 1913 (St. 1913, p. 1012), as amended, by means of ordinary writ of review which is provided for by Constitution and defined and limited by Code Civ. Proc. § 1067 et seq.

3. Waters and water courses ⇨152(1)—Statutory action to "review" order of water commission to appropriate water is not proceeding by certiorari or appeal, but is original action (Water Commission Act 1913, § 1b, as added by St. 1923, p. 162).

Action in superior court to "review" order of state water commission issuing or denying permit to appropriate water brought under Water Commission Act 1913, § 1b, as added by St. 1923, p. 162, is not a proceeding by writ of certiorari nor by appeal, but is an original proceeding, since function of certiorari is to determine whether judicial tribunal has exceeded jurisdiction, and Legislature cannot enlarge function of writ nor invest superior court with jurisdiction over appeals from nonjudicial bodies, under Const. art. 6, § 5.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Review.]

4. Statutes ⇨76(1)—Statute authorizing review of order of water commission issuing or denying permit to appropriate water held invalid as "special law," where general law is applicable (Water Commission Act 1913, § 1b, as added by St. 1923, p. 162; Const. art. 4, § 25).

Water Commission Act 1913, § 1b, as added by St. 1923, p. 162, authorizing any one interested in application for permit to appropriate water or any party protestant before commission to bring action in superior court to review order issuing or denying permit wherein court should review all matters considered by commission and render judgment affirming, reversing, or modifying order, held to violate Const. art. 4, § 25, forbidding special laws regulating practice of courts of justice, in view of subdivision 33, forbidding special laws on any subject where general law can be made applicable.

5. Constitutional law ⇨56—Validity of statute authorizing review of order of water commission cannot be upheld as "special case or proceeding" within superior court's jurisdiction (Water Commission Act 1913, § 1b, as added by St. 1923, p. 162; Const. art. 6, § 5).

Validity of Water Commission Act 1913, § 1b, as added by St. 1923, p. 162, authorizing any one interested in application to state water commission for permit to appropriate water or any party protestant before commission to bring action in superior court to review order granting or denying permit, cannot be upheld as providing for "special case or proceeding" not otherwise provided for, within Const. art. 6, § 5, giving superior court jurisdiction in such cases, since aggrieved party previously had remedy and constitutional provision governs only justiciable matters, in view of article 3, § 1.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Special Proceeding.]

6. Constitutional law ⇨43(2)—Petitioner securing permit to appropriate water under statute held not estopped to deny constitutionality of provision for review of order granting permit (Water Commission Act 1913, § 1b, as added by St. 1923, p. 162).

Petitioner who obtained permit from state water commission to appropriate water under Water Commission Act 1913 (St. 1913, p. 1012), as amended, held not estopped by fact that he applied for and obtained permit to deny constitutionality of section 1b, as added by St. 1923, p. 162, authorizing review by superior court of order granting permit.

In Bank.

Proceeding by the Mojave River Irrigation District against the Superior Court in and for the County of San Bernardino and Hon. Charles L. Allison and another, Judges thereof, for a writ of prohibition to prevent further steps in an action to review an order of the division of water rights of the department of public works, granting a permit to petitioner to appropriate water. Writ granted.

Superseding opinion of District Court of Appeal, 256 P. 469.

Meserve, Mumper, Hughes & Robertson, of Los Angeles (Timon E. Owens, of Los Angeles, of counsel), for petitioner.

Byron Waters and Grant Holcomb, both of San Bernardino, for respondents.

Spencer Burroughs, of Sacramento, T. P. Wittschen, of Oakland, and Hadsell, Sweet & Ingalls, of San Francisco, amici curiæ.

RICHARDS, J. This is an application for a writ of prohibition directed to the respondents herein, the superior court of San Bernardino county and the judges thereof, preventing further action in a proceeding instituted in said court under the provisions of section 1b of the Water Commission Act (Stats. 1923, p. 162), for the purpose of a review of a certain order of the division of water rights, provided for in said act, granting to the Mojave River irrigation district a permit to appropriate water from the Mojave river. The title of said proceeding was "Van Dyke et al., Plaintiffs, v. Department of Public Works, etc., et al., Defendants." The so-called plaintiffs in said proceeding consisted in a large number of persons and corporations or associations claiming prior rights as riparian owners, or appropriators, or adverse claimants to the recipient of said permit, and who were seeking, by said proceeding, to have said court review and reverse or modify the order of said division of water rights granting such permit. The defendants, so-called, in such proceeding were the department of public works, the director of public works, the chief of division of water rights, operative institutions or individuals under said act, and in addition to these the Mojave River irrigation district, the recipient of such permit. The sole authority under which the plaintiffs, so-called in said proceeding in the superior court were acting in instituting, and under which said court was acting in entertaining, the same is expressly pleaded as being derived from the provisions of said section 1b of said act; and the sole question presented to this court for determination in the instant proceeding is that of the constitutionality of said section 1b of said act. There is involved in this question, however, certain preliminary considerations, to which we shall first address ourselves.

[1, 2] The Water Commission Act, so-called, was adopted by the Legislature in the year 1913. Stats. 1913, p. 1012. By the provisions of that act a state water commission was created and invested with the powers and duties prescribed therein. Among the powers with which the state water commission was thus intrusted was the power, conferred by sections 15, 16, and 17 of said act, of granting permits for the appropriation of unappropriated water flowing or existing in the streams, lakes, or other bodies of water within the

state of California, upon proper application for such permits, and which permits when granted should give to the applicants thereof certain priorities as to the use of the water thus permitted to be appropriated upon compliance with the provisions of section 18 of said act relative to the commencement, prosecution, and completion of such construction work as was required therein in order to render available the use or uses of the waters thus to be appropriated. The nature and scope of the powers thus conferred upon the said water commission came under review before this court in the case of Tulare Water Co. v. State Water Commission, 187 Cal. 533, 202 P. 874, wherein this court was called upon to consider the question as to whether the said water commission, in the attempted exercise of the aforesaid powers in the granting or refusal of permits for the appropriation of water, was acting in a judicial or administrative capacity. The question was directly presented to the superior court when, upon the denial by the state water commission of an application for a permit to appropriate water from the Kern river for the purpose of irrigating agricultural lands, made to it by the Tulare Water Company, the latter presented to said court two applications for peremptory writs—one for a writ of review and the other for a writ of mandate. When said court denied both writs, appeals were taken upon both applications to the appellate court, from the decision of which, in both matters, the questions presented therein were in due course transferred to this court for determination. In a well-considered opinion, written by Mr. Justice Sloane, it was decided that the powers with which the state water commission was invested under the foregoing provisions of the act in question, and the various amendments thereto made up to that time were purely administrative and not judicial in character. As a result of this conclusion the writ of review was denied and the writ of mandate granted.

In the concurring opinion of Mr. Justice Shaw the fundamental basis of this conclusion was tersely shown to rest upon the provisions of section 1 of article 6 of the state Constitution, whereby the entire judicial power of the state is solely vested in the judicial tribunals designated in said section, and as a result of which it is not within the power of the Legislature to invest any other body with judicial power to establish and declare the right and title to private property. The decision of this court in that case has been consistently followed in the later cases, and particularly in the case of Department of Public Works v. Superior Court, 197 Cal. 215, 239 P. 1076, wherein a writ of prohibition was sought and issued in this court to prevent the superior court of the county of Siskiyou from entertaining a writ of certiorari for the purpose of reviewing certain

proceedings taken by one of the divisions of the department of public works under the provisions of section 12 of said act, the action of this court in the issuance of said writ being expressly based upon its former decision in the cause of *Tulare Water Co. v. State Water Commission*, supra, and upon the concurring opinion of Mr. Justice Shaw in that case.

The most recent expression of this court touching this subject is to be found in the case of *Bank of Italy v. Johnson* (Cal. Sup.) 251 P. 784, wherein the principle declared in the foregoing decisions is fully approved. From these foregoing recent decisions of this court two conclusions may be said to be fully and firmly established. They are, first, that the powers with which the state water commission and the several departments and divisions thereof were invested under the Water Commission Act of 1913, and the later amendment thereto with relation to the issuance of permits or the denial thereof for the appropriation of water, were purely and wholly administrative and were not judicial in their character and exercise; second, that the courts of this state possessed no power to review the said acts of the water commission or any of its departments through the ordinary process or proceeding of a writ of review, as such writ is provided for in the state Constitution and is defined and limited by the provisions of section 1067 et seq. of the Code of Civil Procedure. We do not deem it necessary in this case to enter upon a consideration or attempted differentiation between the foregoing cases and certain other decisions of this court having reference to the issuance of writs of review with respect to a limited class of proceedings of certain other subordinate departments of the state government with relation to the acts of which writs of review have been at times issued. It suffices here to say that as to the state water commission the foregoing decisions have foreclosed further discussion of the two propositions above referred to as decided therein.

[3] The Water Commission Act of 1913 was several times amended by subsequent Legislatures down to the year 1923, when there was added thereto the provision designated as section 1b, with respect to the interpretation and application of which the present controversy has arisen. Stats. 1923, pp. 161, 162. Said section 1b reads as follows:

"Any person, firm, association, or corporation interested in any application for a permit to appropriate water or any party protestant before the state water commission may within thirty days after issuance of a permit or an order refusing to issue a permit and rejecting an application bring an action in the superior court in and for the county wherein the proposed point of diversion or a proposed point of diversion lies. Said action shall be for a review of the order of the state water commission.

Said court shall review all correspondence, maps, data and other records on file with the state water commission which pertain to said application and all evidence taken before said commission and take such additional evidence as it may require or as may be submitted by the parties in interest or the state water commission and shall then render judgment affirming, reversing, or modifying the action of the state water commission. The priority of right of an applicant shall continue until final judgment is rendered."

In determining the scope and effect of the foregoing amendment to the Water Commission Act certain primary conclusions would seem to be inevitable. The first of these relates to the use of the term "review" as defining the nature of the proceeding to be instituted and conducted in the superior court under the terms of said amendment. It would seem to be clear that in the use of said term the framers of said amendment could not have intended that it should have reference to the writ of certiorari or review as the same is provided for in the Constitution and defined in the Code. This for two reasons: First, for the reason that the remedy provided for in said amendment is not that remedy to which in both its ancient and modern uses the writ of certiorari is confined, viz., that of determining whether the jurisdiction of a court or other tribunal exercising judicial functions has been exceeded. The amendment in question contemplates no such action or determination on the part of the superior court in which the proceeding provided for in it is to be begun and conducted, and it cannot therefore be concluded that the framers of this amendment used the term "review" therein as referring to writs of review or proceedings thereunder. The second reason is that the law is well settled that the function of a writ of certiorari or review, as such writ existed prior to and is provided for in the state Constitution, cannot be extended by the Legislature so as to embrace the consideration and review of the proceedings of nonjudicial bodies. The early and later decisions of this court touching this subject refer to both writs of prohibition and review and to the inability of the Legislature to enlarge or restrict the functions of either of these writs. *Maurer v. Mitchell*, 53 Cal. 289; *Camron v. Kenfield*, 57 Cal. 550; *Farmers' Union v. Thresher*, 62 Cal. 407; *Pac. Tel. Co. v. Eshleman*, 166 Cal. 640, 694, 137 P. 1119, 50 L. R. A. (N. S.) 652, Ann. Cas. 1915C, 822; *Miller & Lux v. Board of Supervisors*, 139 Cal. 260, 208 P. 304. It follows that for both of the foregoing reasons the proceeding provided for in said amendment cannot be considered as in the nature of "certiorari" or "review." It would seem to be equally well settled that said proceeding cannot be treated as in the nature of an appeal to the superior court from a ruling of the division of water rights in granting or denying permits, al-

though it would appear from some of the provisions of said amendment that its framers contemplated that in some of its aspects it should resemble an appeal. It is firmly established, however, that the Legislature has no power to invest the superior court with jurisdiction over appeals from nonjudicial bodies or from other tribunals than those embraced in the provisions of section 5 of article 6 of the Constitution, which limits the appellate jurisdiction of superior courts to "such cases arising in inferior courts in their respective counties as may be prescribed by law." In the cases of *Chinn v. Superior Court*, 156 Cal. 480, 105 P. 580, and of *Inglin v. Hoppin*, 156 Cal. 483, 491, 105 P. 582, this question was fully considered and determined, this court in each of these cases holding that an attempt on the part of the Legislature to provide for an appeal to the superior court from an order of the board of supervisors, in the one case establishing an irrigation district and in the other creating a reclamation district, was unconstitutional and void.

[4] We have thus by a process of elimination reached the conclusion that the proceeding in the superior court provided for in section 1b of the Water Commission Act is neither a proceeding by way of certiorari or appeal. It follows necessarily that the proceeding provided for in said amendment must be an original action or proceeding to be instituted and conducted in the superior court following the action of the division of water rights, created under the Water Commission Act, granting or denying an application for a permit to appropriate water. This being so, we look to the content of said amendment to ascertain the nature of such action or proceeding, and we there find that the procedure of the superior court in such action or proceeding is strictly limited and defined to be, first, that "said court shall review all correspondence, maps, data, and other records on file with the state water commission which pertain to said application and all evidence taken before said commission, and take such additional evidence as it may require or as may be submitted by the parties in interest or the state water commission;" and that having done so, such superior court "shall then render judgment affirming, reversing, or modifying the action of the state water commission." It will be seen at a glance that the practice and procedure to be pursued by the superior court in the particular action or proceeding provided for in said amendment differs from the ordinary practice and procedure of superior courts in original actions or proceedings of which such courts have jurisdiction in at least two essential respects. The first of these relates to the evidence to be presented and considered by such courts in such action or proceeding, and which, according to the provisions of said amendment,

is to obviously consist, in a large part at least, of matters which would ordinarily not be admissible as evidence upon the trial of an ordinary action or proceeding instituted in such courts. In providing that said courts shall "review" all such matters as may have been considered by the division of water rights in its determination to grant or deny the application for the permit in question, the amendment assuredly contemplates that all of such matters shall be received in evidence before such court in such action or proceeding, whether receivable in evidence in an ordinary action or proceeding or not. In the foregoing respect it would seem to be obvious that said amendment provides for the particular action or proceeding which it purports to create a practice and procedure radically at variance with that which the general laws provide for the practice and procedure of the superior courts in actions or proceedings of which such courts are given jurisdiction, and that in so doing said amendment runs counter to the provisions of section 25, art. 4, of the state Constitution, which inhibits the Legislature from passing "local or special laws" regulating the practice of courts of justice. The other essential particular in which the practice and procedure provided for in the action or proceeding which it directs the superior court to entertain has reference to the judgment to be rendered by it in such action or proceeding; and in which by the terms of such amendment said court is directed to "render judgment affirming, reversing, or modifying the action of the state water commission." It would seem to be apparent that by such a direction to the superior court to confine its action and determination to the rendition of the particular and limited form of judgment designated by the foregoing provisions of said amendment the Legislature has therein undertaken to provide a different form and content of judgment than that which by the general laws may be rendered and entered in such courts, and in that respect also said Legislature runs counter to the foregoing inhibition of the state Constitution.

The respondents herein, while apparently conceding that the amendment in question does undertake to provide a practice and procedure for the superior courts in the particular action or proceeding to which it relates differing in the foregoing essentials from the general practice and procedure of such courts, attempt to avoid the inhibition of the foregoing provision of the state Constitution through one or both of two contentions. It is first contended that the amendment in question is not a "special" law, and hence is not within the inhibition of the foregoing constitutional provision. It is argued in support of this contention that the amendment in question, since it has application to all coming within the classification of those who are

seeking permits for the appropriation of water and that it also has application to the proceedings before the division of water rights, a subordinate division of the department of public works, which in its delegated power to grant or refuse such permits, is in a class by itself; and that thus the amendment in question, since it applies as to its practice and procedure to all those who come within one or both of these classifications, is a general law. We are unable to perceive that this argument supplies an adequate answer to the aforesaid constitutional objection, since there would appear to be no reason why persons seeking the permit or privilege to appropriate water from this particular subordinate branch of the state government should be accorded this special form of access to courts of justice as distinguished from all other persons who seek permits or privileges of many sorts from one or other of the numerous boards or officials similarly functioning as executive agencies of the state and who are similarly empowered by statute to grant or refuse such permits. Neither does there appear to be any sufficient reason why the purely administrative action of the division of water rights in granting or refusing permits to appropriate water should have accorded to it and its orders, or to the persons or associations affected thereby, the special right of a judicial method of review differing essentially from that available in courts of justice to all other similar functions and empowered to issue similar orders in similar applications for similar privileges or permits. In a word, there appears to be no basis for any such classification of either the persons seeking, or of this particular subordinate branch of the state government granting or denying, permits to appropriate water which would suffice to justify the Legislature in providing a special practice and procedure in courts of justice applicable only to those seeking, granting, or denying such permits, but denied, or at least not accorded, to all other persons or institutions having access to such courts. The inhibition of the Constitution against special enactments regulating the practice and procedure in courts of justice is further enforced by the subsequent clause in the same section of the Constitution, which forbids the Legislature to enact local or special laws upon any subject, "where a general law can be made applicable." Const. subd. 33, § 25, art. 4.

We have been pointed to no reason why a general law could not be made applicable to the situation presented by the amendment under review, nor, in fact, why the general laws of the state already in existence are not entirely adequate to deal with the controversies of those who are claiming or seeking to exercise conflicting rights in or to the use of waters of the state. It is, however, insisted by the respondents herein that

this court has heretofore given its sanction in certain leading cases to statutes which have assumed to provide for a special practice and procedure in certain classes of newly created actions or proceedings in courts of justice; and in making this contention the respondents strongly rely upon the decision of this court in the case of Title, etc., Restoration Co. v. Kerrigan, 150 Cal. 289, 88 P. 356, 8 L. R. A. (N. S.) 682, 119 Am. St. Rep. 199. It is true that in that case it was conceded that the statute commonly known as the "McEnerney Act" (St. 1906, Extra Sess. p. 78) did provide for a special practice and procedure in the class of cases covered, thereby differing in certain essential respects from those provided for by general laws in other judicial proceedings. This court, however, in its elaborate opinion sustaining said act clearly pointed out that in order so to do it was necessary for it to find that the persons and classes of cases to which said law was to be given application were so far to be distinguished from all other persons or cases by the existence of such substantial, natural or intrinsic or constitutional distinctions as would reasonably indicate the necessity or propriety of special legislation restricted to such classification. The distinction between that case and the case at bar it too obvious to require further elucidation, and this may also be said of the several other cases which the respondents have cited to the same effect.

[5] The respondents, however, further contend that the validity of the procedure embraced in said amendment can be upheld under the provisions of section 5 of article 6 of the Constitution, which contains the following provision:

"The superior courts shall have original jurisdiction * * * of all such special cases and proceedings as are not otherwise provided for."

The foregoing provision of our present Constitution was brought into it in substantially identical language from our former Constitution as amended in 1862 (article 6, § 8), and was, in fact and substance, a part of our statutory law even prior to that time. The clause giving county courts originally and superior courts latterly original jurisdiction "in all such special cases and proceedings as are not otherwise provided for" was given early and not infrequent interpretation by the courts. The earlier of these cases were considered and their conclusions restated in the case of Bixler's Appeal, 59 Cal. 550, 555, and the phrase "special cases and proceedings" was therein defined as referring to such "new cases, the creation of statutes, and the proceedings under which are unknown to the general framework of courts of law and equity"—as not including any class of cases for which courts of general jurisdiction had always supplied a remedy." It would thus seem that this provision of our past and pres-

ent Constitutions can be of no avail to the respondents in the instant matter, for the reason, if for none other, that our law has always supplied a remedy for those who were, or were in danger of being, wronged by the action or nonaction of administrative bodies. This is made clear by our decision in the cases of *Tulare Water Co. v. State Water Commission* and *Department of Public Works v. Superior Court*, supra. An even better reason, however, exists why the foregoing provision of the Constitution can have no application to such a proceeding as that which was pending before the division of water rights, and which was sought to be transferred to the superior court by virtue of the provisions of the amendment to the *Water Commission Act* under review. That reason is that said matter, when instituted before the division of water rights, was a purely administrative as distinguished from a justiciable matter, of which, under the Constitution as well as under our decisions above cited, only the executive branch of our state government could have, and of which the judicial branch thereof could not have, and could not be given by the Legislature, original jurisdiction. Section 1 of article 3 of the Constitution declares:

"The powers of the government of the state of California shall be divided into three separate departments—the legislative, executive, and judicial; and no person charged with the exercise of powers properly belonging to one of these departments shall exercise any functions appertaining to either of the other, except as in this Constitution expressly directed or permitted."

It follows necessarily that the clause in section 5 of article 6 of the Constitution referring to "special cases and proceedings" could only have reference to such matters as were justiciable and could not be given application to any matters which were essentially administrative in character, and over which, therefore, the courts could neither assume nor be given by the Legislature jurisdiction. Such is the matter over which section 1b of the said *Water Commission Act* vainly attempts to confer jurisdiction upon the superior court and the judges thereof, who are respondents herein.

[6] Finally, the respondents herein contend that the petitioner herein is estopped to seek the aid of this court in this proceeding for the reason that, having invoked the aid and benefit of those other provisions of the *Water Commission Act* which confer upon the

division of water rights the power of granting permits for the appropriation of water, it cannot here be heard to claim that another and entirely severable provision of said act, later incorporated therein and purporting to invest the superior court with jurisdiction to "review the action of said administrative board is void as violative of the Constitution."

We do not think that the principle of estoppel can be so far applied as to prevent a party who may be entitled to the benefits to be obtained by application to an administrative board or officer from asserting in a court of justice that other and severable portions of the law under which he makes such application and receives such benefit, and which impair his full enjoyment thereof, are void because violative of the Constitution; nor do we think the cases cited by the respondents sustain so extreme an application of the principle of estoppel. We find no merit, therefore, in this final contention.

The foregoing considerations render unnecessary a review of any others matters presented by either of the parties or by *amicus curiae* in this proceeding.

Let the writ of prohibition issue as prayed for.

We concur: WASTE, C. J.; PRESTON, J.; CURTIS, J.; SHENK, J.; SEAWELL, J.; LANGDON, J.

202 Cal. 793

CALIFORNIA DELTA FARMS, Inc., et al. v.
EAST BAY MUNICIPAL UTILITY
DIST. et al. (Sac. 4003.)★

Supreme Court of California. Dec. 21, 1927.

Rehearing Denied Jan. 19, 1928.

In Bank.

Appeal by plaintiffs from a judgment of the Superior Court of Amador County, C. P. Vicini, Judge, in an action. Affirmed.

Hadsell, Sweet & Ingalls, of San Francisco, for appellants.

T. P. Wittschen, of Oakland, for respondents.

PER CURIAM. In this proceeding, while the facts are different from those involved in the decision of the matter of *Mojave River Irrigation District v. The Superior Court*, etc., et al., 262 P. 724, this day filed, the identical question of law is involved. It follows that upon the authority of the above-entitled case the judgment herein must be and the same is hereby affirmed.

202 Cal. 701

HUNT v. L. M. FIELD, Inc. (S. F. 11429.)★

Supreme Court of California. Dec. 20, 1927.

Rehearing Denied Jan. 15, 1928.

1. Appeal and error ⇨1011(1)—Finding on conflicting evidence may not be disturbed on appeal.

Findings based upon substantially conflicting evidence may not be disturbed by an appellate court.

2. Evidence ⇨434(8)—Fraudulent representations inducing party to enter into contract may be established by parol evidence.

Fraudulent representations as to a material matter by which a party is induced to enter into a contract to his damage may be established by parol evidence, notwithstanding written instrument purports to contain entire agreement between parties.

3. Sales ⇨125—Delay in rescinding contract for sale of truck for fraudulent representations, which was result of indulgence extended to defendant, is not available as defense.

That plaintiff, seeking rescission of sale and lease of truck on ground of fraudulent representations, requested defendant, prior to delivery of truck, to make certain necessary repairs, thus technically delaying rescission through indulgence extended to defendant, is not available as defense.

4. Sales ⇨121—Delay of 2½ weeks by purchaser of truck and request for repairs made prior to delivery did not constitute an unreasonable delay nor waiver of right to rescind.

Delay by plaintiff seeking rescission of contract for sale and lease of truck, on ground of false representations as to mechanical condition and as to hauling job asserted to accompany purchase of truck, of approximately 2½ weeks between date of delivery and giving of notice of rescission and request for certain necessary repairs, made prior to delivery, did not constitute unreasonable delay nor an affirmation of contract and waiver of right of rescission.

5. Sales ⇨121—Waiver of right to rescind sale of truck for misrepresentation as to mechanical condition did not waive right to rescind for misrepresentations as to hauling job.

Even though purchaser seeking to rescind contract for sale and lease of truck on ground of misrepresentations as to mechanical condition and hauling job asserted to accompany purchase of truck, waived right to rescind because of representations as to mechanical condition, such waiver did not of itself result in waiver of right to rescind for falsity of representations as to hauling job.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by Thomas Hunt against L. M. Field, Inc. Judgment for plaintiff, and defendant appeals. Affirmed.

Superseding opinion of District Court of Appeal. 254 P. 594.

Herbert Chamberlin, of San Francisco, for appellant.

Walter McGovern and S. T. Hogevoil, both of San Francisco, for respondent.

PER CURIAM. This is an appeal by the defendant from a judgment rescinding and canceling a written contract. On February 28, 1922, and at divers times thereafter, the agents of the appellant company are alleged to have represented to the respondent, among other things, that said company had for sale a certain motortruck and trailer; that said vehicles were in good mechanical condition and available for immediate delivery; that they carried with them a manufacturer's warranty as to their proper construction and freedom from mechanical imperfection; and that the purchaser of said vehicles would be employed, on April 1, 1922, and for approximately eight months each year for a period of five years thereafter, by the La Honda Mill Company to haul at a fixed compensation certain of its lumber to distributing points. In addition to the foregoing, the complaint avers that each and all of said representations were, to the appellant's knowledge and to the knowledge of its agents making the same, false and untrue and made solely for the purpose of defrauding the respondent and thereby inducing him to enter into and execute the written contract; that the respondent, being ignorant of the falsity of said representations, and in reliance thereon, entered into said contract and paid the appellant thereunder the sum of \$1,000 in part payment of the purchase price of said motortruck and trailer; that respondent discovered the false character of said representations on April 14, 1922, and gave written notice of rescission to the appellant on April 29, 1922. A second cause of action for money had and received is also appropriately alleged in the complaint, the prayer of which asked that the contract be rescinded and canceled and that respondent be given judgment for the \$1,000 theretofore paid thereunder. In its answer, the appellant denied the material allegations of the complaint. The cause went to trial before the court with a jury sitting in an advisory capacity. A verdict was returned in favor of the respondent, whereupon the court made findings declaring all the allegations of the complaint to be true and those of the answer untrue. Upon these findings of fact judgment was entered as prayed for in the respondent's complaint.

In support of a reversal thereof, it is urged by the appellant that the findings as to the making of the false representations by the

appellant's agents and respondent's reliance thereon are without support in the record. It is also contended that the respondent by his conduct lost or waived any right to rescind the contract, if such right ever existed, by reason of the delay in exercising the same and because of his asserted election to affirm the contract at a time subsequent to his alleged discovery of the falsity of the representations inducing its execution.

[1, 2] An examination of the record leads us to conclude that there is ample evidence to sustain the findings complained of. It is true that the evidence adduced by the appellant conflicts in many material respects with that offered by the respondent. The rule is well settled, however, that findings based upon substantially conflicting evidence may not be disturbed by an appellate court. *Taber v. Besks*, 182 Cal. 214, 217, 187 P. 746; *Blanc v. Connor*, 167 Cal. 719, 722, 141 P. 217; *Estate of Moore*, 162 Cal. 324, 326, 122 P. 844; *Still v. San Francisco & N. W. R. Co.*, 154 Cal. 559, 564, 98 P. 672, 20 L. R. A. (N. S.) 322, 129 Am. St. Rep. 177. It is equally well settled that fraudulent representations as to a material matter, by which a party is induced to enter into a contract to his damage, may be established by parol evidence (*Newman v. Smith*, 77 Cal. 22, 25, 18 P. 791; *Barfield v. South Side Irrigation Co.*, 111 Cal. 118, 121, 43 P. 406; 14 Am. & Eng. Encyc. of Law, 199), and this despite the fact that the written instrument purports to contain the entire agreement between the parties (14 Am. & Eng. Encyc. of Law, 199, § [c]).

[3-5] It merely remains to be determined, therefore, whether the respondent by unreasonable delay or by conduct asserted to evince an intention to affirm the contract has lost or forfeited his right of rescission. We have no quarrel with the principle advanced by the appellant, to the effect that the exercise of such right may be foreclosed to a party as the result of unreasonable delay in asserting the same or by an affirmation of the contract at a time subsequent to the discovery of the falsity of the representations inducing its execution. The doctrine is well established in this state, and citation of authorities in support thereof is unnecessary. We encounter difficulty, however, in applying said doctrine to the facts presented in the instant case. It appears that the contract sought to be avoided was executed on March 1, 1922. There is evidence to the effect that the appellant's agents had, prior to that time, agreed to give the motortruck a "general overhauling" in order to make certain that it complied with the representations previously made as to its "good mechanical condition." Apparently acting upon this agreement the respondent, at a time subsequent to the execution of the written contract but prior to the delivery of the truck, requested and obtained of the appellant certain necessary repairs of the vehicle. While from this con-

duct it may be technically said that the respondent did not immediately exercise his right of rescission upon the discovery of the falsity of the representations touching the mechanical condition of the truck, yet it is readily apparent that his delay in giving notice thereof was attributable, not to any inexcusable neglect upon his part, but rather to the indulgence extended to the appellant. A delay in rescinding, which is the result of such indulgence should not be available as a defense to an action for rescission, for the defaulting party by his belated attempt to comply with the fraudulent representations has momentarily lulled his adversary into inactivity. *Menefee v. Oxnam*, 42 Cal. App. 81, 94, 183 P. 379. Moreover, it appears that delivery of the truck was not made until April 11, 1922. The respondent, within 24 hours thereafter returned the vehicle to the appellant as being unsatisfactory and not as represented. Since that time the vehicle has remained in the appellant's possession. From this it can be seen that only 2½ weeks were permitted to elapse between the date of delivery and the giving of written notice of rescission. It would be impossible, of course, to designate a definite period within which a party must exercise the right to rescind for the facts peculiar to each case are determinative thereof. 4 Cal. Jur. 801. Examination of the authorities discloses that it has been variously held that a delay of from 2 months to 2 years might, under certain circumstances, be excusable. *Suhr v. Lauterbach*, 164 Cal. 591, 593, 594, 130 P. 2; *Davis v. Butler*, 154 Cal. 623, 98 P. 1047; *Matteson v. Wagoner*, 147 Cal. 739, 743, 82 P. 436; *Hill v. Wilson*, 88 Cal. 92, 97, 25 P. 1105. In the case of *Davis v. Butler*, supra, it is declared that:

"Whether the defrauded party has acted promptly (Civ. Code, § 1691) is a question to be decided by the trial court upon the facts of the particular case, and there were here no circumstances requiring the court to find that the delay had been unreasonable."

We are not prepared to say, therefore, that the respondent herein, under the circumstances above narrated, unreasonably delayed his election to rescind. Nor are we prepared to declare that respondent's conduct in the premises has been such as to constitute an affirmation of the contract and a waiver of the right of rescission. But, even if this were true as regards the defective mechanical condition of the truck, it would avail the appellant nothing, for a waiver or ratification made with knowledge of only a part of the invalidating circumstances does not preclude a party from seeking a cancellation of the contract on the basis of other circumstances. *Willey v. Clements*, 146 Cal. 91, 99, 79 P. 850. In other words, we are of the opinion that a waiver of the right to rescind upon the ground of the falsity of the representations touching

the mechanical condition of the truck would not, of itself, result in a waiver of the right to rescind for the falsity of the representations as to the hauling job asserted to accompany the purchase of said truck. That these latter representations were material and an inducing element in the execution of the contract is apparent from the record. Their falsity is likewise established therein. The evidence discloses that respondent did not discover the falsity of said representations until a time subsequent to his requested repair of the truck. In this connection he testified in part that at the time the repairs were requested he "firmly believed the job was good and they would have the job, and later on it turned out there was no job." Respondent also testified that the appellant's agents upon several occasions informed him that they would "force" the La Honda Mill Company to furnish the hauling job. From this it is readily apparent that a waiver of the right to rescind for the false representations as to the mechanical condition of the truck would not, in and of itself, constitute a forfeiture of the right to rescind based upon the subsequent discovery of the falsity of the representations touching the hauling job. The case of *Scott v. Delta Land & Water Co.*, 57 Cal. App. 320, 324, 207 P. 389, is authority for the principle that a judgment of rescission may be sustained upon evidence supporting any one material misrepresentation.

For the foregoing reasons, the judgment is affirmed.

202 Cal. 630

BRENOT v. SOUTHERN PAC. R. CO. et al.
(L. A. 9870.)

Supreme Court of California. Dec. 15, 1927.

1. Railroads ⚡425—**Railroad's fence held not to have contributed to injury, where mules were entrapped at point where track ran between precipitous slopes.**

Fence maintained by railroad along its right of way did not contribute to injuries to mules which entered right of way from public highway, where mules were on track at time of injury at a point along right of way, where there was rising ground on one side of track and sharp decline on the other and were unable to leave track because of uneven character of ground.

2. Railroads ⚡411(10)—**One occupying land not abutting railroad right of way could not recover prior to amendment of statute for injuries to animals (Civ. Code, § 485, prior to amendment by St. 1915, p. 1281).**

Owner of mules, occupying land which did not adjoin railroad right of way, could not recover from railroad for death of mules under Civ. Code, § 485, prior to amendment by St. 1915, p. 1281, since such statute applied only to proprietor occupying land abutting right of way.

3. Appeal and error ⚡931(1)—**Appellate court will make all possible assumptions to support judgment, in absence of finding.**

Appellate court must make all possible assumptions which will uphold trial court's decision, as to matters as to which there was no finding.

4. Railroads ⚡411(10)—**Railroad's breach of covenant to fence did not entitle occupant of nonadjoining land to recover for injuries to animals.**

Owner of mules, occupying land which did not adjoin railroad right of way, cannot recover from railroad for death of mules, which entered onto right of way from a public highway, because of railroad's breach of covenant with grantor of land to maintain fence, since such covenant was obviously to prevent ingress of stock from adjoining land.

Preston, J., dissenting.

In Bank.

Appeal from Superior Court, Los Angeles County; Albert Lee Stephens, Judge.

Action by E. L. Brenot against the Southern Pacific Railroad Company and another. From a judgment for defendants, plaintiff appeals. Affirmed.

Adopting opinion of the District Court of Appeal (254 P. 917).

Louis P. Boardman and Philip C. Boardman, both of San Francisco, for appellant.

W. I. Gilbert, of Los Angeles, for respondents.

CURTIS, J. At the time of granting a hearing of this cause, after a decision thereof by the District Court of Appeal, we entertained some doubt as to whether the facts of this case as found by the court did not bring it within the rule announced in the cases of *Denver & Rio Grande Railroad Co. v. Robinson*, 6 Colo. App. 432, 40 P. 840; *Missouri, K. & G. Ry. Co. of Texas v. Loyell*, 110 Tex. 546, 221 S. W. 929; *International & G. N. R. Co. v. Dixon*, 49 Tex. Civ. App. 506, 109 S. W. 978. These authorities hold in effect that, where a railway company, although under no legal obligation to fence its right of way, elects to do so, it must not by the construction of such fence increase the danger to animals straying thereon. The principle enunciated in these cases is well illustrated in the following excerpt from the opinion in *Denver & Rio Grande Railroad Co. v. Robinson*, supra:

"There was at that time no law requiring the company to fence its right of way; but, if it was responsible for the maintenance of this inclosure, it was its duty to take proper precautions to prevent cattle from going within it. Left in the condition it was in, it was, as counsel characterizes it, a trap, from which cattle within it, when a train entered it from the west, had little chance of escape. An animal upon the track, frightened by an approaching train, and seeing a fence on either side, would naturally seek an outlet over the bridge, where it would

be caught in the open spaces between the ties, and must inevitably be run upon if the train proceeded. In this state an owner of cattle may permit them to run at large; and surely, if a railroad company see fit unnecessarily to fence its right of way, and in doing this makes an inclosure so contrived that there is easy access to it by cattle at one point, and no escape at any other, it cannot be acquitted of blame when an accident occurs as the direct consequence of its act."

[1] After a further consideration of the findings of fact in this case, with the above authorities in view, we are of the opinion that the facts found by the trial court in this action do not bring this case within the rule followed by the courts in the cases just referred to. In the present action the court found:

That appellant's mules "entered upon said right of way and railroad tracks of said defendants through the opening made and left unguarded, as hereinafter set forth, in the fence so previously constructed and maintained by said defendant corporations along the southerly line of said strip of land and right of way, and proceeded along said right of way and along the railroad tracks thereon to a point where the right of way was fenced on both sides and where there was a precipitous rise in the ground on one side of said railroad tracks and a sharp decline on the other, and at which point said mules were struck by the locomotive of a freight train of said defendant corporations, rounding a curve just beyond in said railroad tracks, and two of said mules of plaintiff were thereby killed outright, and three of said mules received such injuries that they died therefrom, and one of said mules thereby received such injuries that it was crippled and greatly incapacitated for work."

There is nothing in this finding to indicate that the fence maintained by respondents along its right of way contributed in any material manner to the injuries sustained by appellant's mules. From anything that appears in the findings, the mules might have been killed in the manner in which they were in the absence of any fence whatever. They were on the track at the time they were struck by respondents' train at a point along the right of way, where "there was a precipitous rise in the ground on one side of said railroad tracks and a sharp decline on the other," and they were struck by said train "rounding a curve just beyond in said railroad tracks." Evidently they were unable to leave the railroad track by reason of the uneven character of the ground in the immediate vicinity of where they were struck by the train, rather than on account of the fence along the railroad right of way. In fact, as we understand the finding, as above quoted, the fence maintained by respondents was not in any way responsible for the mules being on the railroad track at the time when they were struck by respondents' train, nor did the fence in any manner prevent the escape of the

mules from the danger they were in when the train approached. Had the right of way been unfenced, appellant's mules could have entered thereon, and they could have received a like injury to that which the court found they sustained after their entry thereon through the opening left in the fence by respondents. The fence, therefore, did not contribute either proximately or remotely to any injury received by the mules. It cannot be said, as it was in the cases above referred to, that the fence of respondents formed a trap or cul-de-sac into which animals straying onto the right of way and becoming frightened by an approaching train might be driven, and being unable to escape therefrom on account of the presence of the fence would be run over if the train proceeded. If the animals of appellant were in a place from which it was difficult or impossible to extricate themselves before they were struck by the approaching train, as we have already seen was the case, their dangerous predicament was not in any way attributable to the fence maintained by respondents. There was nothing except the precipitous character of the ground on either side of the track which prevented the mules from leaving the track on the approach of the train. They could have traveled along the track in front of the moving train, and in that way might have escaped, had not the train come suddenly upon them as it rounded a curve. It was expressly stipulated, however, that there was no negligence on the part of the train crew operating the train, the locomotive of which struck and injured the mules. As we view the case, there was nothing in the findings to indicate that the fence maintained by the respondents along their right of way in any way increased the danger to appellant's mules after they had strayed upon the respondent's right of way.

We are therefore satisfied that under the facts found by the trial court the opinion written by Mr. Presiding Justice Works and concurred in by Mr. Justice Craig and Mr. Justice Thompson, correctly disposes of the legal questions presented herein. It is adopted as the opinion of this court, and is as follows:

"This is an action for damages occasioned by the alleged negligence of the defendants. Plaintiff was the owner of six mules, five of which were killed and one of which was rendered worthless by being run down by one of defendants' trains. Defendants had judgment, and plaintiff appeals.

"Points arising on the appeal are presented upon the findings of the trial court. It was found, among other things, that defendants, at the time the mules were run down, were engaged in operating a railroad over a certain strip of land, which strip had been conveyed by deed to one of defendants as a right of way by two men of the name of Porter; that by the terms of the grant the grantee was required 'to construct and maintain a good and substantial fence on each side of said strip of land and right

of way; that said defendant did thereafter, and before the accident to appellant's mules, 'construct and maintain such fence * * * as required by said grant'; that at the time of the accident appellant, 'as successor in interest by leasehold' of one of the Porters, 'was in the possession and useful occupation of certain lands lying close to, but not bordering upon, the said right of way, * * * and which lands belonged to' Porter 'at the date of said conveyance by him * * * of said right of way and constituted a portion of the lands through which said right of way had been granted'; that at the time of the accident to the mules the city of Los Angeles, having acquired the right to construct a certain aqueduct across the right of way of respondents, while 'in the course of the work of constructing said aqueduct * * * by and with the knowledge and consent of' respondents, 'and with their aid and co-operation, * * * did remove a large portion of said fence from the southerly line of said right of way, and did also remove a cattle guard from said right of way, leaving the northerly line * * * entirely fenced, and leaving the southerly line of said right of way and the railroad tracks thereon unfenced and open and without guards * * * and without any protection against the entry of stock thereon; that the aid and co-operation of' respondents 'in constructing said aqueduct consisted particularly of the work of removing said cattle guard and shifting said railroad tracks and maintaining the same * * * for the passage of trains during the course of said work'; that appellant was at the time the owner of the six mules, of the aggregate value of \$1,800, 'which were on his said premises,' confined in a corral in which 'they had been impounded for the night by' appellant; that they broke therefrom 'and wandered out and along for a mile or more upon' a certain road 'to the point where said road formerly crossed said right of way and railroad tracks, at which point they had often been driven across said right of way and railroad tracks to a pasture beyond, and entered upon said right of way and railroad tracks * * * through the opening made and left unguarded, * * * in the fence so previously constructed and maintained along the southerly line of said * * * right of way'; that the mules then proceeded 'along the railroad tracks to a point where the right of way was fenced on both sides, and where there was a precipitous rise in the ground on one side of said railroad tracks and a sharp decline on the other'; and that at that point they were struck by the locomotive of a freight train of respondents, 'rounding a curve just beyond in said railroad tracks,' with the result already stated.

[2] "The present action is an old one; the complaint having been filed practically a year before the amendment to section 485 of the Civil Code (St. 1915, p. 1281), which is now in effect. Before the amendment, the section read, in part: 'Railroad corporations must make and maintain a good and sufficient fence on either or both sides of their track and property. In case they do not make and maintain such fence, if their engine or cars shall kill or maim any cattle or other domestic animals upon their line of road which passes through or along the property of the owner thereof, they must pay to the owner of such cattle or other domestic animals a fair market price for the same, unless it

occurred through the neglect or fault of the owner of the animal so killed or maimed.' Because of the finding of the trial court that the land of which appellant was lessee lay close to but did not border upon, the right of way of respondents, appellant may not recover under this section as it formerly stood. It has been directly decided (*Barbee v. Southern Pac. Co.*, 9 Cal. App. 457, 99 P. 541) that the relief afforded by the enactment may be resorted to only by a proprietor occupying lands abutting upon a right of way.

"There are many cases in other states holding, under the general law of negligence, that a recovery may be had from a railroad company under such circumstances as existed here. Respondents, after having constructed their fence along both sides of their tracks, it will be observed, removed a portion of the structure on one side, thus providing a means of ingress to the tracks; there being no means of egress therefrom except through the break which they had made. It seems that in this state, before section 485 was amended and under the opinion in the case above cited and other adjudications referred to in it, one whose animals crossed intervening lands on the way from his property to a railroad right of way and were there injured or killed, under the circumstances above stated, might not have recovered for the loss suffered. The remedy allowed by the section seems to have been exclusive.

[3, 4] "Appellant contends, however, that he is entitled to recover because of the breach by respondents of their covenant, in the deed by which they acquired the right of way, to erect and maintain a fence along the strip acquired. Granting for the sake of argument, without deciding, that the covenant was one running with the land, and that there is no legal objection against appellant, as a lessee and not a holder of title, availing himself of the covenant, we think relief must be denied him on other grounds. It is obvious that the covenant was made for the purpose of preventing ingress of live stock to the right of way from the property of the Porters from which it had been segregated or set apart by the grant. The contiguity of location which must have been contemplated by this purpose has been destroyed. This is evident from the finding of the trial court that the leasehold of appellant did not border upon the right of way but lay close to it. There was no finding as to the ownership of the land lying between the leasehold and the right of way, or as to the nature of the use to which it was being put, and as to those matters, under familiar rules of law, we are bound to make all possible assumptions which will uphold the decision of the trial court. Let us assume, then, that the intervening strip had been condemned as a right of way for a public highway which extended along the railroad right of way and across the entire body of land formerly owned by the Porters, thus entirely segregating the latter right of way from the entire tract on that side, and that at the time of the accident to the mules the public road had been built and was being used by the general public. Would not appellant be in the same situation with others of the general public if his mules emerged from the leasehold, got upon the public road, and thence upon the railroad right of way through the breach in the fence? We think he would. The covenant having been made for the purpose

of insuring that live stock of the Porters or of their assignees should not emerge from their lands and thus enter, immediately, upon the right of way, we think it cannot be held to protect appellant from a loss occasioned by the entry of his mules upon the railroad right of way from a public highway. No authority is presented to us upon this question, and we know of none."

Judgment affirmed.

We concur: WASTE, C. J.; SHENK, J.; RICHARDS, J.; SEAWELL, J.; LANGDON, J.

PRESTON, J. I dissent.

To my mind the findings are susceptible only of the construction that the mules in question were on the track because of the cul-de-sac, and that they were caught thereon because of their inability to get off the right of way.

The fact that at that particular spot the precipitous grounds may have prevented the mules from beating a hasty retreat into the fence does not alter the fact that they were in a trap.

There is no finding that there was room between the rails and fence for the accommodation of the stock, and, if there was, it would not be controlling. Mules in such a trap cannot be charged with negligence, nor can they be expected to exercise ordinary horse sense. Seeing the fence on either side, the on-coming train "stampeded" them, and they were killed as the result of such conditions. I may be speaking with some judicial knowledge of the habits of the mule.

202 Cal. 760

LEMEN et al. v. EDMUNSON.
(L. A. 8910.)

Supreme Court of California. Dec. 24, 1927.

1. Constitutional law $\S$ 56—Appellate jurisdiction of superior court, being derived from Constitution, could not be extended or restricted by statute (Const. art. 6, $\S$ 5; St. 1919, p. 1256, $\S$ 12).

Since appellate jurisdiction of the superior court is fixed by Const. art. 6, $\S$ 5, it could neither be extended nor restricted by St. 1919, p. 1256, $\S$ 12, authorizing appeals from orders of the real estate commissioner canceling a real estate broker's license.

2. Appeal and error $\S$ 31—Real estate commissioner empowered to revoke license is not a "court" from whose order appeal may be taken to the superior court (Const. art. 6, $\S$ 5; St. 1919, p. 1256, $\S$ 12).

Real estate commissioner, who under St. 1919, p. 1256, $\S$ 12, is empowered to revoke licenses of real estate brokers, is not a court within Const. art. 6, $\S$ 5, which fixes appellate jurisdiction of the superior court, and appeals

from commissioner's order canceling license to the superior court are a nullity.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Court (of Justice).]

3. Brokers $\S$ 42—Brokers could not recover commissions after cancellation of license where order canceling license was not stayed by attempted appeal to superior court (Const. art. 6, $\S$ 5; St. 1919, p. 1256, $\S$ 12).

Where the real estate commissioner, under St. 1919, p. 1256, $\S$ 12, revoked licenses of real estate brokers, there was no stay of the order by appeal to the superior court, since the commissioner was not a court from whose order appeal could be taken under Const. art. 6, $\S$ 5, to the superior court, and hence brokers could not recover commission for sale of lands after revocation of license and while attempted appeal was pending.

Department 2.

Appeal from Superior Court, Los Angeles County; Victor R. McLucas, Judge.

Action by G. V. Lemen and another against J. A. Edmundson. From a judgment for defendant, plaintiffs appeal. Affirmed.

George E. Clifford, of Los Angeles, for appellants.

Dailey S. Stafford and Frank G. Falloon, both of Los Angeles, for respondent.

SHENK, J. This is an appeal from a judgment for the defendant in an action brought by plaintiffs for a commission alleged to have been earned by them in negotiating a sale of real property for the defendant. The amended complaint alleged that plaintiffs were duly licensed real estate brokers in the county of Los Angeles; that on October 26, 1923, they entered into a contract with the defendant wherein and whereby the defendant agreed to pay them a commission in the event of the sale by them of certain of the defendant's property described in the contract; that on November 3, 1923, the plaintiffs effected the sale for which the commission is claimed and that the commission has not been paid. In his answer, the defendant, among other things, denied that plaintiffs were duly licensed real estate brokers, and alleged affirmatively that plaintiffs' licenses had been revoked by the real estate commissioner. At the trial, by an agreed stipulation of facts, it appeared that plaintiffs had been duly licensed real estate brokers; that, prior to the making of the contract which is the subject of the present controversy, the plaintiffs' licenses had been revoked by the real estate commissioner; that, subsequently and within the time provided by section 12, c. 605, Statutes of 1919 (Stats. 1919, p. 1252), and pursuant to the provisions of that section, plaintiffs appealed to the superior court in and for Los Angeles county from the order of revocation; that

during the pendency of the appeal the contract sued on was made, and the negotiations and sale of real property, if any were entered into and consummated, were completed in accordance with the terms of the contract; and that the appeal was subsequently dismissed by the superior court on the ground that it had no jurisdiction to entertain the appeal. On this stipulation of facts, the preliminary issue as to whether plaintiffs were duly licensed real estate brokers at the time of the contract and alleged sale was submitted to the trial court; and, from its judgment thereupon made and entered in favor of defendant, the plaintiffs have brought this appeal.

[1] Appellants contend that, inasmuch as section 12 of the statute referred to provides for an appeal from the order of the commissioner revoking a license and also provides for a stay of the order pending the appeal, their licenses remained unrevoked until the appeal was dismissed by the superior court. So far as material here, that section provides:

"* * * The decision of the said commissioner in suspending or revoking any license under this act shall be subject to review in accordance with the provisions of chapter one of title one of part three of the Code of Civil Procedure; and any party aggrieved by such decision of the commissioner may within ten days from the date of said decision appeal therefrom to the superior court of the state of California, in and for the county in which the person affected by such decision resides or has his place of business. * * *

"The decision of the commissioner shall not take effect until ten days after its date, and if notice of appeal and demand for transcript are served upon the commissioner in accordance with the provisions of this section, then such stay shall remain in full force and effect until decision upon appeal by said superior court. * * *

The appellants' contention is without support in the authorities. The Constitution of the state (article 6, § 5) fixes the appellate jurisdiction of the superior court. Such jurisdiction comes from the Constitution and not from the statute, and the Legislature can neither extend nor restrict it. *Millsap v. Alderson*, 63 Cal. App. 518, at page 532, 219 P. 469, 475, citing *Chinn v. Superior Court of San Joaquin County*, 156 Cal. 478, 105 P. 580. The language of the concurring opinion of Paterson, J., in the case of *Tyler v. Presley*, 72 Cal. 290, at page 293, 13 P. 856, 858, relied upon by the appellants, has no bearing on this case, for the reason that the order sought to be stayed in that case was made by the Supreme Court in proceedings to disbar an attorney, and the question of a stay arose on an application for a writ of mandate. The case of *People v. Center*, 54 Cal. 236, also relied upon by appellants, is not in point, because there the appeal was

from the superior court to the Supreme Court.

[2, 3] Appellants urge further that, even if the statute providing for an appeal to the superior court be unconstitutional, the proceedings in the superior court were in effect a trial de novo, because evidence may be received by the court, and cites *U. S. v. Ritchie*, 17 How. 525, 15 L. Ed. 236. The language of said section 12, limiting the action of the superior court to a consideration and determination of the question only whether there has been an abuse of discretion on the part of the commissioner in making his orders, is clearly an attempt to give to the superior court appellate jurisdiction over the orders of the real estate commissioner. "While it is true that under the constitutional provision conferring appellate jurisdiction upon the superior courts the matters to which that jurisdiction on appeal shall pertain—to what extent and in what manner the proceedings or action of justices' or inferior courts may be reviewed—is not provided for, but is left solely to the determination of the Legislature, still an express limitation is imposed as to the character of tribunals whose proceedings may be reviewed in the exercise of its appellate jurisdiction, and it can be exercised in case of appeals from 'justices' or 'inferior courts' only. All the authority that is given to the Legislature, under the constitutional provision last referred to, is to provide the method and extent to which an appeal from these courts may be taken. It has no power to enlarge the tribunals from which it may be taken, because the constitutional provision has expressly declared of what those shall consist. The appeal to the superior court, when provided for by the Legislature, can only be from a court—either a justice or inferior court—and the right of appeal cannot be given from any other tribunal." *Chinn v. Superior Court*, supra. The real estate commissioner is not such a court. *Brecheen v. Riley*, 187 Cal. 121, 125, 200 P. 1042. The appeal being a nullity, there was no stay of the order by the purported appeal. See 2 Cal. Jur. p. 424, and cases cited.

Appellant calls attention to the case of *Hale & Norcross Silver Mining Co. v. Fox*, 122 Cal. 56, 54 P. 270, and contends that, because the superior court in the present case was forced to entertain the appeal on the question of jurisdiction, the order of revocation was stayed. In the *Hale & Norcross Case*, however, the appeal was from the superior court, a tribunal from which an appeal would lie in proper cases, and a writ of supersedeas was issued pending a determination of the appealability of the order appealed from. The case is not in point.

The judgment is affirmed.

We concur: RICHARDS, J.; LANGDON, J.

202 Cal. 731

CITY OF LOS ANGELES v. HUGHES et al.
(L. A. 9029, 9415.)★

Supreme Court of California. Dec. 22, 1927.

Rehearing Denied Jan. 19, 1928.

1. Eminent domain ⇨134—Where acreage being condemned is reasonably adapted to subdivision, that fact should be considered in fixing value.

Where acreage being condemned by city under Park and Playground Act of 1909 (Deering's Gen. Laws 1923, Act 6373), is reasonably adapted to purposes of subdivision, that fact should be taken into consideration in fixing value of property.

2. Eminent domain ⇨238(5)—Record held to show that both witnesses and trial court considered subdivision possibilities in fixing value of land being condemned.

Record on appeal held to show that both condemnor's witnesses and trial court took subdivision possibilities into consideration in fixing value of land being condemned by city under Park and Playground Act of 1909 (Deering's Gen. Laws 1923, Act 6373).

3. Eminent domain ⇨134—Value of land being condemned was value as it stood, plus increased value due to suitability for subdivision, but value was not to be fixed by what could be obtained after subdivision.

Market value of tract of land being condemned by city under Park and Playground Act of 1909 (Deering's Gen. Laws 1923, Act. 6373), was value as it stood when its value was to be determined plus increased value due to suitability for subdivision into city lots, but value was not to be fixed by what could be obtained for lots after subdivision actually took place.

4. Eminent domain ⇨262(3)—Supreme Court assumes, in support of judgment, that trial court adopted correct theory in valuing land being condemned.

Supreme Court was bound to assume, in support of judgment, that trial court properly considered any increased value of land due to suitability for subdivision into city lots, in determining its value in condemnation proceedings under Park and Playground Act of 1909 (Deering's Gen. Laws 1923, Act. 6373).

5. Evidence ⇨142(1)—Testimony as to specific sales of land in neighborhood of that being condemned to establish value held inadmissible.

Admitting testimony of condemnor's witness on direct examination as to specific sales of land in neighborhood of that being condemned under Park and Playground Act of 1909 (Deering's Gen. Laws 1923, Act 6373), in order to determine value, held error.

6. Eminent domain ⇨262(5)—Error in admitting testimony in behalf of condemnor held harmless, where there was much proper testimony of similar import and award was increased in reliance thereon, in part at least.

Error in admitting testimony in behalf of city condemning land under Park and Playground Act of 1909 (Deering's Gen. Laws 1923, Act 6373), as to specific sales of land in neigh-

borhood of that being condemned to establish value, held harmless, where there was much proper testimony as to specific sales on behalf of both sides to proceeding and award of damages was increased in reliance on such evidence in part at least.

7. Eminent domain ⇨150—Award in condemnation proceeding of \$1,000 for improvement, which exceeded valuation in evidence by \$120, held not excessive, where court personally viewed premises.

Award, in condemnation proceedings under Park and Playground Act of 1909 (Deering's Gen. Laws 1923, Act 6373), of \$1,000 for improvements by nursery company on 2½-acre tract, which exceeded valuation fixed by evidence by \$120, held not excessive, where court personally viewed premises and improvements.

8. Property ⇨4—Statutes defining real property held merely declaratory of common law (Civ. Code, §§ 657, 658, 660).

Civ. Code, §§ 657, 658, 660, defining real property as including a thing attached to land by roots, as trees, vines, or shrubs, held merely declaratory of common law.

9. Eminent domain ⇨82—Nursery stock of lessee held interest in land for which condemnor was bound to pay, notwithstanding that lease authorized removal of nursery stock (Park and Playground Act of 1909; Civ. Code, §§ 657, 658, 660, 1013).

Nursery plants and trees growing in ground were interest in land in nature of improvement for which city condemning land under Park and Playground Act of 1909 (Deering's Gen. Laws 1923, Act 6373) was bound to pay compensation, notwithstanding that lease from owner to lessee provided that nursery stock might be planted and grown by lessee for resale under Civ. Code, §§ 657, 658, 660, 1013.

10. Eminent domain ⇨155—Lessee rather than fee owner held entitled to award for nursery stock, in condemnation proceedings, where lease authorized removal of nursery stock by lessee (Park and Playground Act of 1909; Civ. Code, §§ 657, 658, 660, 1013).

Lessee rather than fee owner of land held entitled to award for nursery plants and trees growing in ground, in condemnation proceeding instituted under Park and Playground Act of 1909 (Deering's Gen. Laws 1923, Act 6373), where lease from owner to lessee provided that nursery stock might be planted and grown for resale, under Civ. Code, §§ 657, 658, 660, 1013.

In Bank.

Appeal from Superior Court, Los Angeles County; Frank H. Dunne, Judge.

Action in eminent domain by the City of Los Angeles against Fred T. Hughes, Peder C. Pedersen, and others. From a judgment awarding damages, Peder C. Pedersen and others appeal. Affirmed in part, and in part reversed.

Superseding opinion of District Court of Appeal in City of Los Angeles v. Pedersen, 255 P. 889.

Fred Mansur and L. B. Stanton, both of Los Angeles, for appellants.

Jess E. Stephens, City Atty., and E. J. Delorey and Leslie K. Floyd, Deputy City Attys., all of Los Angeles, for respondent.

SHENK, J. This proceeding in eminent domain was instituted in August, 1924, by the city of Los Angeles, under the Park and Playground Act of 1909 (Deering's Gen. Laws 1923, Act 6373). Exceptions to the report of the referees were filed by defendants Peder C. Pedersen and Catherine Pedersen, owners of the land in question, and by defendants T. Ishikata and S. Inouye, doing business under the firm name and style of Hoover Nursery Company, who were the lessees. After a hearing on the exceptions before the court, judgment was rendered in favor of Peder C. Pedersen and Catherine Pedersen as owners in the sum of \$19,816, subject to a judgment in favor of the Hoover Nursery Company for \$2,945, as the value of the leasehold interest, and \$1,000 for improvements constructed on the land by the nursery company, and subject also to the payment of a \$3,000 mortgage on the property. The Pedersens and the Hoover Nursery Company have appealed separately, and two records are presented. Both appeals may properly be disposed of in one opinion.

Since the appeal of the Pedersens was taken, they have been paid the awards made by the court, and have filed satisfactions of judgment, expressly reserving, however, their claim for greater compensation.

On behalf of the appellants Pedersen, the owners, it is urged as grounds for reversal that the trial court adopted an erroneous rule in estimating the amount of compensation for the land; that the trial court committed error in admitting on direct examination evidence of the selling prices of land in the neighborhood; that the finding that the actual value of the improvements belonging to Hoover Nursery Company was \$1,000 is contrary to the evidence; and that the errors committed on the trial were prejudicial to the right of these appellants to an award of just compensation. The main ground of reversal urged by appellant Hoover Nursery Company is that the finding of the trial court that the nursery stock, planted and growing in the ground, is personal property for which the nursery company is not entitled to compensation, is contrary to the law and the evidence, and that the court should have found the value thereof and awarded compensation therefor.

Appellants Pedersen owned lot 36 of Sunnyside tract in the city of Los Angeles, which was a part of the property sought to be condemned. This lot comprised $2\frac{1}{2}$ acres of land, which was leased to the Hoover Nursery Company and planted by it to nursery stock, consisting of trees, shrubs, and other plants. It was in evidence that other tracts

of land in the neighborhood had been subdivided and sold as building lots for home sites. Counsel for these appellants sets forth in his brief the rules governing the estimation of compensation to be awarded in proceedings in eminent domain, including the definition of "market value." These rules are too well known to require repetition here or to warrant the citation of the many cases where in said rules have been enunciated or recognized. A comprehensive statement thereof, and the citation of the authorities supporting the same, are found in 10 Cal. Jur., at page 338 et seq.

[1, 2] It is of course well understood that, when acreage is reasonably adaptable to purposes of subdivision, this fact should be taken into consideration in fixing the value of the property to be taken. In other words, the value of the property at the time of the taking is to be determined, not only by the uses to which it is then put, but also by the uses of which it is reasonably susceptible. These rules are not challenged but, on the contrary, are recognized and relied upon by the respondent. These appellants assert that all of their witnesses adopted as a basis for their estimates the value of the land for subdivision and building purposes. The record supports the assertion, but the further claim of these appellants that the witnesses for the respondent did not adopt the same basis of valuation and that the court did not take into consideration the value of the land for the purpose of subdivision and sale as city lots is not supported by the record. The witness McGarry, who had been one of the referees, testified on behalf of respondent that in arriving at his estimate of the market value of the land he considered its value as a subdivision possibility, but not as an actuality. The witness Smith, the other of the respondent's witnesses who had served as a referee, when asked to give his estimate of the value of the land stated: "We figured this out on a basis for a subdivider to take this piece of property as it was." A number of times during the trial the court asked questions as to whether the subdivision possibilities had been taken into consideration by the witness in arriving at his estimate of the market value, and was assured that this had been done. The court also personally viewed the land, and had an opportunity to see its character as well as the development of the surrounding property.

[3, 4] If the argument of counsel for these appellants is intended to go one step further, and it is sought to establish that the value of the land must be estimated, not only on a basis of a subdivision possibility, but also on the basis of what the owners would be able to obtain for the lots after subdivision had actually taken place (and the argument is open to that interpretation), we are unable to agree, nor do the cases relied upon by these appellants support this contention. For example the test announced in Montana

Ry. Co. v. Warren, 6 Mont. 275, 284, 12 P. 641, 646, is that:

"The owner has a right to obtain the market value of the land, *based upon its availability* for the most valuable purposes for which it can be used, whether or not he so used it."

The same test is stated variously in other cases cited as follows:

"Its market value depends not wholly upon the use to which the owner is putting it, but upon the use or uses for which it is available at the time it was taken." *Hooker v. Railroad Co.*, 62 Vt. 47, 49, 19 A. 775.

"* * * If the present value of the land taken was enhanced by reason of the adaptability thereof to some use to which they might be put in the future—as, for example, if land used only for farming purposes was so situated that it might be platted into city lots, and if its present value was thereby increased—such increased value was the proper basis for the assessment. We think this is a correct rule." *Washburn v. Railroad Co.*, 59 Wis. 364, 378, 18 N. W. 328, 334.

"The real question was what the property was actually worth for any and all purposes for which it might be used." *South Park Commissioners v. Dunlevy*, 91 Ill. 49, 57.

"It appeared, on the cross-examination of the witnesses, that, in forming their estimate of the market value of the land, they had considered its adaptability for suburban residences. If such fact affected its market value at the time in question, it would properly enter into the consideration of the witnesses, and the jury also, in estimating such value." *Sherman v. Railway Co.*, 30 Minn. 227, 229, 15 N. W. 239.

The Supreme Court of Kansas, in *Chicago, K. & N. Ry. Co. v. Davidson*, 49 Kan. 589, 31 P. 131, reviewed the cases mentioned hereinabove, and on the authority of those cases, among others, affirmed a judgment of compensation entered on a verdict, approving the following instruction:

"In estimating the market value of the land, both before and after the condemnation, it will not be proper for you to make the estimate on what the land would have been worth had the land at that time, or prior thereto, been laid off or platted into lots and blocks as an addition to the city of Wellington, but you must consider the land as it was at that time, and with reference to the use that was then being made of the same, and all other uses that could reasonably be supposed from the evidence could be made of it thereafter, whether for farming purposes or for platting and laying the same off into lots and blocks as an addition to the city of Wellington."

Under all of the authorities, both in this state and elsewhere, the true basis for computing the market value of land sought to be condemned, in view of the evidence of its suitability for subdivision purposes, is its value as it stood on the date when, under the law, its value was to be determined, plus any increased value which it may have had in the market by reason of its suitability for subdivision into city lots. It may fairly be said,

therefore, that the witnesses for both parties in this case were guided by the proper rules in the valuation of the land. And it must be assumed in support of the judgment that the court adopted the same theory in arriving at its conclusions. The opinion evidence as to values ranged from \$13,958, which was the amount fixed by the board of referees, to \$31,000. The fact that after the hearing on the exceptions and a view of the premises the court added \$5,858, to the award of the referees indicates that the court was impressed by the showing of the availability of the property for subdivision purposes.

[5, 6] The ruling challenged by the appellants Pedersen as prejudicially erroneous was made by the court in the course of the direct examination of the respondent's witness Smith, who was asked by respondent's counsel: "Q. Now you have a list of any sales made there, that your figures are based on?" Objection was made to this evidence on direct examination of any specific sales, but the court stated that Mr. Smith "could tell what he knows about sales out there." This the witness proceeded to do. The ruling was erroneous, and the objection should have been sustained. *C. P. R. R. v. Pearson*, 35 Cal. 247, 262; *Reclamation District No. 730 v. Inglin*, 31 Cal. App. 495, 160 P. 1098; 10 Cal. Jur. p. 360. But we are not convinced that the ruling was prejudicial. Much testimony was properly given by witnesses for both sides as to specific sales in that vicinity, and the record indicates that the trial court increased the award in reliance, in part at least, on such evidence.

[7] The evidence in court as to the value of the improvements belonging to Hoover Nursery Company was only \$120 less than the amount fixed by the judgment on this item. As the court personally viewed the premises, including the improvements, we cannot say that the award thereon was excessive.

[8-10] The contention of Hoover Nursery Company that the nursery plants and trees growing in the ground were, on the record presented, a part of the realty would seem to be well taken. Respondent contends, however, that, because the lease between the parties provided that nursery stock might be planted and grown by the nursery company for resale by it, such trees and plants acquired the character of personal property exclusively. The Civil Code provides:

"Sec. 657. Property is either: 1. Real or immovable; or, 2. personal or movable."

"Sec. 658. Real or immovable property consists of: 1. Land; 2. that which is affixed to land. * * *"

"Sec. 660. A thing is deemed to be affixed to land when it is attached to it by roots, as in the case of trees, vines, or shrubs. * * *"

These sections are merely declaratory of the common law. Growing trees, shrubs, and other plants were generally considered a part of the realty to which they were attached by

their roots, and continued to be such until they were severed, when they became personal property. The occasion to declare trees, plants, crops, etc., to be personal property while they were attached to the land by their roots, was merely to apply a fiction of law in order to arrive at a just determination in particular cases. Trees and plants have thus been termed personal property in cases, such as cited by the respondent herein, where there has been an agreement between the parties to the effect that, though such trees, etc., be planted by one other than the owner, they shall nevertheless not become the property of the owner of the land. The Civil Code, § 1013, provides that, when a person affixes his property to the land of another, without an agreement permitting him to remove it, the thing affixed belongs to the owner of the land. It has often been held that property affixed to land which, as between the parties shall be deemed to be personal property, still retains its natural character of realty as to third persons. *McNally v. Connolly*, 70 Cal. 3, 11 P. 320; *San Francisco Breweries v. Schurtz*, 104 Cal. 420, 38 P. 92; *Oakland Bank of Savings v. California Pressed Brick Co.*, 183 Cal. 295, 191 P. 524. The Hoover Nursery Company therefore had an additional interest in the real property sought to be condemned to the extent that it was the owner of the trees and shrubs planted and growing in the ground constituting an interest in the land in the nature of an improvement, and it was entitled to be compensated for this interest on the taking of the real property by the city. Under the evidence, the compensation for this interest in the land should go to the lessee, the Hoover Nursery Company, and not to the owners of the fee.

In view of the foregoing determinations, it is deemed unnecessary to discuss other points raised by the parties to these appeals.

The judgment as to the appellants Peder C. Pedersen and Catherine Pedersen is affirmed. The judgment as to the appellants T. Ishikata and S. Inouye, doing business under the firm name and style of Hoover Nursery Company, is reversed.

We concur: WASTE, C. J.; RICHARDS, J.; SEAWELL, J.; PRESTON, J.; CURTIS, J.; LANGDON, J.

202 Cal. 628

SCHROEDER v. BAUMGARTEKER.
(L. A. 8932.)★

Supreme Court of California. Dec. 14, 1927.

Rehearing Denied Jan. 12, 1928.

1. Appeal and error ⇐1002—Jury's finding on conflicting evidence that boys riding bicycle, struck by truck, were not contributorily negligent, held conclusive on appeal.

In action to recover damages for personal injuries, jury's finding on conflicting evidence

that plaintiff and companion riding bicycle, struck by trailer on defendant's truck, were not guilty of contributory negligence, held conclusive on appeal.

2. Municipal corporations ⇐706(7)—Contributory negligence of child struck by automobile is usually for jury.

Whether or not children of 11 or 13 years of age who were struck by automobile were guilty of contributory negligence is usually a question of fact for the jury.

3. Appeal and error ⇐997(1)—Trial court's ruling that whether child struck by automobile trailer was contributorily negligent was for jury held conclusive on appeal.

In action for damages for personal injuries, where trial court ruled that whether child struck by trailer on truck was guilty of contributory negligence was a question of fact for the jury, ruling held conclusive on appeal.

4. Trial ⇐285—Instructions are always to be considered in view of circumstances of the particular case.

Instructions in all cases are to be measured as to their appropriateness and correctness by the particular facts and circumstances of the case in which they are given.

5. Trial ⇐295(6)—Where instructions fairly stated negligence law applicable, where trailer on truck struck boys on bicycle, incompleteness of certain instructions held harmless.

In action to recover damages for personal injuries resulting from plaintiff being struck by trailer on truck while riding bicycle with another boy, where instructions as a whole fairly stated the applicable law of negligence, incompleteness of particular instructions held harmless.

Department 2.

Appeal from Superior Court, Los Angeles County; Walton J. Wood, Judge.

Action by Almund Schroeder, a minor, by G. W. Schroeder, guardian ad litem, against Frank Baumgarteker. Judgment for plaintiff, and defendant appeals. Affirmed.

H. T. Morrow and Henry L. Knoop, both of Los Angeles, for appellant.

Bertrand J. Wellman, of Los Angeles, for respondent.

RICHARDS, J. This appeal is from a judgment in favor of the plaintiff in the sum of \$4,000, rendered upon the verdict of a jury in an action to recover damages for injuries sustained by the plaintiff, a boy of the age of 11 years, while engaged in riding a bicycle operated by his brother, who was of the age of 13 years at the time of the accident in question, which accident arose out of the fact that these two boys were struck by a trailer attached to a truck which was being driven by an employee of the defendant, and which truck and trailer approached the two boys from behind. The immediate cause of the ac-

cident apparently was the fact that the street along its course at and in the vicinity of the point of the collision was rough through the presence of ruts caused by vehicular traffic, and that the trailer attached to said truck, in passing over and along these ruts, swayed from side to side so far as to strike the two boys while they were riding along said street on the proper side thereof, and in such a position that they would have been safe but for the swaying of the trailer as the truck approached and was passing them from behind.

[1-3] The appellant devotes a large portion of his brief upon appeal to a discussion of the evidence in the case, and particularly to that portion thereof upon which he predicates an argument that the injured plaintiff and his brother, who was killed in the collision, were each guilty of contributory negligence as a matter of law. It is sufficient, in response to the appellant's contention in that regard, to say that the evidence with respect to the position and conduct of the two boys was in substantial conflict, and hence that the finding of the jury in that respect ought not to be disturbed upon appeal. But beyond this, and in response to the argument that the plaintiff, upon the state of the evidence, as the appellant views it, should be held to have been guilty of contributory negligence as a matter of law, the current of authority is against that contention, and is strongly in favor of the more humane view that the question as to whether or not children of the ages of these two boys are to be held guilty of contributory negligence so as to prevent their recovery in an action of this character is, in most cases, a question of fact for the jury, and that in cases wherein the trial court, with the evidence and witnesses before it, has ruled that the question as to whether or not the injured child was guilty of contributory negligence was a question of fact for the jury, its ruling in that regard will not be disturbed upon appeal. *Mayne v. San Diego Elec. Ry. Co.*, 179 Cal. 173, 175 P. 690.

[4, 5] The next contention of the appellant is that the trial court was in error in giving certain instructions to the jury. The two instructions which he quotes as subject to his objection are numbered XI and XIV, which read as follows:

"XI. Pedestrians and bicycle riders have the same right as truck and automobile drivers to the use of the street, and bicycle riders are chargeable only with such ordinary and reasonable care for their own safety as a prudent person of like age, intelligence, and experience would exercise under the same or similar circumstan-

es, and the bicycle rider is not bound to assume that the drivers of trucks and trailers or automobiles will act otherwise than in a careful and prudent manner, and they have the right to assume that such drivers will drive at a speed not greater than reasonable and proper, having due regard for the traffic and the width and condition of the street; and you are instructed that it is unlawful to drive at any speed, no matter how slow, that endangers life, limb, or property of any person upon the street."

"XIV. If one is riding a bicycle in the street, he is not required by law to watch or look back for vehicles approaching from behind to avoid collision, or being run down from behind, but he has the right to assume that the vehicle approaching from the rear will not run him down, and that it will be driven in a careful and prudent manner, with due regard for the width and condition of the street, and that it will be so driven as not to endanger the life or limb of the bicycle rider."

The appellant cites as sustaining his contention that these instructions are erroneous the case of *Starck v. Pacific Railway Co.*, 172 Cal. 277, 156 P. 51, L. R. A. 1916E, 58. An examination of this case and also of the other cases which the appellant relies upon as supporting his said contention will show that the circumstances in each of the cases, while such as to justify the ruling of the court that the instructions therein given were to be criticized, arose out of facts and circumstances entirely different from those presented in the case at bar. Instructions in all cases are to be measured as to their appropriateness and correctness by the particular facts and circumstances of the case in which they are given. Applying this rule to the particular facts and circumstances under which the foregoing instructions were given, we are satisfied that they are not subject to the criticism which the appellant directs against them; and while it may be true that they may not contain all the elements which should enter into instructions of this character, when they are examined in the light of the entire body of instructions which were given by the court to the jury, and which quite fully and fairly seem to state the law of negligence applicable to cases of this character, are not to be held so far erroneous or incomplete as to justify a reversal of the case.

As to the appellant's objection to the rulings of the court on the admission of evidence, we find upon a careful examination of the record that they are without substantial merit.

The judgment is affirmed.

We concur: SHENK, J; LANGDON, J.

202 Cal. 778

TIFFANY & CO. v. SPRECKELS et al.
(S. F. 11791.)

Supreme Court of California. Dec. 28, 1927.

1. Contracts ⇨95(3)—Contract to which husband's assent is procured by threats against wife is unenforceable.

Rule that contract, procured by wrongful use of fear and threats, is illegal and voidable, applies when subject of threat is wife of person whose assent to an agreement is secured as a result of such threats.

2. Contracts ⇨99(3)—Finding that husband's agreement to pay for necklace purchased by wife was obtained by threats of criminal prosecution against wife, rendering contract void, held proper under evidence.

Evidence held to sustain finding that written agreement of husband to pay for necklace purchased by estranged wife was void and unenforceable because of threats against wife of criminal prosecution, and because made to prevent such prosecution, where husband's presence was obtained by cablegram stating wife from whom necklace had been stolen or embezzled was threatened with prosecution for fraud, unless satisfactory arrangements were made.

3. Appeal and error ⇨1010(1)—Appellate court may not disturb findings based on sufficient and practically uncontradicted evidence.

Where evidence is sufficient to support findings, and is practically uncontradicted, appellate court has no authority to disturb trial court's findings.

4. Contracts ⇨95(5)—Agreements of husband to pay for necklace purchased by wife, which were induced by communication threatening criminal prosecution against wife, held unenforceable, whether oral or written.

Where husband living apart from wife, was induced to go to England to make arrangement for payment of necklace purchased by wife because of cablegram sent him threatening criminal prosecution against her, agreements to pay for necklace stolen or embezzled from wife, whether agreements were oral or written, were unenforceable as against husband's estate.

5. Contracts ⇨188—Wife was not bound by agreement between her husband and her creditor, signed by husband alone, by which she was to pay debt and renounce child to husband in case of default.

Agreement between husband and wife's creditor, signed by husband only, providing for wife's payment of debt and payment by husband, in event of her default, in which case wife should renounce custody of child, was of no binding effect on wife.

6. Contracts ⇨71(3)—Creditor's agreement for any period to refrain from suit against wife is valid consideration for husband's agreement to pay wife's debt.

Agreement on part of husband to pay debt of wife is supported by valid consideration, if wife's creditor agrees for a period of time, no

matter how brief, not to sue on its claim against wife.

7. Contracts ⇨71(3)—Actual forbearance to sue without any agreement does not constitute consideration.

Fact that creditor does in fact forbear to sue does not constitute consideration for another's agreement to pay, where there was no agreement on the part of the creditor to forbear suit.

8. Contracts ⇨71(3)—Written and oral agreements of husband living apart from wife to pay for necklace purchased by her, without promise of creditor to forbear suit, held without consideration, notwithstanding creditor's actual forbearance.

Written and oral agreements of husband living apart from wife to pay for necklace purchased by her, in event of her default in payment, held void for want of consideration, where there was no agreement on creditor's part to forbear suit against wife, notwithstanding creditor actually refrained from instituting legal proceedings.

9. Parent and child ⇨2(1)—Husband's agreement to pay wife's debt in consideration for wife's renunciation of child in event of her default held not to render contract void.

Agreement of husband living apart from wife to pay for necklace purchased by her in case of her default, in consideration of wife's agreement to renounce claim to custody of child if she defaulted, held not to render contract void, since parents may contract respecting custody of children.

10. Parent and child ⇨2(1)—Parents may contract with each other regarding custody of children, subject to court's supervision of child's welfare.

Parents have a legal right to contract with each other as to the custody and control of their offspring, subject to the control of the court in proceedings wherein the welfare of the child is involved.

11. Parent and child ⇨2(1)—Promise by one parent that other may have child's custody is sufficient consideration to support agreement of other parent.

As between parents, promise by one parent that the other may have the custody and control of their child is sufficient consideration to support an agreement on the part of the parent in whose favor the promise is made.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Walter Perry Johnson, Judge.

Action by Tiffany & Co. against John D. Spreckels, Sr., and Walter D. K. Gibson, as executors of the last will and testament of John D. Spreckels, Jr., deceased. Judgment for defendants, and plaintiff appeals. Affirmed.

Knight, Boland & Christin, of San Francisco, for appellant.

Morrison, Dunne & Brobeck, Dunne, Dunne & Cook and Dunne, Brobeck, Phleger & Harrison, all of San Francisco, for respondents.

CURTIS, J. Action brought to recover upon a claim against the estate of John D. Spreckels, Jr., deceased. The claim was based upon an agreement whereby, it is contended, the deceased guaranteed the payment to appellant of the sum of 16,500 pounds, lawful money of the kingdom of Great Britain (equal to \$80,350 in lawful money of the United States), being the cost price of a pearl necklace purchased of appellant by the wife of the deceased. It is undisputed that Mrs. Spreckels, on or about the 3d day of June, 1920, purchased from Tiffany & Co., at London, England, a pearl necklace, and agreed to pay therefor the sum of 16,500 pounds. The necklace was delivered to Mrs. Spreckels, and she signed a receipt therefor. Shortly thereafter representatives of Tiffany & Co. became apprehensive regarding the transaction, and requested Mrs. Spreckels to return the necklace until she could furnish satisfactory references for credit. Mrs. Spreckels in the meantime had delivered the necklace to a Mr. Barrett, who had sold it, appropriated the proceeds, and absconded. She was therefore unable to return the necklace to Tiffany & Co., nor was she able to pay for the same. At the time of the purchase of the necklace Mrs. Spreckels was residing in London, and had with her Geraldine, age four years, the daughter of herself and her husband, John D. Spreckels, Jr. Mr. Spreckels was residing in California. They had not been actually divorced, although they were then living separate and apart, and on March 17th of the following year an interlocutory decree of divorce between them was entered by the superior court of the city and county of San Francisco. On learning that Mrs. Spreckels was unable to return the necklace, Tiffany & Co. threatened to have her and Barrett prosecuted for conspiracy to defraud. As a result of conferences held immediately after Tiffany & Co. learned that Mrs. Spreckels was unable to return the necklace, in which Mrs. Spreckels and her solicitors met representatives of Tiffany & Co. and its solicitors, two cablegrams were dispatched to Mr. Spreckels in California. One of these cablegrams was signed by Mrs. Spreckels and the other by a Mr. Price, the managing clerk of Crosse & Sons, her solicitors. While these cablegrams were signed by the parties as just stated, they were framed in a large measure by the solicitors of Tiffany & Co., present at the conference. These cablegrams were sent June 18, 1920, and the one signed by Mr. Price was as follows:

"Your wife is implicated in connection with expensive jewelry alleged to have been obtained from Tiffanys by conspiracy and stolen from

her. She is threatened with prosecution unless satisfactory arrangements are made and desires your presence or help for her protection, as she states she is penniless. Please cable."

The following is a copy of the cablegram sent by Mrs. Spreckels:

"To save me from criminal prosecution must have money or guarantee immediately. Have been drawn into this by a scoundrel who has bolted with the pearls. Consequences terrifying for me and disastrous to the family. For everyone's sake, cable or arrange with Tiffany, New York. Position desperate, keep silent to mother and for God's sake come over to me and Geraldine and help us to obtain redress from thief."

Spreckels received these cablegrams in California and, after replying to them, left for London immediately, arriving there about the 12th day of August, 1920. He immediately went into conference with Mrs. Spreckels and her solicitors and with representatives of Tiffany & Co. and their solicitors. He asked for, and was given, "the history of the whole matter concerning the pearl necklace." They discussed the chances of recovering the necklace or its value from Barrett, but finally concluded that he was so hopelessly involved that he could do nothing towards returning the pearls or their value, even if they were able to ascertain his whereabouts. A warrant for his arrest was issued, but it does not appear that it was ever served, probably for the reason that the officers were unable to apprehend him. In these conferences and interviews with the representatives and solicitors of Tiffany & Co., after his arrival in London, Spreckels made certain statements and admissions upon which appellant relies, in addition to the writing signed by him and later referred to, in support of its claim for a judgment in its favor in this action. A Mr. Feaveyear, one of the London managers of Tiffany & Co., testified that:

"J. D. Spreckels, Jr., then stated he proposed to go to Venice to see Mrs. Barrett, and to inform her that the necklace must either be restored to my firm or he would apply for a warrant for her husband's arrest, and, should the money or the jewelry not be forthcoming, he would then see what further steps could be taken to discharge the indebtedness to my firm."

Mr. Feaveyear also testified that on another occasion Mr. Spreckels "stated he was going to take his wife back to America, and, as she had a wonderful voice, and was a very clever dancer, she was to be trained for the stage and he would see she paid my firm's account off by installments." Mr. Fox, another representative of Tiffany & Co., testified:

"On the 15th September, Mr. Spreckels called at 221 Regent street and stated he wished to have an agreement prepared between his wife and himself for payment of the debt to us, and also as to the custody of their child, and he

desired our solicitors to draw up this agreement."

The result of this interview was that Mr. Fox and Mr. Spreckels went to the office of Adam Burn & Son, solicitors, where there was prepared by said solicitors a certain writing in duplicate, one copy of which was signed by Spreckels and was left with Adam Burn & Son, and the other was retained by Mr. Spreckels. Neither copy was signed by Mrs. Spreckels. This writing was as follows:

"Memorandum of agreement made this twentieth day of September, one thousand nine hundred and twenty, between John D. Spreckels, Junior, of San Francisco, in the United States of America (temporarily residing in London), of the one part, and Syida Spreckels, his wife of the other part. Whereas the said Syida Spreckels on or about the third day of June, one thousand nine hundred and twenty, purchased from Messrs. Tiffany & Co. of 221 Regent street in the county of London, a pearl necklace for sixteen thousand five hundred pounds, which amount she is at the present time unable to pay, and whereas there have been various interviews between the parties hereto and the representative in London of the said firm of Tiffany & Company as to the manner in which the debt shall be discharged, now it is hereby agreed between the parties hereto:

"1. That she the said Syida Spreckels shall discharge the debt by payment to Messrs. Tiffany & Company of the sum of thirteen hundred and seventy-five pounds on the twenty-fifth day of December, one thousand nine hundred and twenty, and the balance by installments of thirteen hundred and seventy-five pounds each on the twenty-fifth day of March, the twenty-fourth day of June, the twenty-ninth day of September, and the twenty-fifth day of December in every year until the full amount of sixteen thousand five hundred pounds is paid.

"2. In the event of default being made a payment of any installment, the said John D. Spreckels agrees to accept full responsibility for and will discharge the said debt or so much thereof as shall remain owing and for this purpose will arrange direct with Messrs. Tiffany & Company.

"3. Should default in payment of any installment as aforesaid be made and the said John D. Spreckels be called upon to discharge the debt, then and in such case the said Syida Spreckels agrees to renounce all claim to the custody of their child Geraldine in his favour and will undertake not to approach or attempt to see the said child without his permission.

"4. It is further agreed between the parties hereto that one part of this agreement signed by the said Syida Spreckels shall be retained by the said John D. Spreckels and the part signed by the said John D. Spreckels shall be retained by the said firm of Tiffany & Company until the debt is discharged.

"John D. Spreckels, Jr.
"Witness to the signature of John D. Spreckels, Jr.: Roddam W. Burn, 6 Bell Yard, Doctors Commons, London, Solicitor."

The signing of this writing by Spreckels appears to have closed negotiations between

the Spreckels and Tiffany & Co. Spreckels returned to California, where he met his death on August 8, 1921. Prior to this time, and on the 17th day of March, 1921, as we have before stated, an interlocutory decree of divorce had been granted the said Spreckels by the superior court of the city and county of San Francisco. His death, therefore, occurred before the entry of the final decree of divorce. Nothing was paid Tiffany & Co. for the necklace, and, after the appointment and qualification of the executors of his last will and testament, Tiffany & Co. presented its claim amounting to \$80,350 against said estate for the purchase price of said necklace to the said executors, which claim was rejected, and within the time limited by the provisions of the Code this action was instituted on said claim against said executors to recover said amount of \$80,350 from the estate of said deceased. The trial court rendered judgment in favor of the defendants in the action, and the plaintiff has appealed therefrom.

As stated by appellant in its brief, the issues raised by respondents at the trial were: First, that the agreement was one for the benefit of a third person, and therefore, under English law, was not enforceable; second, that the obligation evidenced by the agreement, if any, was secured by menace, coercion, and duress exercised by or on behalf of appellant. The conclusion we have reached in this case renders it unnecessary for us to decide the question whether the agreement relied upon by appellant was for the benefit of a third person, and therefore not enforceable under the English law, being the first issue above mentioned. We are satisfied that the assent by John D. Spreckels, Jr., to any agreement entered into by him, whether oral or written, to answer for the debt of Mrs. Spreckels, was procured by the wrongful use of fear, induced by the threats of appellant, its representatives and solicitors, to prosecute Mrs. Spreckels along with Barrett for conspiracy to defraud appellant out of said necklace of pearls in case said pearls were not returned, or satisfactory arrangements made for their payment. No citation of authority is necessary to support the proposition that a contract procured by means of threats of this character is illegal and voidable, and therefore unenforceable against the promisor. This principle of law is conceded by appellant. The leading case upon that subject in this state is the case of *Morrill v. Nightingale*, 93 Cal. 452, 28 P. 1068, 27 Am. St. Rep. 207, where this court said, on page 455 (28 P. 1069):

"The consent of a party to a contract must be free, and it is not free when obtained through duress or menace. Section 1569 of the Civil Code declares duress to consist in the 'unlawful confinement of the person of the party, or of the husband or wife of such party,' etc., or 'the confinement of such person, lawful in form,

but fraudulently obtained.' Section 1570 provides, menace consists in a threat of the duress above specified, or of a threat of injury to the character of any such person. In this case there was no arrest and confinement, hence no duress; but the history of the transaction, as disclosed by the findings, clearly indicates threats of imprisonment upon a charge of embezzlement, which, in effect, necessarily were threats of injury to the character of defendant Nightingale, and consequently a menace. The court finds that the contract and notes were executed under the influence of such menace, and such being the fact, the defendant's free consent to the execution thereof was never gained. * * *

That case was approved by this court in the case of *People v. Beggs*, 178 Cal. 79, 84, 172 P. 152, 154, where the court uses the following pertinent language:

"If, instead of paying the two thousand dollars, Da Rosa under the circumstances shown to exist, had given his note and a mortgage securing the same, then, under the authority of the case cited, payment thereof could not have been enforced, the reason therefor being that execution of the security was procured by the wrongful use of fear induced by the threat to prosecute him for the crime out of which the indebtedness arose. If it be a wrongful use of fear in the one case, is it not likewise an equally wrongful use of fear in the instant case?"

[1] The above rule applies with equal force when the subject of the threat is the wife of the person whose assent to an agreement is secured as a result of such threats. 13 *Corpus Juris*, 404, § 325.

[2, 3] In the present action the trial court found as a fact that the writing of September 20, 1920, was signed by John D. Spreckels, Jr., because of said threats and to save his wife from criminal prosecution threatened by appellant. That the evidence was sufficient to support this finding we think must be conceded. The two cablegrams already referred to and which were practically prepared by the solicitor of appellant, can have no other meaning or significance. The evidence shows without conflict that they were sent only after the insistent demands by the representatives of appellant that Mrs. Spreckels communicate with her husband for assistance, and their contents is a correct reflection of appellant's attitude both before and after the cablegrams were sent.

In addition to these cablegrams, the evidence of Mr. Crosse, solicitor for Mrs. Spreckels, and of his managing clerk, Mr. Price, shows that repeated threats were made by Mr. Burn, appellant's solicitor, that Mrs. Spreckels would be arrested for conspiracy to defraud his client, unless the necklace was restored or satisfactory arrangements made for the payment thereof. Mr. Price testified that:

"The first conversation was on the 17th of June, 1920, at the Washington Hotel, Curzon street, London, with a representative of Messrs.

Tiffany's, whose name I do not know, and Mr. R. W. Burn, their solicitor. The whole position was discussed, and Mr. Burn urged Mrs. Spreckels, who was present, to communicate with her husband for assistance. He informed me that, failing satisfactory arrangements being made, they would have no alternative but to prosecute Barrett and Mrs. Spreckels for alleged conspiracy. After discussing the matter with Mrs. Spreckels she ultimately consented to do so, although it was against her wish."

It will be noted that this conversation took place on June 17th, and the cablegrams were sent on the following day. Mr. Price further testified in answer to interrogatory No. 16:

"A. Yes; I repeat what I have above stated, that they said they would prosecute Barrett and Mrs. Spreckels. * * *

"Interrogatory No. 24: Referring to page 4 of said Exhibit B, please state who, if any one, informed you that they had instructions from Messrs. Tiffany to apply for a warrant for the arrest of both Barrett and Syida Spreckels. A. Yes; I was informed by Mr. R. W. Burn.

"Interrogatory No. 25: Please state the name of the person who made said statement to you, and the date on which it was made. A. Mr. Roddam W. Burn. The date was the 17th June, 1920, and on later days on the telephone."

Mr. Crosse testified:

"The claim made by Messrs. Tiffany & Co. was for the return of the jewels or payment of £16,000, and in default of either of those things they would prosecute Mrs. Spreckels. * * * it was at Messrs. Tiffany's office in Regent street, London. I cannot remember who was there, except that Mr. Roddam W. Burn, the solicitor, was there; but I think there were about half a dozen representatives of Messrs. Tiffany present. The conversation was what I have already stated in my answer to interrogatory No. 14, that, unless satisfactory arrangements were made, they would prosecute Mrs. Spreckels.

"Interrogatory No. 17: If you had more than one conversation with Adam Burn & Son, or Roddam W. Burn, please state whether any of them were by telephone. A. Yes; I did have several conversations by telephone with Messrs. Roddam Burn & Son, or Roddam W. Burn, the principal, all of which were to the same effect. * * * On the 22d June, and 2d, 3d, 5th, 6th, and 15th July there were conversations, the effect of all of which was that, if satisfactory arrangements were not made to settle the debt, they would prosecute Mrs. Spreckels. * * *

"Interrogatory No. 24: Referring to page 4 of said Exhibit B, please state who, if any one, informed you that they had instructions from Messrs. Tiffany to apply for a warrant for the arrest of both Barrett and Syida Spreckels. A. It was Mr. Roddam W. Burn who informed me to that effect.

"Interrogatory No. 25: If your response to interrogatory No. 24 is in the affirmative, please state the name of the person who made said statement to you, and the date on which it was made. A. This was on the 13th September, 1920, at Messrs. Tiffany's office in Regent street, London. It was Mr. Roddam W. Burn."

The evidence further shows that on the arrival of John D. Spreckels, Jr., in London, he asked for a "history of the whole matter concerning the pearl necklace," and he was given "full details and particulars." It can hardly be imagined that in a rehearsal of the history of the events surrounding the purchase, loss, and attempted recovery of the necklace mention would not have been made of the frequent and repeated threats of appellant to prosecute Mrs. Spreckels, unless arrangements were made satisfactory to appellant to settle the debt incurred in the purchase of the pearls. These threats were stressed in the two cablegrams sent to Spreckels, and were undoubtedly depended upon, by all parties concerned in preparing or sending them, to move Spreckels to come to his wife's assistance. The knowledge that his wife, with their minor daughter in her possession, was liable to be made the subject of a serious criminal prosecution, was undoubtedly the impelling cause which sent John D. Spreckels, Jr., to London to render them help and assistance. And, when the evidence shows that "full details and particulars" of the transaction were given him on his arrival, the only reasonable inference to deduct from such evidence is that he was fully advised of the determined purpose of the appellant, expressed on various occasions to Mrs. Spreckels and her solicitors, to hold Mrs. Spreckels criminally liable for the loss of the pearls. Spreckels was in no way responsible to appellant for the purchase price of the pearls, either legally or morally, much less was he in any way liable for their loss. He showed no particular concern for the mere business affairs of his wife. The parties were estranged, and had been living apart for some time, and he may have looked upon any mere financial transaction to which she was a party with unconcern and indifference. He was, however, naturally solicitous of the good name of himself and family, and would desire to protect it from the disgrace that would result from a criminal prosecution of one of its members. Besides, his daughter of tender years was with her mother, and the arrest and imprisonment of the mother might result in most serious consequences to the child. It was these considerations, as shown by the evidence, and these alone, in our opinion, which prompted John D. Spreckels, Jr., to make the oral and written agreements by which, the appellant now claims, he obligated himself to answer for the debt of his wife.

[4] Appellant contends that, even if, at the inception of his connection with this affair, the threats of prosecution influenced Spreckels' action, yet three months intervened between the sending of the cablegrams and the signing of the agreement on September 20th, during which time, appellant claims, the evidence shows that no suggestion was made by

any person that Mrs. Spreckels would be prosecuted. Conceding this last statement to be true, it was for the trial court to determine the weight and effect of the cablegrams upon the mind of Spreckels at the time he signed the writing or made the oral promises relied upon by appellant. Besides, as we have already shown, Spreckels, on arriving in London on the 12th day of August, 1920, was fully informed of all the details and particulars relating to the necklace. Furthermore, the testimony of Mr. Crosse, the solicitor of Mrs. Spreckels, shows that Mr. Burn, representing appellant, stated to him on September 13, 1920, just seven days before the written agreement was signed, that he had instructions from Tiffany & Co. to apply for a warrant of arrest of both Barrett and Syida Spreckels. It is only reasonable to conclude that Mr. Crosse communicated this statement to his client, and she in turn communicated it to Spreckels. Particularly are we justified in drawing this conclusion from the evidence when the sole purpose of Mrs. Spreckels in sending for her husband, and of the latter in traveling from California to London, was to forestall any criminal proceeding against his wife. As we have already stated, the foregoing evidence as to the threats of prosecution made by the representatives of the appellant against Mrs. Spreckels is uncontradicted. Two of these representatives of appellant, Mr. Fox and Mr. Feaveryear, who, with Mr. Burn, the solicitor, acted for appellant in practically all of its dealings with Mrs. Spreckels, were witnesses in this case; their evidence having been taken by means of depositions. Neither of them denies any of the statements made by respondent's witnesses as to the nature of the threats or that such threats were made as testified to by respondent's witnesses. Mr. Burn, who probably could have thrown more light upon the subject than any one else on behalf of appellant, does not appear to have been a witness in the action. Just why he was not made a witness, or his deposition was not taken, the record fails to disclose. The trial court having found that the assent of Spreckels to the agreement, which is the basis of this action, was procured by means and as the result of threats made by appellant to prosecute Mrs. Spreckels, and the evidence in support of such findings being not only sufficient, but practically uncontradicted, this court has neither the authority nor the inclination to disturb the action of the trial court in this regard. There is some claim made by appellant, in discussing other questions arising on this appeal, that, besides the writing of September 20, 1920, Spreckels made oral promises that he would pay the claim of Tiffany & Co. against Mrs. Spreckels, and that, even if he is not bound by said writing, he is liable under his oral promises. In so far as these oral state-

ments, or any oral agreement arising out of them are concerned, the oral agreement is in no better position than the written agreement, when considered in reference to the threats of prosecution made by the appellant. Any agreement made by Spreckels, either oral or written, the testimony in this case discloses, was made as the result of said threats of criminal prosecution against Mrs. Spreckels.

[5-8] There is another reason in our opinion why the agreement made by Spreckels was without binding effect upon him or upon his estate, and this is that there was no valid consideration to support any agreement, either written or oral, made by him. In the first place, as we have already seen, the writing claimed by appellant to be an agreement was not signed by Mrs. Spreckels, and it is doubtful whether she ever knew that it had been signed by her husband and delivered to appellant. Whether she knew of its existence or not, there is no evidence that she ever assented to it or agreed to any of its terms. It necessarily follows that the agreement had no binding effect upon Mrs. Spreckels, and therefore between her and Spreckels it was merely a "scrap of paper." If it be considered as an agreement for the benefit of Tiffany & Co., there is still no consideration to support such an agreement. Tiffany & Co. parted with nothing of value; neither did it suffer any detriment by any transaction had between it and John D. Spreckels, Jr. There is no semblance of a claim that it parted with anything of value in consideration of any contract or agreement made by Spreckels. The only possible claim it can make is that it suffered a detriment by forbearing to sue Mrs. Spreckels for the purchase price of the pearls, and agreeing to accept payment of their purchase price in installments as set out in the writing signed by Spreckels. Had Tiffany & Co. by any valid agreement bound itself not to sue upon its claim against Mrs. Spreckels for a period of time no matter how brief, in consideration of Spreckels agreeing to pay its claim against Mrs. Spreckels, such an agreement on its part would have been sufficient to support Spreckels' engagement to pay their claim, provided his assent thereto had not been gained by reason of threats of prosecuting Mrs. Spreckels. *Whelan v. Swain*, 132 Cal. 389, 64 P. 560; *Humboldt Sav., etc., Soc. v. Dowd*, 137 Cal. 408, 70 P. 274. There is no evidence, however, of any such an agreement by Tiffany & Co. The writing of September 20, 1920, was prepared by the solicitors of Tiffany & Co. and contains no references to any engagement by Tiffany & Co. to extend the time of payment of their claim against Mrs. Spreckels or to accept the agreement of the Spreckels to pay the same in installments. So far as this writing affected the rights of Tiffany & Co. to proceed against

Mrs. Spreckels, it (Tiffany & Co.) could have instituted action the day the writing was signed against Mrs. Spreckels to recover the purchase price of the pearls. The fact that it did forbear to sue without any agreement of forbearance does not constitute a consideration. *Estate of Thomson*, 165 Cal. 290, 131 P. 1045; *Commercial Bank v. Redfield*, 122 Cal. 405, 55 P. 160, 772; *Shadburne v. Daly*, 76 Cal. 353, 18 P. 403. The agreement, therefore, on the part of Spreckels to pay the claim of his wife, and this applies to any oral promises made by him as well as to the purported written agreement, was without any consideration, and imposed no obligation upon him or upon his estate to pay the same. *Chaffee v. Browne*, 109 Cal. 211, 41 P. 1028; *Lagomarsino v. Giannini*, 146 Cal. 545, 80 P. 698. As was said in the former of these cases, quoting from *Bayler v. Commonwealth*, 40 Pa. 37, 80 Am. Dec. 551, where the wife had assumed to secure her husband's indebtedness under circumstances similar to those in the present action:

"No new consideration was given at the time it was executed. The wife received nothing, the husband received nothing, the creditor parted with nothing. The instrument was, therefore, no more than a collateral security given for an old debt of the husband."

[9-11] The further contention is made by respondents that, even if the written agreement of September 20, 1920, between Spreckels and wife were in all other respects legal, the agreement is rendered invalid by reason of the nature of the promise of Mrs. Spreckels contained therein "to renounce all claim to the custody of their child Geraldine in his (Spreckels') favor," the sole consideration of Spreckels' agreement to her to accept responsibility for the payment of appellant's claim. This contention, we think, cannot be sustained. Parents have a legal right to contract with each other as to the custody and control of their offspring. *Sargent v. Sargent*, 106 Cal. 541, 39 P. 931; *Anderson v. Anderson*, 56 Cal. App. 87, 204 P. 426; *Van der Vliet v. Van der Vliet* [Cal. Sup.] 254 P. 945. This right, however, is subject to the control of the court in proceedings wherein the welfare of the child is involved. *Black v. Black*, 149 Cal. 224, 86 P. 505. But, as between the parents themselves, a promise by one parent that the other may have the custody and control of their child is legal, and is a sufficient consideration to support an agreement on the part of the parent in whose favor the promise is made.

The written agreement, and any oral agreement made by Spreckels to accept responsibility of his wife's debt to appellant, for the reasons that the same were procured by menace, and are unsupported by any valid

consideration, are invalid and unenforceable against the estate of said deceased.

The judgment is affirmed.

We concur: WASTE, C. J.; RICHARDS, J.; SEAWELL, J.; SHENK, J.; LANGDON, J.; PRESTON, J.

202 Cal. 770

IVANCOVICH v. BERTOSSI. (S. F. 11682.)

Supreme Court of California. Dec. 28, 1927.

1. Sales $\S$ 181(12)—Evidence, in action for breach of contract to sell wine, held to sustain finding for defendant on theory wine became unmerchantable because of buyer's attempt to blend wines.

In action by assignee of contract for sale of wine to recover against seller for breach, because of wines being sour and unfit for beverage purposes, evidence held sufficient to sustain finding in favor of defendant on theory that wine became unmerchantable by reason of buyer's act in attempting to blend different wines after purchase.

2. Sales $\S$ 284(1, 2)—Delivery to buyer of possession of wine for purpose of preparing it for resale, in which process it deteriorated, held sufficient compliance with warranty requiring delivery free from commercial defects.

Where buyer of wine under contract, requiring delivery free from any commercial defects, took possession of the wine by agreement for purpose of preparing it for resale and shipment, and wine was caused to deteriorate and spoil as result of his treatment, there was sufficient compliance with warranty.

3. Set-off and counterclaim $\S$ 59—Personal judgment on counterclaim based on contract will not lie against assignee of such contract suing for breach.

Where buyer, in contract for sale of wine, had assigned cause of action for an alleged breach to another, a personal judgment for amount of damage sustained by seller as alleged in cross-complaint for breach of such contract will not lie against assignee.

4. Appeal and error $\S$ 1071(6)—Neither party can complain of failure to make finding which would not have benefited either.

Where neither appellant nor respondent would have been benefited by certain finding, neither party can complain of court's failure to make such finding.

In Bank.

Appeal from Superior Court, Sonoma County; Ross Campbell, Judge.

Action by George J. Ivancovich against Angelo Cassani, for whom Nonie Bertossi, as executrix, was substituted after his death, and wherein defendant filed a cross-complaint. Judgment for defendant, and plaintiff appeals. Affirmed.

Edwin T. McMurray, of San Francisco, for appellant.

Geary & Geary, of Santa Rosa, and James L. Atteridge, of San Francisco, for respondent.

CURTIS, J. This action was brought to recover damages, which the complaint alleges the plaintiff's assignor sustained by the breach of a certain contract for the purchase and sale of two lots of wine described in said contract. This contract was dated December 17, 1918, and was signed by Angelo Cassani, the then owner of the wine, who was also the original defendant in this action. Upon his death, subsequent to the commencement of this action, the executrix of his will was substituted as defendant in his stead. By this contract Cassani agreed to sell G. B. Cella, of New York City, two lots of wine "in good condition, and without commercial defects," one consisting of about 82,000 gallons then in the Mt. Olivet winery, belonging to Cassani, and the other lot consisting of about 87,000 gallons, then in his Santa Rosa winery, both of said wineries being located in Sonoma county, in this state. The price of the wine was 51 cents per gallon for that in the Mt. Olivet winery and 50 cents per gallon for that in the Santa Rosa winery. The purchaser agreed to pay for the wine "f. o. b." at the respective wineries, "invoice and bill of lading to be sent and paid at sight in San Francisco, Cal." \$10,000 was paid on the contract at the signing thereof, to be applied on final shipment. The wine was all to be taken within 90 days from date of contract. Barrels, revenue stamps, and lumber were to be paid for by purchaser, who was also to provide all necessary labor for filtering wine, in case purchaser desired same to be filtered. The wine was to be loaded on board cars at depot, ready and complete for shipment by seller. Before the signing of the contract, Cella visited both wineries and took samples of all the wine contained therein, and the contract of sale provided that the quality of the wine sold should be of a quality "same as sample submitted." On January 20, 1919, this contract was sold and assigned by Cella to Louis H. Mooser, Jr., doing business under the name of Mooser & Co., of San Francisco, who thereafter carried on with Cassani all transactions regarding the wine covered by the contract. Louis H. Mooser, Jr., prior to the commencement of this action, assigned his rights of action on said contract to the plaintiff herein. The foregoing facts were set forth in plaintiff's complaint, together with the further facts that said Mooser, within the 90 days provided in said contract, as the limit within which said wine might be taken, had detailed tests made of said wine, and that said tests

showed that said wines and all portions of the same were not in good condition, and were not without commercial defects, but, on the contrary, said wines were by said tests shown to contain volatile acids far in excess of the proportion or percentage which would permit the sale of the same in good condition, and in such proportion and percentage as would prevent the sale of said wines in good condition; that said Mooser, for this reason, rejected said wines, and notified Cassani of his said refusal. It is then set forth in said complaint that, on account of Cassani's refusal to comply with said contract, said Mooser was damaged in various sums, including said sum of \$10,000 paid by Cella to Cassani at the execution of the contract, and which amount Mooser had paid to Cella at the time of the assignment of the contract by Cella to Mooser. To this complaint the defendant Cassani filed an answer and cross-complaint in which he denied that there was any defect in the wine when sold or at any time thereafter until "said Mooser was permitted by this defendant to blend said wines, and otherwise manipulate and change said wines; that such manipulation and blending of said wines so made by said Mooser changed the said wines so that they were different in quality and composition from what they were when said Mooser took charge thereof, and any deterioration in the quality of said wines was occasioned solely by the acts of said Mooser performed in and about said wines." Cassani in his answer denied that Mooser was damaged by reason of any act on his part, and alleged in his cross-complaint that, by reason of Mooser's action in manipulating and blending the wine, and thereby causing it to deteriorate, he was damaged in a sum largely in excess of \$10,000. The court found in favor of the defendant, and rendered judgment that plaintiff take nothing by his said complaint, and that defendant recover her costs.

Practically the only point involved in this appeal is whether the findings are supported by the evidence. The following facts are disclosed by the evidence: The wine in question was manufactured and produced by Cassani in his two wineries in Sonoma county, and was the entire output of these wineries for the year 1918. Cella, an experienced wine man from New York, visited Cassani's wineries three or four times before entering into the agreement to purchase the wine. At these several visits he took samples of the wine from each of the tanks or vats in which it was stored. These he tasted and tested. Whether he "tested" the wine other than by tasting it is not clear from the record. After taking the samples and tasting and testing them, he returned to Cassani's place of business, and on December 17, 1918, entered into the agreement of sale, and paid

the sum of \$10,000 on the purchase price. This contract he sold on January 20, 1919, to Mooser. Shortly after Mooser bought the contract from Cella, and before the wine was blended by Mooser, the latter directed Cassani to ship a carload of this wine from the Santa Rosa winery to Cella in New York. This shipment of wine, consisting of about 6,000 gallons, was shipped to Cella at New York, and paid for by Mooser. No complaint was ever received by Cassani from Cella or from Mooser or from anybody else as to the character and quality of this wine so shipped by Cassani to Cella at New York City.

About February 4, 1919, Mooser sent men to the Santa Rosa winery to blend the wine. This took about a month. The wine in the Mt. Olivet winery was not blended, and it does not appear that Mooser ever made any objection that it was not up to the requirements of the contract. Mooser had the wine in the Santa Rosa winery analyzed by a chemist, and these analyses showed an excess of volatile acid which rendered the wine sour and unfit for beverage purposes. The action was tried some four years after the events happened, and the witness who testified to procuring the samples stated that he procured the samples somewhere between the 17th day of December, 1918, the date of the contract of purchase, and the 10th day of March, 1919. As we have already seen, the blending of the wine in the Santa Rosa winery began on February 4, 1919, and it took about a month to complete the work. The analyses of the wine were made on or about March 10, 1919. Cassani testified that Mooser sent a party to the winery to get samples of the wine, and that this was after the wine had been blended. The trial court undoubtedly concluded from the evidence that these samples of wine were taken after the wine had been mixed and blended by Mooser, and we cannot say from the state of the record upon this subject that the trial court was not justified in arriving at this conclusion. There is no conflict, however, in the evidence that the wine in the Santa Rosa winery, after it had gone through the process of blending, was sour and of little commercial value for beverage purposes. The evidence is clear that the blending of the wine was done by Mooser, and, if there were any deleterious results therefrom, Mooser himself was alone responsible therefor. The blending of the wine was for the purpose of making the whole output of the winery of a uniform color and quality, and the process of blending consisted simply of pouring together the wine contained in two or more tanks or vats, and making one lot of the whole before it is drawn out again either into the vats or in barrels for shipment. While this process does not necessarily tend to deteriorate the

wine, yet the evidence of experts produced at the trial was to the effect that in blending wines there were a number of contingencies that might arise which would affect the quality of the wine after it was blended. As one witness said:

"If your hose and other implements in the winery are not clean, if they are not thoroughly washed out, it will affect even a sound wine. The sound wine can be spoiled by using hose and material that are not cleaned or properly cleaned. But sound wine blended will remain a sound wine, but tanks in the winery differ."

This same witness testified that a tank of unsound wine, when blended with other wine in the winery, might absolutely spoil the whole lot. While there was no direct evidence that any of the wine in the Santa Rosa winery was unsound before the blending process took place, the owner of the winery, Cassani, who was an experienced man, testified that he disapproved of mixing the white or muscat wine with the Zinfandel. It appears that practically all of the wine in the Santa Rosa winery was Zinfandel wine, but there was a small lot of white or muscat wine in this winery. The testimony of Cassani as to this incident was as follows:

"Q. When you say blend and mix, you mean they dumped the wine from one tank into wine in another tank? A. Yes, they mixed it all up, you know. Q. That was for the purpose of making the type of wine that they wanted? A. Making one kind of wine; that is all. Q. I see. A. When they say they going to put in that white wine, I says, 'Gentlemen, I don't care for me what you doing, but you spoil the Zinfandel wine by putting in that.' Q. What did they mix with the Zinfandel? A. Yes; they did. Q. I say, what did they put in with Zinfandel? A. White wine, muscat, you see, that gave a bad smell; that is why I had to sell my wine cheaper to get rid of it."

[1] There was testimony of experts produced by the plaintiff who testified, contrary to the statement of Cassani, that the mixing of white or muscat wine with Zinfandel wine would spoil the latter. Yet the trial court was not bound to accept their evidence, and it may well have rejected their statements and concluded in accordance with the views of Cassani that by mixing or blending the two kinds of wine the whole was spoiled. There was ample evidence to show that the wine was sound and free from commercial defects on the 17th day of December, 1918, when the contract of sale was entered into. Both Cassani and the witness Buzzzi, who had worked for Cassani in making the wine, and who also was employed by Mooser to help blend the wine, testified that the wine was in good condition when sold. Cella, the purchaser, only a day or so before he purchased the wine, tasted the wine, and took samples of it for testing. A short time after the purchase, but after Mooser had ob-

tained an assignment of the contract, a carload of the wine was shipped to Cella at New York City, and no objection was ever made as to the quality of the wine shipped. This evidence was sufficient to justify the trial court in finding that the wine before blending was sound and free from commercial defects. It is admitted that, after the wine was blended, it was sour and unfit for beverage purposes. When we consider the evidence of Cassani that mixing the white or muscat wine with the Zinfandel wine would spoil the mixture, together with the other evidence in the case as to the unfavorable results that might result from the blending of wine by the use of a hose or other implements not properly cleaned, we are of the opinion that it was not an unreasonable conclusion or inference for the trial court to draw that the inferior quality of the wine and its unmerchantable character after it was blended was due entirely and solely to the acts of Mooser and his employees in the mixing or blending of the wine. The evidence, therefore, was sufficient to sustain and justify the findings of the trial court in favor of the respondent.

[2] Appellant also contends that the findings do not support the judgment. In this connection he claims that, as the contract of sale warranted the wine to be sound and free from any commercial defects, this warranty referred to the time of delivery, and not simply to the time of purchase. Appellant's position appears to be that, although the wine may have been sound when purchased, yet if it were not in that condition at the time it was to be delivered under the contract, the warranty had not been kept. There is no merit in this contention in view of the facts of this case. While there may not have been an actual delivery of the wine under the contract, so as to entitle the seller to demand payment therefor, yet by an agreement of the parties Mooser took possession of the wine for the purpose of preparing it for resale and shipment, and, while in such possession, and as a result of his treatment of the wine, it was caused to deteriorate and spoil. The inferior quality of the wine, due to the acts of Mooser, cannot be chargeable to the respondent. The fact that the wine was not, at the time fixed for delivery, up to the standard required by the contract of sale, was due entirely to the acts of Mooser. The appellant cannot, therefore, complain of the failure of the wine to meet the requirements of the warranty at that time.

[3, 4] Appellant also claims that the finding, under the allegations of the cross-complaint, that defendant was damaged in excess of \$10,000 by the failure of Mooser to accept and pay for the wine according to the contract, was indefinite, and that "defendant is entitled to a judgment for the actual

amount of damage suffered." The court found that, upon Mooser's refusal to accept and pay for the wine, Cassani was compelled to sell the wine and did so at a loss of more than \$10,000, which amount the court offset against the payment of \$10,000 made by Cella to Cassani on the execution of the contract. As Mooser had assigned his cause of action to the appellant, the trial court rightly concluded that a personal judgment for the amount of damage sustained by the respondent for the breach of the contract by Mooser would not lie against Mooser's assignee, the appellant herein, and refused to award such a judgment. But, as the appellant had sought to recover the \$10,000 paid by Cella at the execution of the contract, the trial court did go into the merits of respondent's claim for damages, and found that such claim was in excess of the said sum of \$10,000, which appellant sought to recover from respondent. Appellant cannot complain that the court failed to fix a definite amount in which respondent was damaged, so long as the amount found was in excess of the amount which appellant was claiming from respondent, and which appellant would have been entitled to recover had not respondent sustained damages by reason of Mooser's failure to carry out the contract. Had the trial court found and fixed definitely the amount of damage sustained by respondent in excess of the sum of \$10,000, neither the appellant nor the respondent would have been benefited by such a finding. Neither party can therefore complain of the court's failure to make such a finding.

A number of other objections to the judgment have been advanced by appellant in his brief, all of which have been considered by us, and, after such consideration, we are of the opinion that they are without merit. A detailed discussion of them would serve no useful purpose, as they involve matters of no special legal significance.

The judgment is affirmed.

We concur: WASTE, C. J.; PRESTON, J.; SEAWELL, J.; LANGDON, J.; SHENK, J.; RICHARDS, J.

203 Cal. 17

COULTER v. HOWARD. (L. A. 8883.)

Supreme Court of California. Dec. 30, 1927.

1. Brokers $\S$ 43(3)—Provision in landowner's escrow offer to sell held "note or memorandum" sufficient to bind her for broker's commission (Civ. Code, $\S$ 1624; Code Civ. Proc. $\S$ 1973).

Where landowner was sued by broker for commission on real estate transaction in which the landowner had placed an offer in escrow, which, in general, except as to commission statement, complied with an agreement pre-

viously signed by her son, without authority, allowing 5 per cent. commission to broker for selling, held that the offer was a sufficient "note or memorandum" within Civ. Code, $\S$ 1624, and Code Civ. Proc. $\S$ 1973, relative to land sale commission contracts being required to be in writing to bind landowner for commission upon her refusing to comply with offer after broker had secured a buyer.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Memorandum.]

2. Contracts $\S$ 76—Real estate broker's services, rendered under void contract or voluntarily, will support subsequent written promise to pay therefor.

The fact that a real estate broker has rendered services to a landowner in selling real estate under a void contract or voluntarily will, in view of Civ. Code, $\S\S$ 2310, 2311, support a subsequent written promise by the landowner to pay for the services.

3. Brokers $\S$ 63(1)—Commission of realty broker, who obtained buyer, held due as of date vendor repudiated, though brokerage contract provided for payment from proceeds.

Where the contract between a landowner and a real estate broker provided for the broker's payment of commission for land sale at the close of an escrow and then only out of funds payable to the landowner under such escrow, held, in broker's action for commission after the landowner had refused to convey upon the broker's procuring a purchaser, that the commission was due as of the date of the vendor's repudiation.

4. Brokers $\S$ 63(1)—Law requires good faith of vendor who has placed real estate with broker for sale and doing of no intentional preventative act.

The law requires good faith of owner who has placed his land in the hands of a real estate broker to sell and the doing of no intentional act to discourage, embarrass, or prevent the completion of the sale.

5. Brokers $\S$ 51—That real estate broker did not bring parties together personally is immaterial on question whether broker produced ready, able, and willing buyer, where broker dealt with landowner's agent.

In suit by a real estate broker for his commission upon the landowner's repudiation of the brokerage contract and refusal to sell, the fact that the real estate broker did not bring the owner and prospective purchaser together personally, but that the broker dealt with an agent of the owner, held immaterial as to broker's right to commission for producing a purchaser ready, able, and willing to purchase.

6. Brokers $\S$ 86(1)—In broker's action for realty commission, evidence held to show purchaser's payment was made during time allowed and before vendor's repudiation, entitling broker to commission.

In a broker's action for real estate commission, evidence held to show that the purchaser made the required payment during the period permitted therefor by the sale's agreement, so as to entitle broker to commission, although

vendor subsequently repudiated agreement and it was not completed.

7. Brokers **54—Broker producing purchaser ready, willing, and able to purchase realty during life of brokerage contract held entitled to commission.**

Where a real estate broker produced a purchaser ready, willing, and able to purchase real estate on the owner's terms during the life of the brokerage contract and before cancellation of escrow, he was entitled to his agreed compensation, though vendor refused to consummate contract and canceled escrow.

Department 1.

Appeal from Superior Court, Los Angeles County; T. A. Norton, Judge.

Action by F. Bradley Coulter against Julia O. Howard. Judgment for defendant, and plaintiff appeals. Reversed.

Tanner, Odell & Taft, of Los Angeles, for appellant.

N. B. Nelson, of Los Angeles, for respondent.

PRESTON, J. This is an action by a duly licensed real estate broker for a commission of 5 per cent. upon the purchase price named in a certain real estate transaction. Defendant had judgment against plaintiff, from which she has taken this appeal.

The only serious question in the case, and the only one which need be discussed, is the contention of appellant that certain material findings are, as a matter of law, contrary to the evidence. The substance of the findings in question is as follows: First, that no written evidence of the employment of plaintiff by defendant is shown, and the statute of frauds is therefore not satisfied; and, second, that appellant failed to produce a purchaser ready, able, and willing who offered to buy defendant's property upon the terms imposed by her. Our investigation of the record convinces us that appellant is correct in her contention and that said questioned findings are entirely without support in the evidence; this appearing as a matter of law.

The facts are substantially as follows: Defendant, a widow, owned a lemon orchard of 20 acres near Santa Monica in Los Angeles county, which she was willing to sell, with certain reservations and upon certain terms of payment, at a purchase price of \$3,000 per acre, or a total of \$60,000. Plaintiff, a licensed broker, was interested under a verbal contract with her in finding a purchaser on said terms. Pursuant to this verbal arrangement plaintiff found a prospective purchaser in one B. O. Driver, which fact was communicated to defendant. Later, and on June 21, 1923, one Ray Howard, the son of defendant, assumed the authority to act for his mother, and attempted to give in his own

name to plaintiff a three-day listing contract for sale of said property on said terms, promising in consideration of the services of plaintiff to pay her a 5 per cent. commission on the selling price. Accordingly, within the time limit specified, plaintiff induced said B. O. Driver to make an offer in writing to purchase said property at said price of \$60,000, payable in installments on certain specified dates. This offer was drafted at the First National Bank of Santa Monica by some officer of the bank. The bank was to act as escrow party for both vendor and vendee in the contemplated real estate transaction. Later, and on the 22d day of June, 1923, defendant herself appeared at said bank and also signed a separate written offer to sell said property, specifying the terms of sale. In so far as said terms are here material they were as follows:

"Escrow Instructions.

"Santa Monica, Cal., June 22, 1923.

"The First National Bank in Santa Monica, Cal.: I will hand you deed executed by Julie C. Howard, a widow, to Bert O. Driver of lots 7-8-9-10. * * * Reserving all subterranean waters on lots 9 and 10 which you are authorized to deliver to buyer or his representatives, upon payment to you by July 1st, 1923, for account of parties executing the instrument the sum of \$10,000 from which you may deduct your $\frac{1}{2}$ to be escrow charges and charges for usual form guarantee dep. by limiting liability to \$60,000 and from which you may 5-6/25/23 also pay all incumbrances on said property. Procure mtg. for \$50,000 payable \$5,000 on or before 90 days—balance in 4 equal annual payments. * * * This sale is made subject to satisfactory conditions and arrangements being made with the city of Santa Monica in regards to domestic water and sewer service. * * * Pay F. Bradley Coulter a commission of \$ 5% at close of escrow but only out of funds then due and payable to me out of this escrow. * * * Time is declared to be the essence of these instructions. If you are unable to comply with these instructions within the time specified, said instruments shall be returned to me on my written demand; but in the absence of such demand you will proceed to comply with these instructions as soon as possible thereafter. * * *

The prospective purchaser paid, as hereinafter explained, \$500 to the escrow bank pursuant to his offer and thereafter proceeded to make his arrangements with the city of Santa Monica for city water and sewerage connections for said property. These arrangements were satisfactorily completed with said city on June 25, 1923. From and after the completion thereof the evidence shows that the purchaser was ready, willing, and able to complete the purchase of said property and thereafter, to wit, on or about the 27th day of June, 1923, having just learned from inspection of the escrow offer signed by defendant that said document had been

interlined to require the payment of \$5,000 on June 25, 1923, he immediately gave a check to said bank for \$4,500, which completed said \$5,000 payment. His check for \$4,500 was introduced in evidence. It bears date of June 27, 1923, and is marked "Paid" on June 28th. Defendant, however, having learned on or about said 25th day of June that the purchaser had not made the additional payment, proceeded with the intention of repudiating the transaction with him, and on or about June 27, 1923, made a contract with one Blair for the sale of said property at a purchase price of \$64,000. Thereafter, and on the 28th day of June, defendant called at said bank and signed and delivered to it a writing in the words and figures following:

"* * * Santa Monica, Cal. June 28, 1923.

"The First National Bank in Santa Monica, Cal.—Gentlemen: Regarding the escrow in your bank concerning lot 7—8—9 & 10. * * * Mr. Driver, purchaser, we hereby notify you to cancel the escrow and return Mr. Driver the \$500.00 he has deposited, owing to his failure to comply with the conditions we specified regarding the depositing \$4,500.00 additional money by Monday, June 25.

"Yours truly,

Julie C. Howard."

Later, and on July 10, 1923, the money deposited by Mr. Driver was refunded to him and the sale to him was, of course, never completed. The further evidence in the case and the contentions of the parties with respect thereto will be discussed in connection with the law points involved herein.

[1] The first question to be answered is: Did the writing signed by defendant directing the escrow party to pay to plaintiff a 5 per cent. commission at the close of the escrow and out of the funds then due and payable to her, when taken in connection with the facts shown, satisfy the statute of frauds? It must be noted in this connection that a verbal contract of employment was made between defendant and plaintiff. It must also be noted that a written contract executed by the son of defendant was made with plaintiff, and under the evidence there is no escape from the conclusion that defendant well knew of its contents and acted pursuant to its terms in signing at the bank and in the presence of a representative of defendant the escrow offer to sell above noted. Those escrow provisions followed substantially the terms embodied in the writing executed by defendant's son, written authority in whom she disclaimed. In the light of these facts the provision in the escrow offer must be held to be a "note or memorandum" of the contract which is all the law requires. Civ. Code, § 1624; Code Civ. Proc. § 1973.

[2] We agree fully with the language of *Muir v. Kane*, 55 Wash. 131, 104 P. 153, 26 L. R. A. (N. S.) 519, 19 Ann. Cas. 1180, as follows:

"The moral obligation to pay for services rendered as a broker in selling real estate, under an oral contract where the statute requires such contract to be in writing, is just as binding as is the moral obligation to pay a debt that has become barred by the statute of limitations, and there is no reason for holding that the latter will support a new promise to pay while the former will not. There is no moral delinquency that attaches to an oral contract to sell real property as a broker. This service cannot be recovered for, because the statute says the promise must be in writing, not because it is illegal in itself. It was not intended by the statute to impute moral turpitude to such contracts. The statute was intended to prevent frauds and perjuries, and, to accomplish that purpose, it is required that the evidence of the contract be in writing; but it is not conducive to either fraud or perjury to say that the services rendered under the void contract, or voluntarily, will support a subsequent written promise to pay for such service."

See, also, *Carrington v. Smithers*, 26 Cal. App. 460, 463-464, 147 P. 225.

In this connection the language of *Johnson v. Krier*, 59 Cal. App. 330, 332, 210 P. 966, 967, is in point, to wit:

"In the present case the agreement to pay commission was not reduced to writing before the rendition of the services by the plaintiffs, but after plaintiffs had procured the purchasers the oral agreement was ratified in writing, and so the bar of the statute of frauds was removed."

In said cause the defendant had written on the back of the contract of sale and purchase the following words:

"I hereby agree to pay Johnson and Temple a commission of \$2,000 for the making of the within sale [dated and signed]."

See, also, Civ. Code, §§ 2310 and 2311.

The question here under consideration was not fairly involved in the case of *Irwin v. Klimper*, 56 Cal. App. 434, 205 P. 714. Neither do we consider what is there said to be necessarily opposed to the holding here announced.

[3, 4] Respondent next asserts that, conceding the writing signed by her to be sufficient under the law, nevertheless the sum was not to be paid until the close of the escrow and then only out of funds payable to her thereunder. This would undoubtedly be true if she were free from fault in the premises. *Jennings v. Jordan*, 31 Cal. App. 335, 160 P. 576, and *Brion v. Cahill*, 34 Cal. App. 258, 262, 165 P. 704. But, prior to the time provided for completion of the transaction, respondent not only sold the property to another with intent to repudiate the transaction with Mr. Driver, but she actually served notice of attempted cancellation of the whole transaction. The law will not lend an ear to such contention on her part; therefore the payments provided will be held due as of the date of repudiation. The law requires

of the vendor good faith and the doing of no intentional act to discourage, embarrass, or prevent the completion of the purchase. See *Realty Bonds, etc., Co. v. Point Richmond, etc., Co.*, 171 Cal. 238, 152 P. 433; *Ratzlaff v. Trainor-Desmond Co.*, 41 Cal. App. 586, 183 P. 269; *Miller v. Lerdo Land Co.*, 52 Cal. App. 662, 677, 199 P. 1073.

[5] The last contention of respondent is that plaintiff failed to produce, within the time prescribed, a purchaser, ready, able, and willing to carry out the transaction upon the terms imposed by her. The first point stressed by respondent is that she and the purchaser, Driver, never met personally. We can see no force whatever in this suggestion, as the bank was created her agent, and her acts and conduct through and with such agency must be held to be as binding upon her as though personally done, and the negotiations by the purchaser with the bank concerning this transaction must be held to be negotiations with her. *Umphray v. Hufschmidt*, 73 Cal. App. 140, 146, 238 P. 749.

[6] Respondent claims also that the evidence is in conflict as to the time of repudiation or cancellation of the transaction with respect to the payment of the \$4,500 by the prospective purchaser. In our view of the evidence, however, there is no conflict upon this point. The escrow officer of the bank, Margaret Collins, testified that \$500 was paid in at the time the escrow was signed by Mr. Driver; that she also recalled \$4,500 being paid into the same escrow; that said \$4,500 was paid on the same day that the cancellation order was placed with the bank, but before it was placed with them, that is, that the \$4,500 was placed with her in the bank in escrow before said cancellation order was handed to her. The purchaser's check, as above noted, was dated June 27th, stamped "Paid" June 28th, and the cancellation notice was also dated June 28th, so the most that could be said would be that the payment and repudiation notice were made on the same day, but this would not be sufficient to raise a conflict as to the date of payment. While it is true that the defendant and her son testified that the repudiation notice was filed before the money was paid in, nevertheless this testimony coming from them must necessarily be hearsay, as the fact and hour of payment could have been known only to the bank and to the intended purchaser. We therefore conclude that the evidence is without conflict that the payment was made prior to the cancellation notice. This act was clearly permissible under the terms of the escrow signed by defendant, by which the purchaser was permitted to pay the money at any time prior to cancellation in writing of the escrow offer.

In this connection it is contended also that the purchaser never fully agreed to the restrictions made by the defendant with respect

to subterranean waters. Reference is made to statements of said purchaser during the negotiations, but a fair construction of the evidence shows that such statements referred to the unwillingness of the purchaser to buy unless and until the city of Santa Monica should agree to furnish water and sewerage to the property, and, when an agreement was reached with the city on the question, no other conditions respecting water were insisted upon by the purchaser. In other words, it is clear that after June 25th, when the city acted with respect to the water, there was from that time on no objection on the part of the purchaser respecting the water situation.

The ability of the purchaser to pay for the property is not disputed, and, except for the matters above noted, there is no other contention as to his lack of ability, willingness, readiness, and offer to purchase. Defendant, therefore, having refused on her part to carry out the transaction, and having deliberately repudiated the same by making a contract to sell the property to another, there is in reality no equity whatsoever in her position, and it may well be doubted whether she had a right, on June 28th, to cancel the escrow after having herself first repudiated it by contracting, on June 27th, to sell the property to another. Plaintiff, therefore, on this record, clearly earned her commission.

[7] It is not necessary that a binding contract be executed by the purchaser. It is only necessary that he be ready, able, willing, and offer to purchase. The rule in this respect has been often stated:

"It is also established law in this state that a written contract between the seller and the purchaser is not essential to the recovery of the broker's commission if he has produced to the seller a purchaser who is ready, willing, and able to purchase upon the terms proposed by the seller and who has agreed to those terms and is willing and offers to enter into a binding written contract. The broker has performed his duty and has earned his commission regardless of whether a written contract is actually entered into or whether the sale is ever consummated by the delivery of the property and the payment of the purchase price." *Twogood v. Monnette*, 191 Cal. 103, 107, 215 P. 542, 543.

See, also, to the same effect, *Umphray v. Hufschmidt*, supra; *Frank Meline Co. v. Kleinberger*, 77 Cal. App. 193, 246 P. 136; *Ford v. Cotton* (Cal. App.) 256 P. 301; and numerous other cases.

It has also been well said:

"Whether the sale was prevented by the failure of perfect title or by the mere will of the vendor makes no difference. In either case the compensation had been earned by the agent. *Smith v. Schiele*, 93 Cal. 144 (28 P. 857); *Phelan v. Gardner*, 43 Cal. 306-311; *Justy v. Erro*, 16 Cal. App. 519-522, 117 P. 575; *Neilson v. Lee*, 60 Cal. 555; *Stanton v. Carnahan*, 15 Cal. App. 527-529, 115 P. 339." *Purcell v. Firth*, 175 Cal. 746, 750, 167 P. 379, 381.

"Second, the law as to this contract is no different from the law as to brokers' contracts generally; that is to say, where the contract fixes the broker's right to remuneration upon his sale, if he shall produce a purchaser able and willing to buy, he has performed his part of the contract, and the owner's liability for his compensation or commission is complete, and cannot be avoided by any arbitrary or wanton refusal to consummate the sale." *Merriman v. Wickersham*, 141 Cal. 567, 570, 75 P. 180, 181.

The findings made by the court in the respects above noted being as a matter of law contrary to the evidence, the judgment is reversed.

We concur: CURTIS, J.; SEAWELL, J.

202 Cal. 643

NERSKI et al. v. HAMMOND LUMBER CO.
(L. A. 8924.)★

Supreme Court of California. Dec. 15, 1927.

Rehearing Denied Jan. 12, 1928.

1. Appeal and error ⇨907(3)—Where appeal involving interpretation of contract is presented on judgment roll alone, appellate court must assume evidence justified trial court's interpretation of uncertainty.

Where appeal involving interpretation of contract is presented on the judgment roll alone, without a bill of exceptions and without any evidence, appellate court must assume that legal evidence was received, which explained the contract and justified the court's conclusion, notwithstanding uncertainty appears on the face of the contract.

2. Tender ⇨22—To enforce rights which would have expired without tender of payment, complaint should show plaintiff is ready and able to pay.

To enforce rights which would have expired, but for a tender of payment, it should appear from plaintiff's complaint that he is ready and able to make payment.

3. Mortgages ⇨605—Where plaintiff's rights to reconveyance of trust deed depend on tender, allegations of readiness and ability to pay will preserve them, without deposit in court.

In action to obtain reconveyance, release and discharge of a deed of trust, where plaintiff's rights depend on tender, allegations of readiness and ability to pay will preserve his rights, without the necessity of depositing money in court when he files his complaint.

4. Mortgages ⇨621—Judgment ordering reconveyance of trust deed on plaintiff's payment of amount due need not necessarily limit time for payment.

In action to obtain reconveyance, release and discharge of deed of trust, judgment directing such reconveyance is not fatally defective, because it fails to provide that plaintiff must pay amount due within a specified period of time to obtain benefits of judgment.

Department 1.

Appeal from Superior Court, Los Angeles County; William C. Doran, Judge.

Action by J. L. Nerski and others against the Hammond Lumber Company to compel reconveyance of deed of trust. Judgment for plaintiffs, and defendant appeals. Modified and affirmed.

R. L. Horton, of Los Angeles, for appellant.

Frank J. McDougal, of Los Angeles, for respondents.

SEAWELL, J. This is an appeal on the judgment roll alone from a judgment of the superior court of the county of Los Angeles, directing defendant, Hammond Lumber Company, upon receipt of \$700 from the plaintiffs, or any of them, to reconvey, release, and discharge a deed of trust executed by plaintiffs W. P. Dyer and Katie Dyer, his wife, in favor of defendant, as security for the payment of \$1,500. The court found that plaintiffs were entitled to a reconveyance upon payment of the lesser sum of \$700, under and by virtue of a written agreement between plaintiff W. P. Dyer and said Hammond Lumber Company, entered into subsequent to the execution of the deed of trust. The interpretation to be given said agreement is the matter here at issue. Plaintiffs J. L. Nerski and Monana I. Nerski are purchasers from the Dyers of said real property described in the deed of trust, and assignees of all rights of the Dyers under said agreement.

It appears from the allegations of the complaint, all of which were found by the court to be true, and from the findings, that plaintiff W. P. Dyer and his brother, Robert R. Dyer, copartners doing business under the firm names of Dyer & Dyer Lumber Company and Dyer Construction Company, were purchasers of large quantities of building materials from defendant. As collateral to secure payment of the indebtedness of the partnership to the lumber company then existing or thereafter to arise, plaintiffs W. P. Dyer and Katie Dyer, his wife, on May 12, 1924, executed a deed of trust on real property owned by them, which recited that it was given to secure payment of \$1,500 of said indebtedness. Soon thereafter the partnership "got into business difficulties," and it was decided by the defendant, who was the largest creditor, and by the other creditors, that they would undertake to make arrangements with the copartnership, whereby plaintiff W. P. Dyer should retire from the copartnership and relinquish his entire interest therein to his copartner, Robert R. Dyer, who should thereafter conduct the business under the control of a creditors' committee. As a result of their negotiations the agreement here before us for interpretation was executed by W. P. Dyer and the Hammond Lumber Company. Said agreement is as follows:

"In consideration of the following agreement W. P. Dyer hereby agrees to release Dyer and Dyer Lumber Company from any claims that he may have against the partnership and he does hereby relinquish all his right, title, and interest in the partnership to Robert R. Dyer:

"The Hammond Lumber Company will agree that they will not take any action whatever on that certain trust deed made in favor of Hammond Lumber Company and signed by W. P. Dyer and Mrs. Kate Dyer, his wife, for a period of six months from date hereof; it being understood and agreed that, when they have [been reimbursed for the \$700, for which they stand] guaranteed to the McCleary Lumber Company, and which the Hammond Lumber Company will pay, they will agree to surrender to the said W. P. Dyer the said trust deed, upon receipt of the \$700 when received pro rata from the business or paid by W. P. Dyer. [The words above in brackets were undoubtedly inadvertently omitted from the contract as set out in the findings. They are included, however, in the answer, and no point is made that the contract did not contain the bracketed words.]

"It is not the intention of this agreement that the Hammond Lumber Company will apply the first moneys received, in payment of the above-mentioned \$700, but only such part of such moneys as the pro rata applicable to said amount bears to the whole Hammond Lumber Company account, or \$60 for every \$1,000 received by H. L. Company.

"Signed this 5th day of August, 1924."

[1] The contract is loosely drawn, and is lacking in definiteness and certainty as to the mutual obligations of the parties sought to be bound by it. This state of uncertainty is chargeable against the appellant, inasmuch as its agent prepared the contract. The case is presented on the judgment roll alone, and we are neither assisted by a bill of exceptions nor a single line of evidence. Such being the case, we must assume, even though uncertainty appears upon the face of the contract, that legal evidence was received by the court which fully explained the transaction and justified the court's conclusion.

[2-4] Appellant also contends that the judgment directing a reconveyance upon payment to appellant to \$700 should have specified a limit to the time within which said sum should be paid and the reconveyance obtained. It is unnecessary for us to here consider or decide whether the tender of the \$700 within the time required by the contract and appellant's refusal to accept it would discharge the lien of the deed of trust (Civ. Code

Cal. §§ 2905, 1504; 24 Cal. Jur. 534), with the result that respondents would be entitled to the reconveyance of the property without the payment of any sum whatsoever, for the reason that the action has been tried upon the theory that payment of the amount required by the contract of August 5, 1924, remained a condition precedent to the right to obtain a reconveyance even after tender and refusal of the defendant to accept it.

Respondents in their complaint prayed that the court direct a reconveyance of the deed of trust upon payment of the sum required by the contract, and they have not appealed from the judgment making reconveyance conditional upon payment to appellant of \$700. Where an attempt is made to enforce rights which would have expired, but for a tender of payment, it should appear from the complaint that plaintiff is ready and able to make payment, and such readiness and ability, without a deposit in court at the time of the filing of the complaint, is, under modern practice, sufficient to preserve the rights of plaintiff. Since continued ability and readiness on the part of the plaintiff to pay the amount previously tendered is required, it is the practice to provide in the judgment that plaintiff must pay such amount to the defendant within a period of time specified by the court if he would avail himself of the fruits of the judgment. The failure to so provide is not fatal, however, for the defendant may, at any time after the entry of the judgment, tender to plaintiff performance of the act which the court has directed him to perform, and if the plaintiff then refuses to accept the offer of performance and to pay the amount specified in the judgment, he thereby manifests a lack of readiness and ability to pay the amount previously tendered which precludes him from thereafter enforcing the judgment, and the defendant upon an application to the court may obtain a judicial determination of such fact. In the instant case, however, we deem it advisable, in the interests of clarity and convenience, to modify the judgment hitherto entered, by providing that plaintiff shall be allowed 10 days after the going down of the remittitur herein to tender the \$700 and obtain a reconveyance and release of the deed of trust.

As so modified, the judgment is affirmed.

We concur: PRESTON, J.; CURTIS, J.

203 Cal. 51

INDEPENDENCE INDEMNITY CO. v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA. (L. A. 10001.)★

Supreme Court of California. Jan. 4, 1928.

Rehearing Denied Feb. 2, 1928.

1. Master and servant ⇨361—One having both general and special employer may look to either or both for compensation for injury sustained in special employment (Workmen's Compensation Act).

Under the Workmen's Compensation Act (St. 1917, p. 831, as amended), one having both a general and a special employer may, when injury is sustained in the special employment, look to either the general or special employer for compensation.

2. Master and servant ⇨361—Right to control employee's activities gives rise to status of special employer, making him liable for injuries sustained in employment (Workmen's Compensation Act).

For liability to attach to a special employer, under the Workmen's Compensation Act (St. 1917, p. 831, as amended), the injured person must have been at the time of his injury subject to the direction and control of such special employer, since it is the right to control and direct the activities of the employee that gives rise to the status of special employer.

3. Master and servant ⇨417(7)—Findings of Industrial Accident Commission are reviewable only in so far as they have been made without evidence (Workmen's Compensation Act).

The findings of the Industrial Accident Commission, under the Workmen's Compensation Act (St. 1917, p. 831, as amended), are subject to review only in so far as they have been made without any evidence whatever to support them.

4. Master and servant ⇨361—Railroad's section crew members held "special employees" of moving picture company during period consumed in filming pictures (Workmen's Compensation Act).

Where a moving picture filming company hired from a railroad company a section crew to use in the filming of certain scenes, held, that the members of the section crew were, within the meaning of the Workmen's Compensation Act (St. 1917, p. 831, as amended), special employees of the filming company during the period consumed in taking pictures.

5. Master and servant ⇨361—Mere payment of wages is insufficient to establish that recipient is servant of one paying same.

The mere payment of wages or salary is insufficient to establish that the recipient thereof is the servant of the one paying the same.

6. Master and servant ⇨361—Moving picture company's payment for time held not proof section crew was in company's employ during return to railroad work (Workmen's Compensation Act).

In a proceeding under the Workmen's Compensation Act (St. 1917, p. 831, as amended) to recover compensation for the death of a railroad section hand, alleged to have been in the

special employ of a moving picture filming company at the time of his injury resulting in death, held, that the picture company's having paid the railroad company for the time consumed in the crew's returning to railroad work after dismissal by the picture director was not, in itself, sufficient to establish that at the time of decedent's death he was in the special employ of the filming company.

7. Master and servant ⇨405(2)—Evidence held not to show railroad section hand was in special employ of moving picture company while returning after filming picture (Workmen's Compensation Act).

In a proceeding under the Workmen's Compensation Act (St. 1917, p. 831, as amended) to recover for death of a railroad section hand, killed while returning from special employment with moving picture filming company, evidence held not to show that at the time of the accident the deceased was in the special employ of the filming company.

Shenk, J., dissenting.

In Bank.

Proceeding under the Workmen's Compensation Act for the death of Leo Loya, brought on behalf of his father and son, and opposed by the William Fox Vaudeville Company, alleged special employer, and the Independence Indemnity Company, insurer. An award was made by the Industrial Accident Commission, and the insurer brings certiorari to review the commission's award. Award annulled, and cause remanded to the commission for further proceedings.

Superseding opinion of District Court of Appeal, 257 P. 107.

Rehearing denied; SHENK and LANGDON, JJ., dissenting.

Floyd T. Scheidell, of Los Angeles, for petitioner.

G. C. Faulkner, of San Francisco, for respondent.

PER CURIAM. Certiorari to review an award of the respondent Industrial Accident Commission. An application for adjustment of claim was filed with the respondent commission on behalf of the father and dependent minor son of one Leo Loya, deceased. At the time of his death on January 3, 1926, the deceased was in the employ of the Southern Pacific Company as a member of a section crew operating upon the lines of said railroad in the vicinity of Los Angeles. After hearing it was found that the Southern Pacific Company was the general employer of the deceased, and that the Wm. Fox Vaudeville Company was the special employer for whom he was rendering service when fatally injured. Petitioner, as insurance carrier of the Wm. Fox Vaudeville Company, was thereupon directed to pay the death benefit awarded to the minor son of deceased. No award was made in favor of the father, for it was found that he was neither wholly nor partially dependent upon the deceased for support. In this proceeding we are confront-

ed by the question of whether or not the evidence adduced upon the hearing before the respondent commission warrants and supports the finding of the relation of special employer and special employee at the time of the accident as between the Wm. Fox Vaudeville Company and Loya, the deceased. If this finding is without support in the record the order directing petitioner, as insurance carrier of the Wm. Fox Vaudeville Company, to pay the death benefit would be in excess of the commission's jurisdiction.

It appears from the transcript that on the morning of January 3, 1926, the crew of laborers of which Loya was a member proceeded under orders of the Southern Pacific Company from their home base at Saugus, which lies between Los Angeles and Castaic, to Camulos, beyond Castaic, where they assisted in clearing a wreck on the line. This work having been completed, the crew returned to Castaic and at approximately 1:30 p. m. of that day reported to the Wm. Fox Vaudeville Company, then on "location," for the filming of moving pictures. To secure certain train scenes necessary to the completion of the picture being filmed the Fox Company had previously arranged with the Southern Pacific Company to have present at Castaic a special moving picture train together with a gasoline operated motorcar to be used to transport the camera during the filming operations. As stated, this latter car with its crew reported at Castaic about 1:30 p. m. to the agents of the Fox Company. The filming of the desired scenes consumed the greater part of the afternoon. At approximately 4 p. m. the crews of both the train and smaller car were dismissed by the assistant director of the film company. The latter crew, apparently under direction of the section gang foreman, thereupon proceeded toward Saugus, the home base. In some manner the small car became derailed during this trip, and the deceased was thrown to the ground. The injuries received were such as to almost immediately cause his death. At or about the time arrangements were made for the use of the railroad facilities the film company, through an agent, executed a written instrument purporting to be an indemnification agreement whereby the Fox Company agreed, in part:

"To pay for any injury or damage that may occur to the property of the Southern Pacific Company or its employees through the use of its property by the undersigned which may be sustained by reason of any cause whatsoever, reasonable wear and tear excepted."

Issue has arisen herein as to the validity and effect of this agreement. With the merits of this dispute we are not concerned, for the conclusion we have reached renders it unnecessary that we pass upon the validity of said agreement.

[1] The sole question presented herein would seem to be whether the deceased at the time of his death was in the special employ of the Fox Company so as to render its insurance carrier, petitioner, responsible, under the provisions of the Workmen's Compensation Act (St. 1917, p. 831 as amended). It is now well settled in this state that an employee may at the same time be under a general and a special employer. *Famous Players Lasky Corporation v. Industrial Accident Commission*, 194 Cal. 134, 136, 228 P. 5, 34 A. L. R. 765; *Employers' L. A. Corp. v. Industrial Accident Commission*, 179 Cal. 432, 438, 177 P. 273; *Diamond Drill Contracting Co. v. Industrial Accident Commission*, 199 Cal. 694, 697, 250 P. 862. The case of *Famous Players Lasky Corp. v. Industrial Accident Commission*, supra, points out that such employee may, so far as the provisions of the Workmen's Compensation Act are applicable, look to the one or to the other of such employers, or to both, for compensation for injuries due to occupational hazards. See, also, *Employers' L. A. Corp. v. Industrial Accident Commission*, supra; *Pruitt v. Industrial Accident Commission*, 189 Cal. 459, 209 P. 31; *De Noyer v. Cavanaugh*, 221 N. Y. 273, 116 N. E. 992.

[2] The authorities would seem to indicate, however, that for liability to attach to the special employer the injured person must have been at the time of the accident subject to the direction and control of such special employer, for it is this right to control and direct the activities of the employee that gives rise to the status of special employer. *Famous Players Lasky Corporation v. Industrial Accident Commission*, supra; *Employers' L. A. Corp. v. Industrial Accident Commission*, supra; *Stacey Bros., etc., Co. v. Industrial Accident Commission*, 197 Cal. 164, 169, 239 P. 1072; *Scribner's Case*, 231 Mass. 132, 120 N. E. 350, 3 A. L. R. 1178; *De Noyer v. Cavanaugh*, supra; *Pigeon v. Employers' L. A. Corp.*, 216 Mass. 51, 102 N. E. 932, 933, Ann. Cas. 1915A, 737; *Coughlan v. City of Cambridge*, 166 Mass. 268, 44 N. E. 218, 219.

In the case of *Famous Players Lasky Corporation v. Industrial Accident Commission*, supra, it is declared that:

"Where either by the terms of the contract or during the course of its performance the employee of the alleged independent contractor comes under the control and direction of the other party to such contract and suffers injury *in the course of and in consequence of such direction and control*, the relation of both general and special employer may be held to exist, and the injured employee has been held entitled to compensation from both the general and the special employer." (Italics added.)

The opinion in that case also quotes approvingly from *De Noyer v. Cavanaugh*, supra, wherein it is stated:

"If the men are under the exclusive control of the special employer in the performance of work which is a part of his business, they are, *for the time being, his employees.*" (Italics ours.)

We cannot accept the contention advanced by counsel for the respondent commission that the "facts in the case at bar are almost four square with those presented in the case of *Famous P. L. Corp. v. I. A. C.*," supra, for in that case it very clearly appears that the claimant was injured while performing under the immediate direction of the agents of the film company and during the actual filming of scenes. It is readily apparent, therefore, that at the very time of the accident there involved the relationship of special employer and employee existed and the award against the special employer was proper. The case of *Employers' L. A. Corp. v. Industrial Accident Commission*, supra, approves the following test:

"In determining whether, in a particular act, he is the servant of his original master or of the person to whom he has been furnished, the general test is whether the act is done in business of which the person is in control as a proprietor, so that he can at any time stop it or continue it, and determine the way in which it shall be done, not merely in reference to the result to be reached, but in reference to the method of reaching the result. * * * The test is whether, in the particular service which he is engaged to perform, he continues liable to the direction and control of his master, or becomes subject to that of the party to whom he is lent or hired."

Following a review of the authorities the case of *Stacey Bros., etc., Co. v. Industrial Accident Commission*, supra, states that:

"The real test of what constitutes special employment may be said to be found in the character of the control and supervision exercised by the alleged special employer over the work and the employee engaged in the doing of the same."

[3] With these principles before us we experience no hesitancy in declaring to be without support in the record the finding to the effect that the relationship of special employer and employee existed as between the Wm. Fox Vaudeville Company and the deceased at the time of the accident. Of course, the findings of the Industrial Accident Commission are subject to review only in so far as they have been made without any evidence whatever in support thereof. *Southern Pacific Co. v. Industrial Accident Commission*, 177 Cal. 378, 170 P. 822; *Dearborn v. Industrial Accident Commission*, 187 Cal. 591, 203 P. 112; *Elk Grove Dist. v. Industrial Accident Commission*, 34 Cal. App. 589, 590, 168 P. 392. Our examination of the record has failed to disclose any evidence tending to show that the Fox Company or its agents had or exerted any right of control or direction over the section crew on its re-

turn trip to Saugus. H. E. Pierson, district passenger agent of the Southern Pacific Company, called on behalf of said company, and in response to a question whether the deceased was rendering any service to the film company at the time of the accident, testified that he could not say, and that deceased "was en route home from the Fox Company having performed services; we will put it that way." Again, he testified that deceased "had been employed in the afternoon by the Wm. Fox Company." (Italics added.) The agents of the Fox Company very definitely testified that their work was finished at about 4 p. m., and that they "dismissed" both the train and section crew. There is absolutely nothing in the record before us to indicate that the agents of the film company either directed the crew to return to Saugus or exerted any control over their trip to that point. In fact, the record would seem to indicate that upon dismissal the section crew no longer remained subject to the control of the film company.

[4] Under these circumstances it must be held that the commission exceeded its jurisdiction in determining that the film company continued in the status of special employer subsequent to such dismissal and relinquishment of the right of direction. We are not to be understood as holding, however, that at no time did the film company occupy the status of special employer. In our opinion, that relationship sprung into existence and continued in force all during that period consumed in the filming of the pictures. In other words, from the time the crew reported to the Fox Company at approximately 1:30 p. m. and until about 4 p. m., when they were dismissed, they were in the special employ of the film company and the general employ of the Southern Pacific Company. If at any time during that period the deceased had been injured the commission unquestionably would have had jurisdiction, under the authorities, to award compensation as against either the general employer or the special employer, or both. But, as stated, upon its dismissal of the section crew at 4 p. m. the Fox Company ceased to occupy the status of special employer, and the award against its insurance carrier, petitioner herein, was without warrant and not within the jurisdiction of the commission.

[5, 6] The only evidence which might seem to lend support to the contention that the deceased at the time of his death was still in the special employ of the Fox Company is in the form of a bill, introduced in evidence, presented by the Southern Pacific Company and paid by the Fox Company. Certain witnesses called by the Southern Pacific Company testified that the amount stated in the bill represented, among other things, the time consumed by the section crew in returning to the home base at Saugus. It is ar-

gued that the payment of this bill by the film company is evidence that it regarded the deceased as an employee at the very time he met with his death. With this conclusion we cannot agree. The film company produced witnesses who testified, in effect, that the bill was paid without exact knowledge of its import and merely to satisfy the claim presented by the railroad company. This being so, it can hardly be said that the payment of the bill constituted an admission upon the part of the film company that the deceased was at the time of the accident in its special employ. Moreover, it has been held that the mere payment of wages or salary, of itself, is insufficient to establish that the recipient thereof is the servant of the one paying the same. *Arnett v. Hayes Wheel Co.*, 201 Mich. 67, 166 N. W. 957, 959.

[7] From what has been said it is apparent that the deceased was not in the special employ of the Wm. Fox Vaudeville Company at the time he met with his untimely death. It becomes unnecessary therefore to pass upon the validity or invalidity of the indemnification agreement, above referred to, for its execution was intended to place upon the Fox Company only such liability as might accrue or attach pending its special use of the Southern Pacific Company's employees. In other words, the indemnification agreement was intended by the parties to relieve the railroad company of responsibility under the provisions of the Workmen's Compensation Act only while the film company exercised some measure of control over the employees of the former. As the accident causing the deceased's death occurred subsequent to the termination of the special employment, the Southern Pacific Company, as general employer, was, in our opinion, the one upon whom the burden of liquidating the award should have been placed. This conclusion precludes the necessity of determining whether, in a proper case, it is obligatory upon the commission to give effect to an indemnification agreement existing between a general and a special employer, assuming the same to have been properly executed. Of course, the commission has power to determine all questions of law and fact upon which liability depends. *Federal, etc., Co. v. Industrial Accident Commission*, 190 Cal. 97, 103, 210 P. 628.

For the foregoing reasons, the award is annulled and the cause remanded to the respondent commission for further proceedings in accordance with the views herein expressed.

SHENK, J. I dissent. The Industrial Accident Commission found that the Wm. Fox Vaudeville Company was the special employer of Loya at the time of his fatal injury and rendered an award solely against the petitioner, which is the insurance carrier of

that company. In my opinion, the findings of the commission and the award were amply supported by the evidence. The section crew of which the deceased was a member was sent out from Saugus to "location," with instructions to follow the directions of the Fox Company in handling the motorcar from which the deceased was thrown to his death. When the day's work was completed the crew, including the deceased, was sent back to Saugus to the home base on this same motorcar. It was on the return trip to Saugus that the accident occurred. It was the duty of the deceased to assist the Fox Company and return the motorcar to the general employer at Saugus. Until the motor was so returned the deceased was rendering service incidental to the work of the Fox Company in carrying on its work, and until such return the deceased was using the instrumentality provided by the Fox Company in going to and from "location." In this respect the case comes within the rule approved by this court in *Makins v. Industrial Accident Commission*, 198 Cal. 698, 247 P. 202, 49 A. L. R. 411, wherein it was said, on page 701 (247 P. 203):

"The rule is well settled that an employee, in going to work, comes under the protection of the act when he enters the employer's premises or upon the means provided for access thereto, though the premises and such means of access are not wholly under the employer's control or management."

The main opinion holds that under the evidence the motorcar and its crew had been dismissed and returned wholly to the sphere of the general employer. It applies, in effect, the "going and coming" rule to the situation, but loses sight of the well-established exception to the general rule approved in the *Makins Case* with supporting authorities. There are two sufficient reasons why the holding of the main opinion on this branch of the case is untenable. First, the evidence was conflicting as to whether the control of the crew on the part of the Fox Company ceased before the crew reached Saugus. There was documentary evidence that the Fox Company actually paid for the service of the crew of which the deceased was a member, until the crew arrived in Saugus. When the main opinion places over against the documentary evidence the oral statements of the witnesses for the Fox Company that the bill for such services was paid without exact knowledge of its import, this court is placing itself in the position of weighing the evidence, a function left entirely to the commission under the law. And, secondly, the "going and coming" rule was not invoked by the Fox Company before the commission, either by pleading or otherwise, on the original hearing or on rehearing. Under sections 18(a) (St. 1923, p. 438) and 64(c) of the act, this defense was waived.

There is a sufficient reason why the award might properly be affirmed as an award solely against the petitioner. The insurance policy executed by the petitioner contained a provision whereby the petitioner agreed with the Fox Company to pay to any person entitled thereto under the Workmen's Compensation Law the entire amount due or to become due to such person because of any application for compensation *accepted by* the Fox Company. In its contract with the general employer in this case, the Fox Company agreed in writing to hold the general employer harmless from any liability for injury or damage from any cause which might accrue to the employees of the general employer during the progress of the work of the Fox Company. The commission undoubtedly relieved the general employer from its liability as such by reason of this contract. And I think the commission was justified in so holding. The main opinion refuses to pass upon the effect of this contract, deeming it unnecessary to do so. I fail to see why this contract should not be given force and effect. The contention of the petitioner that the contract was not executed with the requisite authority should not be sustained. The contract was signed in the name of the company under its corporate seal by an agent of the company having to do with the ordering of equipment and men, and by the same man claimed by the petitioner to have dismissed the crew at "location." Furthermore, it was stipulated that this same man had authority from the Fox Company to engage the equipment which would include the small car from which the deceased fell. The petitioner is in no position to complain of the effect of such contract, for it expressly agreed to indemnify against liability assumed, as here, by the Fox Company. *Brooks v. A. A. Davis & Co.* (Okla. Sup.) 254 P. 66.

PEOPLE v. KIRSCH. (Cr. 1499.)★

District Court of Appeal, Second District, Division 1, California. Dec. 17, 1927.

Hearing Granted by Supreme Court Feb. 15, 1928.

1. Sales ⇨212—Title passed to junk sold for cash on segregation and identification, irrespective of subsequent weighing.

Title to junk material, under contract providing for cash payment on receipt of delivery, passed to buyer making cash payment as soon as goods sold were segregated and property was thereby definitely identified, irrespective of subsequent weighing and of juggling weighmaster's tickets, of which buyer was accused.

2. Larceny ⇨7—Junk dealer receiving delivery of definite junk material purchased was not guilty of larceny in alleged subsequent removing of part of load and juggling weighmaster's tickets.

Alleged juggling of weighmaster's tickets and passing of ticket for lighter load of junk

sold after unloading part of load and reweighing held not to constitute larceny on part of junk dealer, where acts were committed after delivery had been made of identified goods, since segregation and identification passed title.

Appeal from Superior Court, San Diego County; S. M. Marsh, Judge.

A. Kirsch was convicted of larceny, and he appeals. Reversed.

Paul W. Schenck, of Los Angeles, and Clifford K. Fitzgerald, of San Diego, for appellant.

Stephen Connell, Dist. Atty., of San Diego, for the People.

YORK, J. Appeals from judgment of conviction on the verdict of the jury finding the defendant guilty of grand larceny under count 4, and guilty of petit larceny under count 10, of an indictment returned by the grand jury of San Diego county originally containing 12 counts charging the defendant with larceny, false pretenses, and embezzlement, and from an order denying defendant's motion for a new trial.

To simplify the matter, there were four transactions which were charged in three separate ways and in that way making up the twelve counts of the indictment. The court sustained a demurrer to counts 2, 5, 8, and 11 (the false pretense counts), and overruled the demurrer as to the remaining eight counts. The defendant entered a plea of not guilty to the remaining counts, and was found guilty of grand larceny under count 4 and guilty of petit larceny under count 10.

The very voluminous transcript and the lengthy briefs filed would make the matter appear to be more complicated than it really is. The defendant was the vice president of a company buying certain junk. The evidence clearly shows that by the juggling of weighmaster's tickets by the defendant in the one instance, and the unloading of part of one load after weighing and the reweighing of the remaining portion, and the passing by the defendant of the ticket for this lighter load as a ticket for the full amount received, the defendant succeeded in fixing it so that his company would pay less than the actual amount of the value of the material received as fixed by the contract in the amounts and to the extent as charged in indictments Nos. 4 and 10, on which indictments he was convicted of larceny. The defendant did not testify at the trial.

Portions of the agreement for the sale of this junk material between the Western Electric Company and the Pacific Telephone & Telegraph Company in the first instance, whereby the right was given to the Western Electric Company to purchase or to sell for

and on account of the telephone company all of the junk material accumulated at certain plants within the state, including San Diego, are in the record. The Sugarman Iron & Metals Company entered into a contract with the Western Electric Company agreeing to purchase certain of said junk, evidently the parties considering that the Western Electric Company was the agent of the Pacific Telephone & Telegraph Company, although it makes such contract in its own name. This contract provided for a bond of \$60,000, to protect the Western Electric Company and guarantee to the Western Electric Company "the faithful performance of the contract," the Sugarman Company to pay upon receipt of invoice. The Sugarman Company then made the agreement with the defendant's company, the Amalgamated Metals Corporation, of which the defendant was vice president, by which contract it was provided that the junk material was to be purchased by his company at a price to be ascertained, and said contract provided:

"It is further understood and agreed that prompt cash payment will be made to the party of the first part immediately after receipt of any deliveries made to the party of the second part."

It is contended by appellant that the crime of larceny was not committed under the facts shown, because title to the property had passed to the defendant (or rather, to his company) before the taking and carrying away.

[1, 2] The contracts provided for the segregation of the material in the yards of the telephone company at San Diego. Not only was this segregation made, but an actual physical delivery was made to the defendant either for his company or the Sugarman Iron & Metals Company. The record is somewhat cloudy on this question, as he signed receipts, "The Sugarman Iron & Metals Company, by A. Kirsch," and these receipts ran to the Pacific Telephone & Telegraph Company, while the record discloses the fact that he was claiming to receive the same for the Amalgamated Metals Corporation. The deliveries having been thus made to the defendant under these contracts, we will have to hold that title had passed to the defendant's company as soon as a segregation of the goods sold was made and the property thereby definitely identified. See *Blackwood v. Cutting Packing Co.*, 76 Cal. 212, 18 P. 248, 9 Am. St. Rep. 199. We quote from pages 217, 218 (18 P. 251) of that decision:

"So far as concerns the proposition that where weighing or measuring is necessary to the identification of the goods, the title does not pass until they have been weighed or measured, the American cases are generally in accord with the above rule (citing cases).

"In California the cases are to the same effect. See *Horr v. Barker*, 8 Cal. 608; *McLaughlin v. Piatti*, 27 Cal. 463; *Caruthers v. McGarvey*, 41 Cal. 15. Some of the American cases are not in accord with the rule laid down by Mr. Benjamin in this: That if the goods are identified, it does not matter that weighing or measuring is necessary to ascertain the price or the quantity. And this seems to be the law in California. For the Civil Code contains the following: 'Sec. 1140. The title to personal property, sold or exchanged, passes to the buyer whenever the parties agree upon a present transfer, and the thing itself is identified, whether it is separated from other things or not.'

"This section does not dispense with identification. On the contrary, it requires it. It only dispenses with segregation when the property is otherwise identified. Therefore where the identification consists in the segregation, weighing, or measuring, they are still necessary."

All of the acts of the defendant charged in the two counts of the indictment on which he was convicted were done by him after such physical delivery of the goods to him. In view of our decision on the one point herein discussed, it is not necessary to discuss the other points raised.

The judgments and the order denying a new trial are reversed.

We concur: CONREY, P. J.; HOUSER, J.

87 Cal. App. 664
STEVENS v. WEISBAUM et al. (Civ. 5006.)★

District Court of Appeal, Second District, Division 2, California. Dec. 19, 1927.

Hearing Denied by Supreme Court Feb. 16, 1928.

1. Pleading §433(7)—Inferential allegation of assignment of claim sued on held sufficient as against attack after judgment.

In action on assigned claim of salary due from corporation against executrix of deceased stockholder, complaint not demurred to, although not directly alleging assignment but mentioning former owner of claim as plaintiff's assignor, held sufficiently to allege assignment as against attack after judgment.

2. Corporations §238—Stockholder held liable on corporation's default for proportion of employee's salary falling due after becoming stockholder.

Party becoming stockholder after corporation hired employees by month held liable on corporation's default for payment in proportion to his stock of salaries becoming due after he became stockholder, but not before such time.

3. Set-off and counterclaim §34(1)—In corporate employee's action against stockholder's estate for salaries, debt of corporation paid by estate unrelated to transaction could not be set off.

In action to hold stockholder's estate liable for salaries of corporation's employees, alleged counterclaim based on estate's payment of corporation's debt, not shown to represent indebtedness growing out of same transaction or to be related thereto, could not legally be set off.

Appeal from Superior Court, Los Angeles County; Albert Lee Stephens, Judge.

Action by H. G. Stevens against Jane B. Weisbaum, as executrix of the estate of Harry L. Weisbaum, deceased, to enforce a stockholder's liability. From a judgment for plaintiff, defendant appeals. Modified and affirmed.

Sebald L. Cheroske, of Los Angeles, for appellant.

Bicksler, Smith & Parke, of Los Angeles, for respondent.

CRAIG, Acting P. J. The plaintiff and respondent instituted this action against the executrix of the estate of Harry L. Weisbaum, deceased, alleging that from January 21, 1921, to July 31, 1921, plaintiff was employed by the H. G. Stevens Company, a corporation, at an agreed salary of \$200 per month, of which but \$47 had been paid, and that he advanced to the corporation \$100, none of which sum had been repaid; that one C. C. Stevens, "plaintiff's assignor," was employed by said corporation from February 1, 1921, to July 31, 1921, at an agreed salary of \$100 per month, of which amount but \$20.51 had been paid. It was further alleged in the complaint that Harry L. Weisbaum was a stockholder of the corporation mentioned, and that his proportionate liability as such stockholder for the salaries remaining unpaid was \$751 and \$570, respectively; that Weisbaum died testate on June 3, 1921; and that the plaintiff had duly presented to the executrix of his estate proper claims for said amounts, each of which was rejected, and judgment was prayed therefor.

The defendant and appellant by answer denied the existence of the corporation, the employment of said parties, and the indebtedness, affirmatively alleging that the corporation applied to the commissioner of corporations for a permit to issue 4,000 shares of stock, 1,000 each to the plaintiff H. G. Stevens, C. C. Stevens, Benjamin L. Frank, and Harry L. Weisbaum, since deceased, but that these proceedings had not at the time of the latter's death been completed; that the "corporation was suspended" on March 4, 1922, for failure to pay the state license and franchise taxes; that the two Stevenses were actually liable with the defendant for any moneys due the plaintiff or "his assignor"; and by counterclaim appellant alleged that the corporation incurred an indebtedness amounting to \$1,062.46, of which \$683.83 had been paid by said estate, and prayed that the Stevenses' proportionate share of such liability be set off against any judgment that might be rendered in favor of the plaintiff.

The trial court found generally that all of the allegations of the complaint were

true, and specifically found that there were issued to Weisbaum on February 17, 1921, 425 shares, February 26, 1921, 200 shares, and March 8, 1921, 200 shares of the capital stock of the corporation in question; and that on February 11, 1921, there was issued one share of stock to each of the three other persons named in the pleadings; that the plaintiff had been paid his salary to April 15, 1921, and that his assignor had received \$20.51 on account of the February services, and that the plaintiff had also been paid \$47 on account of salary earned after April 15. The trial court rendered judgment for the full amount of \$751 in favor of the plaintiff and \$535 to his assignor, against the estate, and the defendant appealed. We think the judgment was excessive.

[1] There is no direct allegation in the complaint, nor did the court find, that the claim of C. C. Stevens had been assigned to the plaintiff; this party is mentioned several times in the complaint and answer as "plaintiff's assignor," and appellant in her pleadings demands an apportionment of any indebtedness as against "plaintiff or his assignor," in the event that one should be found to exist. No demurrer was filed by the defendant, and the assignment will therefore be inferred from the language of the complaint quoted, which under the circumstances of this case is sufficient. It has been held that in the absence of special demurrer an inferential statement of such facts, although not commended, will, after judgment, be sustained as a sufficient allegation for the purposes of trial. *Estate of Behrens*, 130 Cal. 416, 418, 62 P. 603; *Williams v. Ashe*, 111 Cal. 180, 43 P. 595; *Amestoy v. Electric Rapid Transit Co.*, 95 Cal. 311, 30 P. 550. The plaintiff's right to maintain an action for the amount alleged to be due C. C. Stevens must therefore be upheld on appeal.

[2] It is contended that the estate was not liable for any amount and hence that the judgment must be reversed, because, it is asserted, Harry L. Weisbaum was not a stockholder at the time the contracts of employment were entered into. It appears that respondent was employed on January 21, 1921, and that C. C. Stevens, his assignor, was employed on February 1, 1921; whereas, Weisbaum acquired his stock in the amounts and upon the dates heretofore noted. However, allowing credit for the amounts found to have been paid on account of salaries, the plaintiff was personally compensated at the rate of about \$6.70 per day after April 15 (at \$200 per month), or until April 22, 1921, while his assignor commenced February 1, and had received \$20.51. The deceased, who held all of the issued capital stock except three shares, became a stockholder on February 17, 1921. Appellant's theory is that although the employees were

engaged at stipulated monthly salaries, that fact did not create a month to month service, but that since there was no showing as to when it should terminate, the contract of employment was in each instance a continuous one, commencing before the decedent became a stockholder, and that he was not bound thereby upon a stockholder's liability to contribute toward any portion of the salaries. But it has been held otherwise in this state. In *Shuler v. Corl*, 39 Cal. App. 195, 178 P. 535, it appeared that the plaintiff was employed under a written stipulation that she should work "for as long a period as the plaintiff should choose to work for defendant, whether a month or years." It was there held that the plaintiff's employment was literally for life unless she chose to terminate it, but that "the various sums of money which would become due to plaintiff would accrue at the end of each month during the period of her employment," so that, the action having been founded upon a contract made outside the state, the statute of limitations would bar each monthly amount, as it in turn passed beyond the two-year period.

Here, as there, at the end of each period of one month from the commencement of the service, the respective sums of \$200 and \$100 became due to the employees, and became an added obligation of the corporation. Plaintiff was not employed at the rate of \$2,400 per annum, payable in equal monthly installments, nor was his assignor so employed. There is no analogy between the facts here presented and those of cases cited by appellant, where a corporation ordered a quantity of goods, and assumed an obligation to purchase them, but they were in fact not delivered until after one from whom it was subsequently sought to collect had become a stockholder. In the latter instances the whole obligation arose and became an existing agreement to pay the total sum, although the contract may not have been fulfilled, and payment may have been delayed, until a later date; whereas, in the instant case nothing was due when the agreement was made, and each successive monthly sum became an obligation only as services were performed, from month to month.

We think, however, that the trial court was in error in allowing the full amount to each employee, since the deceased did not become a stockholder until February 17, 1921; whereas, plaintiff's assignor commenced February 1, 1921, and was paid for about five days in that month. Weisbaum was not a stockholder at the time the February obligation was contracted for, or earned, but on March 1, when the succeeding month began, he held 625 shares, and the other stockholders held one share each, upon which respective holding each became lia-

ble for his proportion of the unpaid amount due C. C. Stevens for salary. In April, 1921, Weisbaum held 1,000 shares, and he and the other stockholders holding one share each became proportionately liable for the fractional month's salary due the plaintiff from April 15 to April 21, plus the \$100 loaned by the plaintiff, and less \$47, as well as for the full month of April's services rendered by the latter's assignor. For the succeeding months of May, June, and July the four stockholders would be liable in like proportions for the salaries of said employees.

[3] As to the counterclaim asserted by the appellant, there is no showing that the \$683.-83 represented an indebtedness growing out of the same transaction, or that it bore any relation whatsoever to the employment of the Stevenses. It could not legally be set off against any judgment rendered in this action.

The judgment should be modified in accordance with the foregoing, and as so modified, the judgment is affirmed.

We concur: THOMPSON, J.; VALENTINE, Justice pro tem.

87 Cal. App. 758

SANTOS et ux. v. SCHARZ. (Civ. 6021.)

District Court of Appeal, First District, Division 1, California. Dec. 23, 1927.

1. Pleading $\S$ 18—Allegation that plaintiff was thrown violently to ground, causing injury to hips and lower back, resulting in miscarriage, held sufficiently certain.

Complaint in action for injuries from automobile collision, alleging that plaintiff was thrown violently to hard pavement causing her to be injured across hips and lower back about the body, so that miscarriage resulted, was sufficiently certain; it being a matter of common knowledge that such a result would be intimately associated with any violent injury to the body, particularly portions of body described.

2. Damages $\S$ 177—Evidence of cost of repair of automobile held admissible to determine whether diminution in value was less than cost of repair.

In action for damages to automobile from collision, testimony as to cost of repairing automobile was properly admitted as proof of extent of plaintiff's damages, since such cost is necessary in determining whether diminution in value of automobile (which is proper measure of damages unless cost of repair is less), is less than cost of repair.

3. Damages $\S$ 185(1)—Evidence held sufficient to show connection between injuries received by plaintiff in automobile collision and subsequent miscarriage.

In action for injuries from automobile collision, evidence held sufficient to show connection between injuries received by plaintiff and subsequent miscarriage.

4. Appeal and error ⚡757(3)—**Sufficiency of evidence to support finding of defendant's negligence will be assumed, where defendant fails to present any evidence on question.**

Where defendant appellant, in automobile collision case, nowhere in brief presents any evidence as to his negligence, appellate court is entitled to assume that there was evidence sufficient to support finding of defendant's negligence.

5. Trial ⚡395(2)—**Finding on issue of contributory negligence held not so indefinite and unintelligible as to require reversal.**

Finding on issue of contributory negligence, which was drawn evidently to controvert allegations of answer wherein contributory negligence of plaintiff was set up, held sufficiently definite as to preclude justification for reversal, though ambiguity resulted from the so-called "and or" method of denial.

6. Municipal corporations ⚡705(10)—**Plaintiff's failure to signal before starting held not contributory negligence as matter of law, where it contributed in no way to collision (Motor Vehicle Act, § 130, as amended by St. 1925, p. 412, § 15a),**

Even though plaintiff suing for injuries from automobile collision violated Motor Vehicle Act (St. 1923, p. 553), § 130, as amended by St. 1925, p. 412, § 15a, in failing to signal before moving into street intersection, she was not thereby guilty of contributory negligence as matter of law, in view of evidence that failure to give signal could not, under the circumstances, have contributed in any way to the collision.

Appeal from Superior Court, Santa Clara County; H. B. Brown, Judge.

Action by J. P. Santos and wife against R. E. Scharz. Judgment for plaintiffs, and defendant appeals. Affirmed.

Cooley & Gallagher, of San Francisco, for appellant.

John W. Sullivan, of San Jose, for respondents.

PARKER, Justice pro tem. This is an action brought by J. P. Santos and Mary Santos, his wife, for damages alleged to have been sustained by them as the result of an automobile collision.

The case was tried by the court sitting without a jury. Judgment went for plaintiffs, and thereafter the court denied defendant's motion for a new trial. Defendant appeals from the judgment.

Errors relied upon by appellant are embraced in five specifications:

[1] (1) The court erred in its order overruling the demurrer of defendant to the complaint of plaintiffs. The complaint alleges: That the automobile of defendant violently struck and injured plaintiff Mary Santos, causing her to be violently thrown to the hard pavement of the ground, rendering her unconscious, and causing her to be bruised,

and injured about her body, black and blue marks being inflicted upon the hip and left leg and across the hips and lower back, and bruises being inflicted on the head, and so injured her physically that a miscarriage was caused, and as a result thereof "the said unborn child passed from her body and died, and as a result plaintiffs lost said unborn child."

Defendant, by special demurrer based upon the ground of uncertainty, complained of the allegations just quoted upon the ground "said complaint is uncertain, in that it cannot be ascertained therefrom how Mary Santos was so injured physically that a miscarriage was caused," and "said complaint is uncertain in that it cannot be ascertained therefrom what alleged injuries or injury caused any alleged unborn child to be lost by plaintiff."

Summarizing the allegation assailed, it states therein that plaintiff Mary Santos was thrown violently to the hard pavement of the ground, causing her to be injured about the body, evidenced by black and blue spots across the hips and lower back, and was so injured physically that a miscarriage resulted. We deem the allegation sufficiently certain. The allegations must be read as a connected whole. It would go beyond the requirements of good pleading to insist that a minute and anatomically accurate detail of the effect on each organ of the body be set forth. It is a matter of common knowledge that a result such as is here alleged would be intimately associated with any violent injury to the body and particularly the portions of the body described. Appellant cites the following cases in support of his contention: Fort Worth Railway v. Morrison, 58 Tex. Civ. App. 74, 123 S. W. 212; San Antonio Ry. Co. v. Adams, 6 Tex. Civ. App. 102, 24 S. W. 839; Shaddock v. Alpine Plank-Road Co., 79 Mich. 7, 44 N. W. 158; Kinsella v. Riesenbergs, 124 App. Div. 322, 108 N. Y. S. 876.

The cases cited have little, if any, application to the instant case. The principle announced in each of these cases, however, is that the allegations should fairly inform the defendant what he is charged with. The general rule is cited in Cyc. vol. 29, p. 569, as follows:

"The nature of injuries should be stated with as much reasonable certainty as their character and nature permit so as to advise the opposite party what character of proof to expect and what the extent of injuries and basis of injuries were."

Appellant cites many cases, and bases his argument upon a line of authority from other jurisdictions to the effect that, if a plaintiff alleges his injuries as bruises and cuts, he cannot prove the loss of a limb. We might accept these authorities and still be far afield

in the present inquiry. We have been cited to no authority, nor do we think any can be found, wherein a pleader, after setting forth that his injury consisted of a fractured limb, would be required to go further and allege just exactly how the entire anatomical structure was affected to bring about that result. As indicated, we find no merit in appellant's point.

Appellant states that there were other specifications of uncertainty, but that he does not deem it necessary to mention each one of those specifications, as they are all based upon the same argument, and that, if he is correct in one, he is correct in all. Therefore we see no necessity of further discussing the alleged errors in the court's ruling on the demurrer.

[2] (2) A witness Albertson was called by plaintiff to prove the extent of damage suffered by reason of injury to the automobile of plaintiffs. This witness testified that the cost of necessary repairs to the automobile was \$65. Defendant objected to this line of testimony, and upon its admission promptly moved to strike it out, which motion was denied. The court allowed plaintiff for damage to the automobile accordingly the sum of \$65. It is defendant's contention here that the proper measure of damages is the difference in the value of the automobile immediately before and after the injury. This is the accepted measure of damages, with the proviso, however, if the injury be capable of repair at an expense less than the diminution in value of the property as injured, the damage is limited to the cost of making such repair. *Kincaid v. Dunn*, 26 Cal. App. 686, 148 P. 235; *Rhodes v. Firestone Tire & Rubber Co.*, 51 Cal. App. 569, 574, 197 P. 392. Here there was a complete lack of evidence even remotely tending to show what was the diminution in value, if any. However, it is fair to assume that an automobile injured as the evidence shows this one to have been would have suffered some damage, and we cannot arbitrarily assume that the diminution in value was of a lesser amount. In *Rhodes v. Firestone Tire & Rubber Co.*, supra, the court says:

"Whether or not the plaintiff was actuated in presenting her proof by an erroneous idea as to the proper measure of damages to apply is not important, for, if the amount of the repair bill considered alone was not the true and exclusive measure to apply in the ascertainment of the damages plaintiff had suffered, it was incumbent upon the defendant to have offered proof showing that the diminution in value on account of the injury would be less than the cost of such repairs; thus limiting the damages to a sum not greater than such diminution in value."

In cases of this sort, under the rule it is necessary to show the cost of repair. Otherwise, how could it be determined whether or not the diminution in value was less than the cost of repair. Plaintiff did show the re-

pair cost and stopped. Defendant offered no testimony on the subject. We are content to accept the rule announced in *Rhodes v. Firestone Tire & Rubber Co.*, supra.

[3] (3) Insufficiency of the evidence to justify the decision or judgment. Appellant urges that there is no evidence showing that the condition of Mrs. Santos, plaintiff, was brought about by the accident. In other words, no connection is shown between the miscarriage and the injuries received.

The law does not require demonstration. The evidence shows that plaintiff Mrs. Santos, though not a robust person, was enjoying good health, free from pain or aches of any sort, and for her type normal; that in the accident she was thrown violently to the pavement and rendered unconscious; that thereby she was bruised and hurt about the body, particularly the legs, back, and abdomen; that immediately thereafter great quantities of blood passed from her body, and in two days an unborn child was aborted, the fetus being in a stage of development approximated as two months. The testimony of a duly qualified physician, called by plaintiffs, on this subject, is as follows:

"I am not trying to speak of her general condition. I am trying to tell you the miscarriage, that what other trouble she had had nothing to do in this case; that the injury was the only thing that had to do with the miscarriage condition, or at least was enough to produce it."

The subject is of a delicate nature and requires no further detail. The facts shown clearly indicate the sufficiency of the evidence to support the decision and judgment on the point.

[4] (4) The next contention of appellant in his attack upon the sufficiency of the evidence is that there is no evidence at all showing or from which may be inferred any negligence on the part of defendant. It is urged that the evidence discloses the fact of a collision and nothing more. It is the claim of appellant that the mere happening of an accident such as this does not afford the slightest evidence that either party was negligent, and that the presumption is that defendant's automobile was being driven in a lawful manner and free from negligence, and this presumption prevails unless it is controverted by other evidence.

Appellant contents himself with this declaration of legal principles, and nowhere in his brief or in any supplement thereto do we find any of the evidence presented. Hence, we are entitled to assume that there was evidence sufficient to support the finding of defendant's negligence. *Dahlberg v. Dahlberg* (Cal. Sup.) 260 P. 290; *Jeffords v. Young*, 197 Cal. 224, 229, 239 P. 1054; *Estate of Berry*, 195 Cal. 354, 233 P. 330. We have, however, examined the typewritten transcript, and find sufficient evidence to support the judgment.

[5] Appellant's next claim of error is predicated upon the trial court's finding on the issue of contributory negligence. He contends that the finding on that issue is indefinite and unintelligible. The finding on the issue reads as follows:

"That said Mary Santos was not careless or negligent in or about the matters or things in her complaint set forth, and that said carelessness or negligence, or any carelessness or any negligence did not consist in part, or did not exist at all, or consist at all in that she negligently drove or operated, and or did not negligently drive or operate an automobile over and across the intersection of Trimble road and the Oakland highway, or without the exercise of ordinary care for her own safety or protection, or that said negligence, or any negligence, or any negligence of Mary Santos was a proximate cause or any cause of the damage or collision complained of."

The finding was drawn evidently to controvert the allegations of the answer wherein the contributing negligence of plaintiff was set up. Some ambiguity usually results from the so-called "and or" method of denial, but on the whole we think the finding sufficiently definite as to preclude any justification for a reversal of the judgment on the ground set forth.

[6] (5) Lastly, appellant asserts that the plaintiff Mary Santos was guilty of contributory negligence which was a proximate cause of the collision complained of. Appellant claims that the testimony of plaintiff shows that she had stopped her car for a brief period of approximately fifteen seconds before entering the intersection wherein the collision occurred; that before starting her automobile she did not first see that such movement could be made in safety, and she did not give any signal plainly visible to the driver of defendant's car of any intention to start her automobile, and in fact gave no signal of any kind.

Passing entirely the question of the length of time the car was stopped, and the fact that the time of delay was used by plaintiff in looking for passing vehicles to insure her safe crossing, we may concede that her failure to signal did constitute a violation of section 130 of the Motor Vehicle Act (as amended by St. 1925, p. 412, § 15a), which section reads as follows:

"The driver of any vehicles upon a public highway before starting, turning or stopping such vehicles shall first see that such movement can be made in safety, and if it cannot be made in safety, shall wait until it can be made in safety; then, if the operation of any other vehicle

may reasonably be affected by such movement, the driver shall give a signal plainly visible to the driver of such other vehicle of the intention to make such movement."

The weak point of appellant's argument is that he fails to connect up even in the slightest degree, this negligence of plaintiff with the defendant or with the collision. Appellant, who was the driver of the automobile which collided with plaintiff Mary Santos, testified that he first saw her car about 125 feet from the point of impact, at which time he himself was 200 feet from the said point of impact. When appellant first saw the car of plaintiff Mary Santos she was traveling at the rate of 15 miles per hour, and he was looking right at her, and she never stopped until the collision. The wife of appellant gave like testimony. From this it is obvious that any negligence of the plaintiff Mary Santos in failing to give a signal before starting could not under any circumstances have contributed in any way to the collision.

There is abundant evidence to show that plaintiff Mary Santos stopped her car before entering the intersection for the express purpose of determining whether or not she could proceed in safety, and that when she entered the intersection the car of appellant was distant some 1,100 feet. The testimony of plaintiff Mary Santos likewise was to the effect that her automobile was partially off the intersecting highway when struck, and that at the time she was driving approximately at a speed of 15 miles per hour.

Appellant, by a process of mathematical deduction, argues that the physical conditions almost demonstrate the negligence of plaintiff. However, as is usual in such cases, the argument, instead of resulting in a demonstration, only serves to sharpen the conflict. We cannot say, from an examination of the entire record, even beyond the point urged by appellant, that plaintiff Mary Santos was guilty of contributory negligence as a matter of law.

It is to be observed that we have made no attempt to include herein all of the facts. To do so would add nothing to the present opinion, nor could a detail of further facts in any way illustrate the points involved. Such facts as are important to the contentions of appellant have been cited, and these are the only facts presented by appellant as necessary to the points he makes.

The judgment is affirmed.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

87 Cal. App. 478

MURR et al. v. COHN. (Civ. 5974.)

District Court of Appeal, First District, Division 2, California. Dec. 12, 1927.

- 1. Appeal and error** §1071(3)—**Quieting title** §37(1)—Where answer in action to quiet title to personal property contained denials, affirmative allegations were unnecessary, and whether evidence supported findings on answer's affirmative allegations of title in defendant was immaterial.

In action to quiet title to personal property, where answer contained denials, it was unnecessary for defendant to put in affirmative allegations setting up title in himself, and whether evidence supported findings based thereon was immaterial on appeal.

- 2. Landlord and tenant** §161(1)—**Tenant held entitled to remove portable gasoline station and pump** (Civ. Code, § 1019).

Under Civ. Code, § 1019, although lease was silent as to contemplated use of property and placing structures thereon, tenant had right to remove portable gasoline station and pump put thereon by him.

- 3. Landlord and tenant** §161(1)—**Tenant using premises for gasoline filling station held entitled to remove tank.**

Although lease of premises was silent as to contemplated use and right to remove articles placed thereon, in view of fact that at execution of lease landlord knew tenant intended to establish gasoline filling station, tenant had right to remove gas tank, where soil could be dumped back into hole and there would be no injury to lot.

- 4. Quieting title** §44(3)—**Evidence that tenant was to leave certain articles installed on premises held insufficient to render erroneous judgment quieting title to articles in tenant** (Code Civ. Proc. § 1962, subd. 2).

In tenant's action to quiet title to personal property against landlord, regardless of admissibility under Code Civ. Proc. § 1962, subd. 2, of testimony by attorney drawing lease that tenant agreed to leave on premises certain improvements which would be part of consideration, evidence relating to such agreement held insufficient to render judgment quieting title to such personal property in tenant error.

Appeal from Superior Court, Ventura County; Merle J. Rogers, Judge.

Action by Nicolas Murr and another against Simon Cohn. From a judgment for plaintiffs, defendant appeals. Affirmed.

Chas. F. Blackstock, of Oxnard, for appellant.

Durley & Downes, of Oxnard, for respondents.

STURTEVANT, J. The plaintiffs commenced an action against the defendant to quiet title to certain personal property. The defendant answered, and a trial was had in the trial court before the court sitting with-

out a jury. The trial court made findings in favor of the plaintiffs, and the defendant has appealed.

The defendant owned lots 18 and 19 in block K of the city of Oxnard. He leased the lots to the plaintiffs for a period of five years. At that time the lots were wholly vacant. When the plaintiffs entered into possession, they placed on the property "one field portable gasoline station, one gasoline air pump, and one gas tank." The station was put in place by laying pieces of 2x4, making a rectangular frame, and resting it on the surface of the ground. Thereafter concrete was poured into that frame, covering the space of ground inclosed with concrete four inches deep. The station was set on top, the outside walls of steel rested on the 2x4 and were nailed thereto. The pump was placed on a concrete pier, which was also constructed on top of the surface of the ground. The tank was sunk into the ground about 7 feet deep. After the plaintiffs had been in possession, they negotiated a sale of the three items mentioned to T. E. Davis. Later the defendant asserted that the several items had become a part of the realty and he had become the owner thereof.

[1] On this appeal the defendant makes six several attacks on the findings, claiming that they are not sustained by the evidence. The first two attacks are addressed to two findings that are entirely without the issues made by the pleadings. The third and fifth attacks are addressed to the findings in response to the allegations of the complaint, which are to the effect that the plaintiff is the owner of the property and the defendant asserts a claim that is without right. The fourth and sixth attacks are addressed to the allegations of the defendant's answer, in which he pleaded affirmatively title in himself. As the answer contained denials, it was unnecessary for the defendant to put in the affirmative allegations, and findings thereon are immaterial. If the third and fourth attacks are not well founded, the judgment should be affirmed. As the rights and liabilities of both parties rest on the relation of landlord and tenant, it is equally clear that, if the plaintiffs were the owners, then the defendant was not the owner, and therefore it becomes necessary to consider only the third attack, which is the contention that the fifth finding is not sustained by the evidence. That finding is the one which finds that the plaintiffs were the owners of the property.

The plaintiffs and the defendant entered into a written lease; that lease was wholly silent as to the fact that the plaintiffs intended to use the property for a filling station or that they intended to place any structure thereon, and, if they did so, what would be the rights and liabilities of the parties. It is suggested by the defendant that one para-

graph is pertinent to this dispute. That paragraph is as follows:

"And the lessees expressly agree that at the expiration of the term of this lease, or sooner termination thereof, they will quit and surrender the said premises, leaving the same in as good condition as they now are, reasonable wear and tear thereof and damage by the elements excepted."

[2, 3] The plaintiffs adopt the same contention and say that they intended to do just exactly what is stated in the paragraph quoted. The plaintiffs had the clear right to remove the station and the pump. That right is statutory. Civ. Code, § 1019; *Gosliner v. Briones*, 187 Cal. 557, 204 P. 19. As to the tank, the case is not quite so clear. Nevertheless, it is free of doubt. The plaintiffs had the right to remove it. It never became a part of the defendant's realty (*Hendy v. Dinkerhoff*, 57 Cal. 3, 40 Am. Rep. 107; *Jahnke v. Jahnke*, [Cal. App.] 253 P. 752), when it is considered that before the execution of the lease the lots were vacant, that at the time the lease was executed the defendant was informed to what use the plaintiffs intended to put the property, and that, upon the tank being removed, the soil can be dumped back into the hole in such a manner and to such an extent that there will be no injury whatever to the vacant lot.

It is conceded by both parties that, in determining the question involved by this appeal, a controlling criterion is the intent of the parties. No part of the record is cited which shows or tends to show that, after the termination of the lease, the tank was to become an "integral part of the premises."

[4] No fraud or mistake was alleged, and no reformation was asked, but on the trial of the case the attorney for the defendant took the stand and testified that, when the terms of the lease were under discussion, it was stipulated between the parties that the plaintiffs would place and leave on the premises certain improvements, the cost of which would be a part of the consideration. Later that testimony was stricken out. The defendant assigns that ruling as error, and contends

that, under the provisions of subdivision 2 of section 1902, Code of Civil Procedure, he was entitled to show the true consideration. The plaintiffs reply that to allow, under that claim, such proof as was offered, would be in effect to allow the defendant to prove covenants which are not even mentioned in the lease. In support of their position, the plaintiffs cite *Harding v. Robinson*, 175 Cal. 534, 542, 166 P. 808. The citation is clearly in point.

Still addressing ourselves to the subject-matter of the last point, the testimony given and stricken out will now be considered from another point of view. The substance of the testimony stricken out was as follows:

"In the month of April, 1923, Mr. Cohn asked me to prepare a lease for the plaintiffs. Mr. Cohn and Mr. Nicolas Murr came to my office and were there for a considerable length of time discussing the general terms of the lease. Mr. Cohn did not want to make a five-year lease, objecting that the term was too long. He wanted to charge more than \$75 a month—something over \$100. Mr. Nicolas Murr contended that Mr. Cohn ought to lease him the property for five years at \$75 a month, because, if the plaintiffs put up the oil station, at the expiration of the lease they would not have any use for it, and that they would leave it there."

Taking this testimony most strongly against the plaintiffs, there is not an intimation that the defendant would have the slightest title until the end of the term. Again, weighing the testimony in the same light, it would result that the minds of the parties never met, and therefore that the defendant obtained no title. This is so because there was not a word spoken regarding the nature of the fixtures to be installed, the material that they would be made out of, the size thereof, or the cost thereof. The terms of the agreement are so indefinite and uncertain that it is impossible to ascertain what promise was being made and what promise was being accepted.

We find no error in the record. The judgment is affirmed.

We concur: KOFORD, P. J.; NOURSE, J.

87 Cal. App. 669

**HOUGHTON v. PICKWICK STAGES,
NORTHERN DIVISION.*
(Civ. 3332.)**

District Court of Appeal, Third District, California. Dec. 19, 1927.

Hearing Denied by Supreme Court Feb. 16, 1928.

1. Appeal and error $\S$ 1046(1)—Permitting jury to view automobile involved in collision, though parts were missing, held not prejudicial to defendant, whose liability was not increased thereby (St. 1923, p. 560, $\S$ 131).

Permitting jury to view automobile which had collided with bus *held* not to have prejudiced defendant bus company on theory that missing door would have shown that automobile had toppled into bus rather than that bus had collided head-on with automobile, where if automobile arrived at intersection first, as jury concluded, under St. 1923, p. 560, $\S$ 131, bus company's liability would be the same in either event.

2. Appeal and error $\S$ 1026—To warrant reversal for error it must appear affirmatively that there has been a miscarriage of justice.

Mere fact that error is made to appear does not present a case for reversal, but it must appear affirmatively after an examination of the entire cause including evidence, from the nature of the error itself, that there has been a miscarriage of justice.

3. Appeal and error $\S$ 1170(9)—Instruction that drivers of bus colliding with automobile were interested witnesses, though erroneous, held not to have resulted in miscarriage of justice (Const. art. 6, $\S$ 4½, 19).

Instruction in action for collision between automobile and bus, that bus drivers were interested witnesses, which interest should be considered in determining their credibility, though in contravention of Const. art. 6, $\S$ 19, held not to have resulted in miscarriage of justice requiring reversal under section 4½, in view of incredible testimony of one of drivers and undoubted interest of driver actually driving bus.

Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

Action by Viola Houghton against the Pickwick Stages, Northern Division. Judgment for plaintiff, and defendant appeals. Affirmed.

W. I. Gilbert and B. P. Gibbs, both of Los Angeles, and Sarau & Thompson, of Riverside, for appellant.

Culbert L. Olson, of Los Angeles, for respondent.

PLUMMER, J. The plaintiff had judgment against the defendant in the sum of \$10,000 for personal injuries suffered in a collision between a Ford coupé in which the plaintiff was riding and one of the stages belonging to the defendant. No question is presented as to the amount of damages. The record

shows that the plaintiff was seriously injured and left a cripple for life. The facts disclosed by the testimony are as follows: On the 21st day of April, 1924, the plaintiff was riding in a Ford coupé with Thomas E. Bradley and Mrs. Eleanor Bradley. The Ford coupé had but one seat, and all three persons just named were seated thereon, the plaintiff being to the right. The Ford coupé was owned by Mr. Bradley and was being driven in a westerly direction on that certain street known as and called Industrial street in the city of Los Angeles. At approximately the same time a stage belonging to the defendant corporation was being driven in a southerly direction on a certain other street in the city of Los Angeles known as and called Mill street, the two streets just named intersecting each other. The collision occurred at a point approximately 10 feet westerly of the center of the intersection of said streets.

At the time of the collision herein referred to, section 131 of the Motor Vehicle Act, as amended in 1923 (St. 1923, p. 560), read as follows:

"A vehicle entering an intersection of public highways at a lawful speed shall have the right of way over a vehicle approaching from its left unless such vehicle approaching from the left shall have first entered into such intersection at a lawful speed in which event the vehicle on the left shall have the right of way."

The testimony of the plaintiff and of the two other persons occupying the Ford coupé was to the effect that the Ford was being driven at a speed of about 12 miles per hour; that when the Ford coupé entered the intersection of Industrial street and Mill street, the stage was several feet north of the north line of the intersection; that as the Ford continued on westerly across the intersection to a point west of said intersection, the stage, traveling at a speed of about 30 miles per hour, came into the intersection and smashed into the Ford coupé before the driver of the coupé could do anything to avoid a collision. The front part of the stage struck the right-hand side of the coupé on which the plaintiff was sitting, breaking the door and generally smashing the entire right-hand side of the coupé. The complaint and the testimony set forth the injuries suffered by the plaintiff, but as no point is made as to the damages, a recital of plaintiff's injuries is omitted. The momentum of the stage carried the coupé to a point south of the south line of Industrial street, and there came to a stop. On the part of the defendant the bus driver testified that the stage traveling at about 15 miles per hour first entered the intersection; that at the time the stage entered the intersection the Ford coupé was at a point from 20 to 25 feet east of the east line of Mill street, and was traveling at a speed of between 25 and 30 miles per hour; that as the coupé came westerly across the intersection, the wheels of the

coupé ran on both sides of the "button" in the center of the intersection, or, as witnesses described it, the coupé straddled the button; and that at a point just west of the intersection, the Ford coupé was turned quickly to the left as if to avoid a collision, and that the Ford toppled over upon the hood, bumper, and left fender of the stage.

The wrecked Ford was taken into the possession of the defendant immediately following the accident, and to a garage maintained by it near the scene of the collision. It remained in this place for about two weeks, and then was removed to an open lot immediately adjoining a garage belonging to the defendant, where it remained until it was placed upon a truck and hauled to the courthouse for purposes of inspection during the trial. It appears that the coupé was in plain view of the defendant during all the time after the accident up to its removal to the courthouse, as just stated. The Ford was moved once about 20 feet in its storage place during the time between the accident and the date of its inspection at the trial, and also was loaded upon a truck and taken to the courthouse for inspection, as above stated. It appears that the left rear wheel, the spokes of which were broken, was removed from it either during the time it was in the defendant's yard or in the storage yard, and other wheels which did not belong to the car were put on it to hold it up. What was left of the right-hand door, which at one time was lying inside the car where it had been driven by the collision, was missing. Some other little changes as to the lining of the car appear also to have taken place. Testimony was introduced by the parties as to the condition of the Ford coupé immediately after the collision, and also as to the changes that had been made in its condition. After all this had been done and after the defendant had introduced considerable testimony as to the condition of the car and photographed as to its condition, the court permitted an inspection of the coupé.

[1] The assignments of error presented for our consideration are two in number: First, that the court erred in permitting the jury to view the Ford coupé; second, that the court erred in instructing the jury that the bus driver and the employees of the defendant were interested witnesses, etc. The objection that the court erred in permitting an inspection of the coupé is based upon the theory of the defendant that the Ford coupé, by reason of the driver having turned sharply to the left, was caused to topple over upon the front of the Pickwick stage, and that the stage did not run into the Ford coupé, and that a certain indentation on the door of the Ford coupé substantiated their theory. No argument is presented upon said appeal that the jury was wrong in coming to the conclusion that the Ford coupé first entered the intersec-

tion, though the testimony of the defendant's two bus drivers is set forth in which they state the contrary. If the Ford coupé first entered the intersection, it had, under the provision of the Motor Vehicle Law as that law existed at the time of the collision, the right of way across that intersection, and the driver of the Ford coupé had the right to assume that the driver of the bus would observe that law, and if, as stated by the defendant's witnesses, the driver of the Ford coupé, in order to avoid a direct or other collision with the stage, essayed a sharp, left-hand turn and thereby the Ford coupé was toppled over against the front of the stage, the responsibility of the defendant would be exactly the same as though the collision had been head-on. The fact that the driver of the coupé attempted to avoid the collision when he became aware of the fact that danger was impending and imminent, and that the bus driver had not regarded the law but was coming across the intersection at a rate of speed which indicated that the stage could not be stopped, does not lessen the defendant's liability in any particular. The whole argument, based upon the assumption that the coupé toppled over before it was hit by the bus, is absolutely without any merit whatever if the premises are correct that the coupé first entered the intersection. It therefore follows that no error on the part of the court could or can be predicated on the fact that an inspection of the Ford coupé was permitted. The fact that the bus hit the Ford or the Ford toppled against the bus had no bearing whatever upon the right of way. It did bear upon the question as to whether the driver of the Ford coupé endeavored, in a perilous situation, to avoid the collision, or at least avoid a direct hit. During the course of the trial the defendant exhibited five photographs of the Ford coupé, which we cannot produce in this opinion, but an inspection of which shows that after having been introduced and shown to the jury, an inspection of the car by the jury could not have had any effect whatever. The photographs to which we have referred show the Ford coupé to be almost a complete wreck. In fact, the Defendant's Exhibit No. 6, showing the side of the Ford coupé on which the plaintiff was riding, leaves just one question in the mind of the jury, and that is how any one could be in that position and escape with his life. Photographs introduced as exhibits such as we have herein referred to, which can be appreciated only by an inspection, could leave no possible ground for any prejudice arising from an inspection of the car, even though the parts thereof to which we have referred were missing.

[2, 3] The instruction, the giving of which is predicated as error, is as follows:

"In weighing the evidence, you are to consider the credibility of witnesses who have tes-

tified before you; you are the sole and exclusive judges of their credibility—their conduct, their character, as shown by the evidence; their manner on the stand; their relation to the parties, if any; their interest in the case; their bias and prejudice, if any; their degree of intelligence; the reasonableness or unreasonableness of their statements; and the strength or weakness of their recollection may be taken into consideration for the purpose of determining their credibility. This instruction, like all instructions, applies not only to one side but to both sides. Attorneys refer to the interest of witnesses on the other side. If there are interested witnesses or relatives on the side of the plaintiff, you should consider that in determining their credibility, but you should not on that account solely disbelieve their testimony. On the other hand, the bus driver and the employees of the defendant were interested witnesses, and the same rule applies to them, and only the same rule, that you should not on that account alone disbelieve their testimony, but should consider their interest in determining their credibility. A witness is presumed to speak the truth. This presumption, however, may be repelled by the manner in which the witness testifies, by the character of his testimony, his motives, or by contradictory evidence.”

The asserted prejudicial part of the instruction reads:

“On the other hand, the bus driver and the employees of the defendant were interested witnesses, and the same rule applies to them, and only the same rule, that you should not, on that account alone, disbelieve their testimony, but should consider their interest in determining their credibility.”

The point is made that the court, in instructing the jury that the driver and employees of the defendant were interested witnesses, transgressed the exclusive province of the jury and instructed the jury upon a question of fact in contravention of section 19 of article 6 of the Constitution, which provides that: “Judges shall not charge juries with respect to matters of fact, but may state the testimony and declare the law.” In support of this instruction the respondent cites, first, the case of *Ellis v. Lakeshore & M. S. R. Co.*, 138 Pa. 506, 21 A. 140, 21 Am. St. Rep. 914, where it was held that the trial court properly called attention to the fact that the engineer and fireman of the train were interested witnesses, although not affected peculiarly by the verdict. The action involved damages suffered by the plaintiff at a railroad crossing.

In the case of *People v. Bush*, 71 Cal. 602, 12 P. 781, the following instruction was approved:

“In this case, Maude and Cora Parsons, nieces of the defendant, have been examined as witnesses in behalf of the defense. This is their right. It is proper, however, for the jury to bear in mind the relationship between them and the defendant, and the manner in which they may be interested by your verdict, and the very grave interest they must feel in it;

and it is proper for the jury to consider whether their position and interest may not affect the credibility or color of their testimony.”

In *Konig v. Lyon*, 49 Cal. App. 113, 192 P. 875, the following instruction was approved:

“The plaintiff as a matter of course is interested in the case. You will simply consider that fact, and the same with the driver of the truck. He is interested on his side of the case and you can consider it in determining his credibility.”

In this case, however, the jury was not told that the driver was interested in the case, but was interested in his side of the case. The case involved an automobile collision between a bicycle and a truck. It is also stipulated in that case that the driver of the truck was in the employ of the defendant, and it of course appeared that if he was negligent in the management and operation of the truck being driven by him at the time of the collision, the responsibility of his employer depended, as a matter of law, upon his responsibility, whether the truck driver was or was not made a party to the action.

In the case of *People v. Bernal*, 40 Cal. App. 358, 180 P. 825, cited as an authority supporting the instruction given to the jury in this case, the trial court instructed the jury that:

“In judging the credibility of a witness, whether such witness be the defendant, the prosecutor, or any other witness produced on either side, you may consider the interest and relation of such witness in and to the case.”

To the same effect is the decision in the case of *People v. Amaya*, 134 Cal. 531, 66 P. 794. As to the impropriety of giving such instructions, we may cite the case of *People v. Maughs*, 149 Cal. 253, 86 P. 187, where an instruction in this language was condemned:

“Where the defendant offers himself as a witness, in determining his credibility, it is proper to take into consideration the consequences, inducements, and temptations which would ordinarily influence a person in his situation.”

In *Huyck v. Rennie*, 151 Cal. 411, 90 P. 929, the court, with reference to such instructions, uses the following language:

“It is unnecessary to cite authorities to the point that, in this state, where, under the constitutional provision, judges are prohibited from charging juries as to the facts, it is improper for the court in its instructions to select testimony of particular witnesses as entitled to special weight or consideration. Similarly, it is improper to indicate that less regard is to be paid to the testimony of one witness than to that of another.”

That the trial court went beyond its province in instructing the jury that the employees of the defendant were interested witnesses seems to us very clear, but that does not, in and of itself, warrant a reversal of the judgment in this action. Just how far a

trial court may go in instructions and an appellate court required to uphold the judgment under the provisions of section 4½ of article 6 of the Constitution cannot be so definitely limited or stated in language as to make a rule promulgated for one case applicable to every other case. The case at bar differs somewhat from the ordinary run of actions, in that the instruction given apparently runs counter to a section of the state Constitution, and just how far such an instruction may go without necessitating a reversal is not made clear by anything called to our attention by counsel in this case. In *People v. O'Bryan*, 165 Cal. 55, 130 P. 1042, the majority of the court, in considering a like question, used the following language:

"But it does not follow that every invasion of even a constitutional right necessarily requires a reversal. It may well be that the court, after examining the 'entire cause, including the evidence,' is of the opinion that the error complained of, whatever its character, has not resulted in a miscarriage of justice. The mere fact that the assignment of error is based upon a provision of the Constitution is not conclusive."

Again, in *Estate of Baird*, 173 Cal. 617, 160 P. 1078, a case where the court had substituted itself for the jury, we find the following:

"But where the error is so grave as the unauthorized substitution of the court for a jury as the tribunal to hear the evidence and determine the facts, we cannot, as a general rule, say that the scheme in force in this state for the administration of justice has not miscarried. [Citing *People v. O'Bryan*, supra.] Doubtless there may be cases so devoid of merit, or so wanting in proof of some essential fact, that the judgment of the lower court to that effect should be upheld even in the face of such an error."

Other cases might be cited where similar views are expressed, a summary of which may be stated in the following words: The mere fact that error is made to appear does not present a case for reversal, but it must appear affirmatively, after an examination of the entire cause, including the evidence, from the nature of the error itself, that there has been a miscarriage of justice. See cases cited in *People v. Attema*, 75 Cal. App. 642, 243 P. 461. Again, the alleged error in this case does not go to the denial of a fundamental right, such as was presented for our consideration in the case of *People v. O'Connor*, 254 P. 630, and in the cases there cited. While the court did instruct the jury as to a question of fact, it did not take away from the jury the right to pass judgment upon all the facts involved. So far as the driver of the appellant's bus was concerned, any jury possessing ordinary common understanding would know that the bus driver was vitally interested in the result of the action, because it was upon his alleged negligence that his employer was being sued for damages, and

the jury would know that the defendant could not be held liable without first holding that the bus driver was guilty of negligence, which made him such an apparent interested party that the statement of such fact by the court added nothing whatever to the knowledge already possessed by the jury. Practically the same may be said of the defendant's driver who was accompanying the defendant's driver of the bus involved in this collision. He and the driver who was actually driving the bus had taken the vehicle to a public scales in order to have it weighed, and were returning therewith to a garage maintained by the defendant. The only difference in the situation between the two drivers consisted in this: That one certainly might have been made liable for damages in the event that his employer was legally liable. The other, possibly, might not have been so held, but his position put him in the same class of an interested witness in behalf of his employer, and the jury, without the instruction of the court, would doubtless have so classified him. Again, an examination of the testimony of the defendant's driver who was accompanying the driver of the bus will show that if the jury absolutely disregarded his testimony, it did not tend in any way to a miscarriage of justice. As the testimony of this witness appears in the transcript, it shows upon its face that it is incredible. This witness testified that he was sitting on the left-hand side of the bus that the witness Archer was driving. "The driver sat to my right and in front of me. The stage was running about 20 miles an hour, and was being driven about 7 feet from the right-hand curb of Mill street, as it was going south. I first noticed the Ford coupé when the stage was possibly 6 feet past the curb line of the intersection. At that time the stage was moving about 15 miles an hour. When I first saw the Ford coupé it was about 20 feet east of the east curb line of Mill street, and was traveling about 25 miles an hour. At about the center of the intersection the stage turned a little to the right. At that time the Ford was about 30 feet east to our left. The Ford coupé straddled the manhole in the center of the intersection. The Ford then turned to the south. The machines did not come together. When the Ford turned to the south, the left wheels left the pavement and the Ford tipped over onto the bus. At that time the Ford was traveling about 15 miles an hour. After the cars came together the stage traveled about 10 feet." The measurements of the intersection involved in this action show that its dimensions are 40x40 feet, that being the width of both streets involved between the curb lines. The testimony in the case shows that the collision occurred about 10 feet west of the center of the intersection. According to the testimony of the witness, whose statements are here being analyzed, the Ford

straddled the manhole in the center of the intersection (other witnesses described this center as being marked by a button), and that the collision occurred after the Ford had passed the center of the intersection. Thus, the Ford, if it was 20 feet east of the east line of Mill street, had to travel at least 50 feet before reaching the point of the collision, while the bus, if at the time the Ford was 20 feet east of the east line of Mill street was 6 feet south of the north line of Industrial street, had to travel only about 12 feet to reach the point of the collision. Industrial street was only 20 feet from the curb line to the center line. Excluding the 6 feet that the bus was projecting south of the north line of Industrial street leaves only 14 feet, and if the Ford coupé straddled the manhole at the center of the intersection, at least 2 feet of the machine would be north of the center line, which would reduce the traveling distance of the bus another 2 feet, leaving only 12 feet for the bus to travel while the Ford was traveling 50 feet. Thus, if the bus was traveling, as stated by the witness, about 15 miles per hour, the Ford coupé, having a trifle over four times the distance to cover in order that a collision might take place, must have been traveling from 60 to 65 miles an hour. In the face of such incredible testimony when applied to the facts, it cannot very well be perceived how any error of the court in instructing the jury that the witness was interested could result in a miscarriage of justice. Again, this witness testified that the stage stopped in about 10 feet after the collision. The physical facts as disclosed by the testimony of all the other witnesses shows that the Ford coupé was carried by the bus, or pushed by the bus, to a point about 10 feet south of the south line of Industrial street. The only support of the testimony of this witness presented to us is the untenable argument of appellant that liability is lacking because the sharp turning of the Ford to the left to prevent a head-on collision caused the Ford to topple over to the right, and it was then that the collision occurred.

It may be further stated that if the instruction set forth herein tended to discredit defendant's witnesses, it had the same effect upon the witnesses for the plaintiff. None but relatives testified in her behalf. The relatives and the two drivers were the only witnesses as to who had the right of way.

Being satisfied from the whole record that no error was committed in allowing the jury to view the wrecked Ford, and that the alleged error of the trial court in giving the instruction set out in this opinion did not result in a miscarriage of justice, and could not have had any influence upon the jury whatever, the judgment is affirmed.

We concur: FINCH, P. J.; HART, J.

STREICHER v. HEIMBURGE et al.*
(Civ. 5528.)

District Court of Appeal, Second District, Division 2, California. Dec. 22, 1927.

Hearing Granted by Supreme Court Feb. 20, 1928.

1. Landlord and tenant ⇨86(2)—Giving of notice by lessee of acceptance of option of renewal fixes rights of parties, notwithstanding failure to agree as to rental under method stipulated.

Where lessor has granted option of renewal on condition that notice be given prior to expiration of term and fixing of rental is not made condition precedent, giving of notice is, in effect, an acceptance, and on such acceptance, rights of parties become fixed as to renewal, even though parties have agreed on method for determining rental and such method fails of its purposes.

2. Landlord and tenant ⇨83(2)—Lease recitals as to rental, acceptance of option to renew, and punctual performance held conditions precedent to exercise of option, where preceded by word "provided."

Where lease gave lessee option to renew lease subject to conditions of punctual performance of lease, and acceptance of option by writing, and agreement as to rent, each condition being preceded by the word "provided," such conditions were conditions precedent, since word "provided" always implies a condition unless subsequent words change it to a covenant.

3. Landlord and tenant ⇨83(2)—Condition precedent that parties agree on rental before renewal of lease must be performed within term of original lease.

Where provision in lease as to rental was a condition precedent to renewal of lease, as distinguished from extension of term, condition requiring agreement as to rental must be performed prior to expiration of term of original lease.

4. Evidence ⇨413—Conversations surrounding execution of contract are introduced only to explain uncertainties and ambiguities in contract.

Testimony of conversation surrounding execution of contract is never introduced for purpose of varying its terms, but only for purpose of explaining uncertainties and ambiguities therein.

5. Landlord and tenant ⇨291(1)—Three days' notice by landlord to quit was unnecessary, where notice was given day after expiration of term (Code Civ. Proc. § 1161).

It was not necessary for landlord to give tenant 3 days' notice to quit, under Code Civ. Proc. § 1161, as prerequisite to maintenance of action in unlawful detainer, where landlord did give notice upon the day after expiration of term requiring tenants to vacate, since nothing could be added by such 3 days' notice.

Appeal from Superior Court, San Diego County; S. M. Marsh, Judge.

Action by Celia Streicher against Max Heimburge and another. Judgment for plaintiff, and defendants appeal. Affirmed.

Arthur F. H. Wright, Adam Thompson, and Gordon Thompson, all of San Diego, for appellants.

Haines & Haines, Wright & McKee, and C. M. Monroe, all of San Diego, and Arthur Joel, of San Francisco, for respondent.

THOMPSON, J. This action in unlawful detainer resulted in a judgment for restitution of the premises and damages for its detention in the sum of \$3,580.57, which sum was not trebled, and from which judgment this appeal is prosecuted.

Briefly, the facts are as follows: Plaintiff's predecessor in interest, Bryant H. Howard, and the defendants executed a lease covering the ground floor and basement of the Dalton building, in San Diego, which lease by its terms commenced December 1, 1920, and ended on the 30th day of November, 1925. Paragraph 20 of the lease contained an option giving to the defendants the right to renew the lease for an additional term of 5 years in the following words:

"Provided, and upon condition that the lessees and their successors in interest have at all times faithfully and punctually performed each and all of the covenants and conditions of this lease on the part of the lessees, the lessor grants to the lessees, and their successors in interest, the right or option to renew this lease for an additional term of 5 years, upon the same covenants and conditions as are herein contained, except as modified by this paragraph, and except further that there shall be no right or option to further renew or extend this lease, provided that this option is accepted by a writing delivered to the lessor by the lessees, or their successors in interest, at least 6 months prior to the expiration of the term of this lease, and provided further that the rent to be paid is agreed upon as follows: The parties are to agree in writing upon the rent to be paid during such renewed term, if they are able to do so. If within 30 days after the acceptance of this option on the part of the lessees, by the delivery of the written acceptance aforesaid, the parties are still unable to agree upon the rent to be paid, then the lessor or his successor within 10 days shall, in writing, appoint an appraiser, and the lessees or their successors within 10 days shall, in writing, appoint an appraiser, and the two appraisers so appointed shall determine the rent to be paid for said time. Or, if the two appraisers so appointed are within 10 days unable to agree upon said rent, then they shall, in writing, immediately appoint a third appraiser, and the majority of the three so appointed shall determine said rent. If either of the parties fail or refuse to appoint an appraiser within the time aforesaid or within 10 days after new appraisers should be appointed by the parties as next provided, then the other party shall appoint both appraisers, who shall determine the amount of said rent; or, if the appraisers so appointed are unable to agree within the time aforesaid, and they fail or refuse to appoint a third appraiser

as aforesaid, or if they appoint a third within that time, but a majority of the three refuse or are unable to agree within 10 days, then the parties within 10 days thereafter shall each, in writing, appoint a new appraiser, and the two so selected shall determine said rent, or if they are unable to do so, they shall appoint a third appraiser as aforesaid, and the majority of the three so appointed shall determine said rent; and this process of appointing and reappointing appraisers shall be continued, within the time and in the manner aforesaid, until either the parties themselves or appraisers for them determine the amount of said rent. The appraisers so appointed shall in all instances be business men of said city of San Diego, and shall reduce to writing and deliver to each party a statement of the amount of rent determined upon."

Within the time provided and on May 6, 1925, defendants notified the plaintiff of their election to exercise the option to renew the lease, but they were not able to agree with her upon the amount of rental to be paid therefor. Thereafter plaintiff and defendants appointed ten successive pairs of appraisers, who were unable to agree upon the rental to be paid, and also to agree upon a third appraiser. The amount of the rental therefore was never fixed by agreement of the parties or by determination of the arbitrators. On December 1, 1925, the plaintiff notified the defendants to remove from the premises "not later than December 31, 1925." The lease contained a clause as follows:

"It is agreed further, should the lessees, or either of them or any of their successors in interest, hold over the leased premises, or any part thereof, after the expiration of the term of this lease, unless otherwise agreed in writing, that such holding over shall constitute a tenancy from month to month only, and that the lessees shall pay the then reasonable value of the use and occupation of the leased premises, which shall not be less, however, than the rent to be paid for the last month under this lease."

[1] Appellants' principal contention is that upon the giving of the notice of their exercise of the option they became vested with a leasehold interest running for a new term of 5 years; that where the mode adopted by agreement of the parties for the fixing of the rental for the new term fails in the accomplishment of that purpose equity will establish a reasonable rental therefor. Abundant authority may be cited to the general proposition of law that, where the lessor has granted an option to the lessee of renewal upon the condition that notice be given prior to the expiration of the term, the giving of the notice is in effect an acceptance of a continuing offer on the part of the lessor (*Nutmeg Park Driving Corp. v. Fiske*, 81 Conn. 463, 71 A. 499), and that upon such acceptance the rights of the parties become fixed, in so far as renewal is concerned, even in those cases where the parties have agreed upon a method for the determination of rent-

al in case of their failure to agree, and this is true even though the method adopted fails of its purpose. It will be noted, however, that such is true only in those cases where the fixing of the rental is not made a condition precedent, and further it should be observed that the authorities have not always carefully drawn the distinction between the right of renewal of the lease and the right to an extension of the term. In determining whether the parties intended that the lessees should be entitled to the renewal only upon the condition that the rental were fixed prior to the expiration of the term, it becomes important to notice the distinction in results between the right of renewal such as is provided for in the agreement under consideration and the right to an extension. In *Shamp v. White*, 106 Cal. 220, 39 P. 537, a lease was involved which granted the lessee an option to renew the lease without providing specifically that notice of its exercise should be given prior to the expiration of the term. The court says:

"The contract here expressed was one for a renewal of the lease, and not one for an extension of the term, despite the language subsequently used—'at the expiration of this lease, if not extended as heretofore mentioned, the party of the second part will quit,' etc. The distinction becomes important for this reason: Being a lease with a privilege of renewal, it was incumbent upon the lessee desiring to exercise his option to give notice of his election before the expiration of the original term; while, if the lease had provided merely for an extension, his remaining in possession (no specific form of notice having been required) would have been sufficient notification of his decision. *Renoud v. Daskam*, 34 Conn. 512; *Delashman v. Berry*, 20 Mich. 292, 4 Am. Rep. 392; 1 Taylor on Landlord and Tenant, § 332; 2 Wood's Landlord and Tenant (2d Ed.) 947; 6 Lawson's Rights, Remedies, and Practice, § 2833."

To the same effect, see *Robertson v. Drew*, 34 Cal. App. 143, 166 P. 838; *Loeffler v. Wright*, 13 Cal. App. 224, 109 P. 269; *Andrews v. Marshall Creamery Co.*, 118 Iowa, 595, 92 N. W. 706, 60 L. R. A. 399, 96 Am. St. Rep. 412.

And likewise it has been held that payment of rent and performance of other covenants of a lease during the full period of the original term are conditions precedent to the exercise of the right of renewal. *Behrman v. Barto*, 54 Cal. 131.

Like performance of other conditions which may have been agreed to by the parties is required. In the case of *Stout v. North*, 211 Mo. App. 245, 242 S. W. 119, the lease gave the lessee the right of renewal of the lease upon the same terms and conditions at his option, and one of the terms was that the rental for the original term was to be secured by a note "*approved by*" the lessor, it was held that it was necessary for the lessee to secure the rental for the new term

by a note "*approved by*" the lessor before the lease was renewed. (*Italics ours.*) It is there said:

"A general covenant to renew is indivisible and must be exercised in its entirety. 16 R. C. L. § 388, p. 885. Consequently, in this case, as already stated, mere notice of an intention to stay, and thereafter holding over without doing anything else, are not sufficient to call the renewal into existence. * * * Unless all the terms and conditions of the renewal privilege have been complied with, she" (the lessor) "is not compelled to further accept defendant as a tenant. Compliance with only a part, but not all, of the terms and conditions of the renewal privilege, leaves him in no better situation than if none had been complied with. It is held that even though the time for the exercise of the election to renew is not expressly limited, the lessee must nevertheless exercise his election to do so before the expiration of the term. 16 R. C. L. § 396, p. 893; 18 Am. & Eng. Ency. of Law (2d Ed.) 692. In the case of *Renoud v. Daskam*, 34 Conn. 512, it was held that a failure to exercise the privilege of renewal during or at the expiration of the first term entitled the lessor to insist upon the termination of the tenancy, and that an offer to comply made two days after the expiration of the first term was too late and did not entitle the lessee to relief even in equity. In *I. X. L. Furniture [& Carpet Installment], etc., House v. Berets*, 32 Utah, 454, 91 P. 279, a similar ruling was made. Consequently, the fact that after the expiration of the first term, and after the time when the renewal term was to begin, and after plaintiff had begun steps to put defendant out, he then sought to arrange at the bank for the rent of the next year and invited plaintiff to meet him there and settle with him as to such rent, can have no efficacy in affecting or changing the status that then existed between them."

To the same effect, involving another lease providing for security, is the case of *McFadden v. McCann*, 25 Iowa, 252.

It has also been determined that where the lease grants the right of a new lease, the lessor to be notified of the election of the lessee, and then says, "provided that they pay as high a rent as is offered by other parties," that the latter provision is a condition which must be met before the lessees become entitled to the new lease, even though the offer made by the "other parties" is under circumstances such as to raise "a strong suspicion" that it was not made in good faith. *Bettens v. Hoover*, 12 Cal. App. 313, 107 P. 329.

[2, 3] It will be observed in the paragraph quoted from the lease under consideration that the parties by appropriate words made faithful and punctual performance of the lease during the original term the first condition of "the right or option to renew this lease for an additional term of 5 years, upon the same covenants and conditions." They introduced this condition by the use of the word "Provided," which word is generally employed to introduce a proviso, and which pro-

viso, it has been said "always implies a condition unless subsequent words change it to a covenant." Stockton v. Weber, 98 Cal. 433-440, 33 P. 332, 334, quoting Bouv. Law Dict. p. 2761, title "Proviso." Again, the second condition precedent is introduced by use of the same word, "provided that this option is accepted by a writing," etc. The natural and logical sequence would be, if the parties intended to agree that the fixing of the rental should also constitute a condition precedent, to likewise introduce that subject in similar fashion. And so they did by saying, "And provided further that the rent to be paid is agreed upon as follows." We fail to see how their meaning might have been made more clear except possibly they had added the words "prior to the expiration of the term hereby granted" after the word "upon." But as we have already observed, where the right is for a renewal of the lease as distinguished from an extension of the term, the law provides that the conditions must be performed within that time. Counsel strenuously urge the application of the authority of Kaufmann v. Liggett, 209 Pa. 87, 58 A. 129, 67 L. R. A. 353, 103 Am. St. Rep. 988, to the facts of this case. Two quotations from that opinion are sufficient to show the distinction:

"It will be noticed that here is a direct and positive grant of the right of renewal. It is not left to be determined by anybody else, but is definitely settled by the parties."

And again:

"If the right to renewal had been intended to depend upon the rent being fixed in advance, it would not only have been the easiest but most natural thing to have said so."

[4] The conclusion reached on this branch of the case disposes of the error assigned by appellant in the rejection of testimony sought to be introduced by the defendants consisting of conversations had between the defendants and plaintiff's predecessor in interest, Eryant H. Howard, relative to the draft of the lease. There is no uncertainty or ambiguity in the terms of the lease, and therefore any evidence introduced concerning the intent of the parties other than that expressed in the writing could have no other effect than to vary the terms of the contract. Testimony of conversations surrounding the execution of a contract is never introduced for the purpose of varying its terms but only for the purpose of explaining uncertainties and ambiguities therein. Balfour v. Fresno

Canal & Irrigation Co., 109 Cal. 221-225, 41 P. 876.

[5] It is also asserted by appellants that it was necessary for the plaintiff to have given the defendants a 3 days' notice to quit as a prerequisite to the maintenance of an action in unlawful detainer. He specifically relies upon clause 13 of the lease, heretofore quoted, which provides, if the lessees hold over after the expiration of the term, "that such holding over shall constitute a tenancy from month to month only." It must be borne in mind that plaintiff did give a notice to defendants upon the next day after the expiration of the term requiring them to vacate. We fail to see how anything could be added to this notice, for the reason that on December 1, 1925, there was nothing which defendants could do, no covenant which they could perform, which would entitle them to remain in possession. In determining a somewhat similar argument in the case of Buhman v. Nickels & Brown Bros., 1 Cal. App. 266, 82 P. 85, the court says:

"The law neither does nor requires an idle act, and it would certainly be idle to require 3 days' notice to quit, in view of the express stipulation of the parties and plaintiffs' compliance therewith. The defendant could not, by any act or acts, prevent the lease from lapsing, and under such conditions no further notice was required. Code Civ. Proc. § 1161; Harloe v. Lambie, 132 Cal. 135, 64 P. 88; Earl Fruit Co. v. Fava, 138 Cal. 76, 70 P. 1073; Kelly v. Teague, 63 Cal. 68."

And again in Bettens v. Hoover, supra, it is said:

"The complaint does not attempt to state a cause of action for unlawful detainer by a lessee after default in the payment of rent, but is framed upon the theory that defendant is holding over, without the consent of the landlord, after the termination of his term. In such a case the 3 days' notice, provided for in subdivision 2 of section 1161, Code of Civil Procedure, is not required. Earl Orchard Co. v. Fava, 138 Cal. 76, 70 P. 1073."

The authority relied upon by appellants, to wit, Martin v. Splivalo, 56 Cal. 128, is not in point here, for the reason that the court was there considering a tenancy at will, and here we are concerned with a holding over after expiration of the term by lapse of time, which the landlord was diligent to see did not ripen into an estate of any character.

Judgment affirmed.

We concur: WORKS, P. J.; CRAIG, J.

88 Cal. App. 141

NORTHRUP et al. v. COHN et al.
(Civ. 3384.)

District Court of Appeal, Third District, California. Dec. 30, 1927.

1. Appeal and error ⇐1015(2)—Trial court's grant of new trial on ground evidence does not justify verdict is conclusive on appeal, where evidence substantially conflicts.

Where trial court grants new trial on ground that evidence is insufficient to justify verdict, determination of trial court that verdict is against weight of evidence is conclusive on appeal, where there is substantial conflict in evidence.

2. New trial ⇐72—Evidence held to warrant inference of plaintiff's negligence in running in front of automobile, justifying court's grant of new trial.

Evidence held sufficient to warrant inference that plaintiff negligently ran in front of defendant's automobile and that such negligence was proximate cause of accident, warranting trial court in granting new trial on ground evidence was insufficient to justify verdict.

3. Appeal and error ⇐1015(3)—New trial ⇐72—Trial court in deciding motion for new trial can pass upon weight of evidence, and its determination is conclusive.

Where it cannot be said, as matter of law, that evidence is insufficient to justify verdict for plaintiff, but on other hand it cannot be held, as matter of law, that evidence is insufficient to justify verdict for defendant, trial court deciding motion for new trial is not bound even by substantial conflict in evidence, but has power to pass upon weight thereof, and its determination that justice requires new trial is conclusive.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by Otis Northrup and another against M. M. Cohn and another for damages for personal injuries. Judgment for plaintiffs, and from an order granting a new trial plaintiffs appeal. Affirmed.

A. P. Michael Narlian and Harold N. Nuzum, both of Los Angeles, and Joseph N. Beardslee, for appellants.

W. I. Gilbert, of Los Angeles, for respondents.

FINCH, P. J. Plaintiff Jennie Northrup was struck and severely injured by an automobile driven by defendant M. M. Cohn, and this is an action for damages on account thereof. The parties named will be referred to herein as the plaintiff and the defendant, respectively. The jury returned a verdict in favor of the plaintiff, and judgment was entered thereon in her favor. In due time the defendant gave notice of intention to move for a new trial on many specified grounds, including that of "insufficiency of the evidence to justify the verdict." The court granted the motion "upon all the grounds stated in the

notice of intention to move for a new trial." This appeal is from the order granting the motion.

[1, 2] Where there is a substantial conflict in the evidence, the determination of the trial court that the verdict is against the weight of the evidence is conclusive on appeal. *Rosenberg v. Moore*, 194 Cal. 392, 396, 229 P. 34. In this case the evidence is in substantial conflict, and therefore no ground for a new trial need be considered except that of the insufficiency of the evidence.

At the time of the accident the defendant was traveling north along the east side of Moneta avenue in Los Angeles. While the plaintiff was crossing from the west side to the east side of the avenue she was struck by the right front fender of defendant's automobile, and her alleged injuries were caused by the impact. She testified that she "was crossing right at the intersection" of Forty-Fifth street and Moneta avenue, but other witnesses testified that she was crossing 40 or 50 feet north of the intersection. She testified that she knew that Moneta avenue "was a very heavily traveled street"; that as she crossed the avenue she looked to the north until she reached the car tracks, there being double street car lines along that avenue; that she then looked south; that when she had reached the center of the avenue she saw defendant's automobile "half way up the next block" to the south; that when she had crossed the north-bound car line she "started to run" and ran as fast as she could for about 14 feet to the point where she was struck; that as she ran she continuously looked at defendant's automobile; that, the automobile did not swerve from its course, but "came right straight." She further testified as follows:

"Q. When you were in the middle of the east side of the street and saw it coming at the south side, why didn't you stop? A. Because he didn't stop. * * *

"Q. I know, but I am asking you when he didn't stop why didn't you? A. I thought if I ran hard enough I would escape.

"The Court: Were you trying to beat him to it? A. I was. * * *

"Mr. Nuzum: Did you try to cross all the way in front of the automobile, or did you try to get out of the way of the automobile? A. Tried to get out. * * *

"The Court: You understood my question perfectly, did you? A. Yes. I thought you meant when I saw it away over I started to run to beat it."

The accident occurred between 8:30 and 9 o'clock in the evening. Some of the witnesses, including the defendant, testified that the speed of his automobile at the time of the accident was about 15 miles an hour. The defendant testified that the plaintiff was "within 1 foot of the front fender" when he first saw her; that he did not see her sooner "be-

cause when I saw her in front of my machine she was running, and being there was traffic in both directions very thickly, it was almost impossible to see any one darting out from under a machine in front of yours;" that he stopped his automobile within 2 feet from the point of collision. Another witness, who was riding in the rear seat of the defendant's automobile, testified:

"We slowed down because there were machines in front of us. * * * I know that there was one directly in front of us."

There is other evidence much more favorable to plaintiff.

[3] The foregoing evidence is sufficient to warrant the inference that the plaintiff negligently ran in front of the defendant's automobile, and that such negligence was a proximate cause of the accident. Of course, it is not intended to express any opinion as to the weight of the evidence. It cannot be said, as a matter of law, that the evidence is insufficient to justify the verdict, but, on the other hand, it cannot be held as a matter of law that the evidence is insufficient to justify a verdict in favor of the defendant, and, since the trial court in deciding a motion for a new trial is not bound by even a substantial conflict in the evidence, but has the power to pass upon the weight thereof, its determination that justice requires a new trial is conclusive.

The order is affirmed.

We concur: PLUMMER, J.; HART, J.

87 Cal. App. 721

PAUL v. SALISIAN et al. (Civ. 5385.)

District Court of Appeal, First District, Division 2, California. Dec. 21, 1927.

1. Sales $\S$ 441(3)—Evidence in action for breach of warranty of title held to sustain finding that defendants were sole owners of raisins sold to plaintiff.

In action to recover purchase money paid for raisins in counts for breach of warranty of title and quality and for money had and received, evidence held sufficient to sustain finding that defendants, sellers, were sole owners of raisins and that raisin association did not have title to them when sold to plaintiff, especially where plaintiff failed to show evidence requiring a different finding.

2. Appeal and error $\S$ 909(5)—As respects contract not in record authorizing defendants to sell raisins, reviewing court will assume trial court properly construed its terms.

As respects contract under which defendant had previously sold raisins to association which rejected them and consented to their sale by defendants, since it was not printed in the record, it must be assumed that trial court, in

finding defendants had title, had entire contract before it, and, with no showing to contrary, reviewing court will assume trial court properly construed its terms.

3. Trial $\S$ 396(6)—Finding that buyer should not have yielded possession of raisins to marketing association was immaterial, where seller was not responsible for what happened after title passed.

In buyer's action against seller for breach of warranty of title and quality of raisins and for money received by seller, where plaintiff alleged that raisins were delivered to packer and immediately rejected and were thereafter taken from packer by raisin association under claim of title from seller, finding that seller had title was not erroneous because court found that buyer should not have yielded possession to association without legal proceeding, where title had passed to buyer and seller was not responsible for what occurred thereafter.

4. Sales $\S$ 268(1)—Buyer knowingly buying raisins of inferior quality from seller having title could not rescind and recover money paid.

Where buyer knowingly bought raisins of inferior quality from seller having title, he could not rescind contract because he had made a bad bargain and sue for breach of warranty of quality and title and to recover purchase price paid, especially where there was no fraud or misrepresentation by seller.

Appeal from Superior Court, Fresno County; Stanley Murray, Judge.

Action by Irven Paul against A. S. Salisian and others. From a judgment for plaintiff in an amount less than he complained for, he appeals. Affirmed.

K. Ohanian and Percy Church, both of Fresno, for appellant.

Carl E. Lindsay and K. Kuyumjian, both of Fresno, for respondents.

NOURSE, J. Plaintiff sued to recover \$2,779 purchase money paid defendants under a written contract for the sale of a quantity of raisins. Judgment went for plaintiff in the sum of \$1,000, from which he appeals on a typewritten record.

The complaint was framed in two counts—one to recover for breach of warranty of title and of quality, and the other a common count for money had and received. It was alleged that on February 20, 1924, the parties executed a written agreement for the sale of approximately 55 tons of raisins at 3¼ cents a pound, which defendants represented to be their sole property and to be in good and merchantable condition; that the raisins were delivered to the Foley packing house on February 24th and 25th in a spoiled, deteriorated, and wet condition; that plaintiff immediately notified defendants in writing of the condition of the raisins, that the same were rejected and held by the packing house subject to defendants' disposal; that after the rejection

of the raisins they were taken from the packing house by the Sun Maid Raisin Growers' Association under claim of paramount title. In the answer it was denied that any representations as to title or quality were made to plaintiff, and in this connection it was alleged that, prior to the sale, the raisins had been under contract to the raisin association, but that the association had released them and consented to this sale; that, after the delivery to plaintiff, the association took possession of the raisins at the instigation of plaintiff and paid defendants \$1,000, which they held for the use and benefit of plaintiff. On the issue of quality it was alleged that there were some damaged raisins delivered, but that plaintiff, at the time of the purchase, knowing the condition of the raisins, mixed the good with the bad and became responsible for his inability to market them.

Evidence was offered to show that a portion of the raisins sold to plaintiff had been delivered to the raisin association about two months prior to the date of the contract involved in this action; that these raisins had been rejected by the association; and that an oral release and consent was given to defendants to sell them outside of the association. It was also shown that plaintiff personally inspected the raisins before the sale and requested defendants to mix the wet with the dry; that he then indorsed upon the contract the words "All inspected," and accepted delivery at the place designated. When he was informed at the packing house that the raisins could not be stemmed at a profit, he gave defendants written notice of rescission of the contract and had the raisins placed outside of the packing house to be held at the risk and disposal of defendants. An agent of the raisin association had them removed to the association's packing house and paid the defendants \$1,000, which sum they deposited in court for the use of plaintiff.

[1, 2] The trial court held that defendants were the sole owners of the raisins, and that the raisin association did not have paramount or any title to them when sold to plaintiff. This finding is attacked on the ground that it is not supported by the evidence. We have referred to some evidence supporting this finding and this is sufficient particularly when plaintiff has failed to show any evidence which would require a different finding. He has referred to a portion of the contract between defendants and the raisin association, but he has not printed the contract in his record on appeal. We must assume that the trial court had the entire contract before it, and, with no showing to the contrary, we will assume that the court properly construed its terms.

[3] It is argued that the trial court erred in finding that appellant should not have yielded possession to the raisin association

without legal proceedings. It would make no difference if the finding were not supported by the evidence as it was not essential to the judgment. Title passed to appellant on delivery to the packing house at his request. What occurred thereafter was a matter between appellant and the raisin association, for which respondents were in no way responsible.

[4] It appears from the record that appellant bargained for the purchase of the raisins after he had fully inspected them and found some to be wet and of inferior grade; that after the delivery he discovered that he had made a poor bargain and gave written notice of rescission on the ground of breach of warranty of quality; that he then permitted the raisin association to take possession (at his own instigation, or, at least, without objection); and that he then elected to sue on the contract for breach of warranty of title. There was no fraud or misrepresentation on the part of respondents, but appellant received just what he bargained for. He has failed to show any ground upon which he can charge the subsequent loss of possession to respondents and his appeal is entirely without merit.

Judgment affirmed.

We concur: KOFORD, P. J.; STURTEVANT, J.

88 Cal. App. 59

Ex parte TRAUGER. (Cr. 1594.)

District Court of Appeal, Second District, Division 1, California. Dec. 28, 1927.

1. Habeas corpus $\S$ 92(1)—Insufficiency of evidence to warrant conviction cannot be considered in habeas corpus.

In a habeas corpus proceeding, the question of insufficiency of evidence to warrant conviction cannot be considered.

2. Intoxicating Liquors $\S$ 222—Complaint for unlawful possession of liquor need not negative exceptions which would make possession lawful.

Complaint charging unlawful possession of intoxicating liquor need not negative any of exceptions which, if they existed, would make possession lawful.

Original application by George Trauger for writ of habeas corpus prayed to be directed to the sheriff of Tulare county to secure release from custody. Petition denied.

John Preston King, of Lindsay, for petitioner.

CONREY, P. J. In the petition it appears that in a justice's court in the county of Tulare a complaint was filed, wherein petitioner was charged with unlawful possession of in-

toxicating liquor, a misdemeanor. He pleaded not guilty, and was tried and convicted.

[1] The evidence was in the form of certain stipulations of fact. Petitioner claims that the court was without jurisdiction to render its judgment against petitioner, and that the imprisonment (for nonpayment of the imposed fine) is illegal, in this, that the mere possession of intoxicating liquor is not a crime, but that it must be charged and proved that the possession was accompanied by some unlawful intent. In a habeas corpus proceeding the question of insufficiency of evidence to warrant conviction cannot be considered. In re Jacobs, 175 Cal. 661, 166 P. 801; In re Horr, 177 Cal. 721, 171 P. 801; In re Williams, 183 Cal. 11, 190 P. 163.

[2] The case is thus reduced to the point where the only question relates to the sufficiency of the complaint to charge the commission of a misdemeanor. There is nothing in the petition to indicate that the complaint failed in any essential element required in charging the commission of a public offense. Where the charge is that of unlawful possession of intoxicating liquor, it is not necessary to negative any of the exceptions which, if they existed, would make the possession lawful. People v. Cencevich, 64 Cal. App. 39, 44, 220 P. 448.

The petition is denied.

We concur: HOUSER, J.; YORK, J.

38 Cal. App. 105

SAMPSON v. DRAEGER. (Civ. 3374.)★

District Court of Appeal, Third District, California. Dec. 29, 1927.

Rehearing Denied Jan. 28, 1928.

Specific performance ⇨41—Specific performance could not be ordered against land purchaser who signed no instrument nor took possession under contract, though part payment made (Civ. Code, § 1741).

Where a real estate broker had, by the owner's permission, sold land to defendant, but defendant had neither signed any instrument, although he had accepted a receipt upon making part payment, nor had he taken possession under the contract, *held*, in suit by one coming into possession of the broker's contract rights on the broker's death, that such a situation did not, because of Civ. Code, § 1741, warrant a court's ordering specific performance of the contract.

Appeal from Superior Court, Kern County; J. W. Mahon, Judge.

Suit by Stewart B. Sampson against Otto Draeger. Judgment for plaintiff, and defendant appeals. Reversed.

F. E. Borton and James Petrini, both of Bakersfield, for appellant.

Wiley & Harvey, of Bakersfield, for respondent.

PRESTON, Justice pro tem. This is an appeal by the defendant, Otto Draeger, from a judgment entered against him in the sum of \$2,700, in an action to enforce specific performance of a contract for the sale of real estate.

The facts are not in dispute, and can thus be briefly stated: Alex Kirkpatrick and others were the owners of 160 acres of land in Kern county, Cal., the title to which stood in the name of Kirkpatrick, as trustee. W. A. Sampson was a duly licensed real estate broker, residing near the land. On February 27, 1920, W. A. Sampson wrote a letter to Kirkpatrick, who resided in Los Angeles, Cal., and said in part:

"I have good reason to believe that if you and your associates will promptly give me authority to sell the west half of section 27, at \$80.00 per acre, I can line up local parties to take the land on terms. * * * [Here follows terms.] In the event the foregoing is approved, and I line up responsible parties to take over the land and make improvements as stipulated, I will expect five per cent. commission. * * *"

To this letter Kirkpatrick replied:

"Replying to your favor of February 27th, in which you ask for authority to sell the west half of 27 on terms stated, will say we will sell on terms for you, viz.: A contract of sale for \$80.00 per acre land clear. * * *"

Kirkpatrick made no mention of the 5 per cent. commission demanded by Sampson. There were no other writings between these parties, but Kirkpatrick later came to the land and talked the matter over with Mr. W. A. Sampson, and it was finally agreed that Sampson was to sell the land on the basis of \$80 per acre net to Kirkpatrick, one-fourth to be cash. Pursuant to this arrangement, Mr. Sampson advertised all the lands belonging to Kirkpatrick and his associates for sale at public auction. The auction sale was had, but this particular piece of land was not sold. Thereafter, and on or about March 22, 1920, defendant, Otto Draeger, and Sampson entered into negotiations relative to the purchase and sale of said land, which resulted in defendant agreeing to buy the land for \$100 per acre, and paying Sampson \$500, and Sampson giving defendant a receipt in the words and figures as follows:

"Received—Wasco, Cal. March 22, 1920, of Otto Draeger of Vacaville, Cal., check for five hundred dollars on account and as first payment on purchase of 160 acres of the west half of section 27, township 27 south, range 24 east, M. D. B. & M. (definite legal description to be supplied) at \$100 per acre (sixteen thousand dollars) with a further cash payment of three thousand five hundred dollars when certificate of title showing land clear of incumbrance is ready for delivery, and deed for same. The balance of purchase price to be divided, \$4,000 in three years and \$8,000 in five years, with privilege of partial payments of \$1,000 in advance of date due. W. A. Sampson."

★Rehearing denied.

It will be noted that the defendant, Draeger, did not sign the foregoing receipt, or any writing whatever relative to the land, and the contract, as far as he was concerned, was entirely oral. At the time defendant received said receipt from Sampson, he did not know that Kirkpatrick and his associates owned the land. Defendant negotiated with Sampson under the belief that the land belonged to Sampson.

Within two weeks after the payment of the \$500 and the giving of the receipt above set forth, W. A. Sampson died. After his death, defendant paid to Kirkpatrick the full amount of \$80 per acre for the land, and obtained from him a deed to said land, and, after receiving the deed from Kirkpatrick, took possession of the property. The estate of W. A. Sampson was probated, and all his rights under the contract with the defendant were distributed to the plaintiff.

Upon these facts the trial court found that the plaintiff, as successor in interest of W. A. Sampson, was entitled to judgment against the defendant for the sum of \$2,700, the balance of the purchase price of said land under the contract with W. A. Sampson, and rendered judgment accordingly.

Many contentions are made for a reversal of the judgment. It seems to us, however, that only two questions need be determined: First, did W. A. Sampson and Otto Draeger enter into a valid and enforceable contract of sale and purchase? or, to state it another way, Did W. A. Sampson enter into such a contract with Otto Draeger that could be specifically enforced against Otto Draeger? Second, was there a part performance by Otto Draeger, sufficient to bind him, notwithstanding his failure to sign the contract?

We think both these questions must be answered in the negative.

Section 1741 of the Civil Code provides:

"No agreement for the sale of real property, or of an interest therein, is valid, unless the same, or some note or memorandum thereof, be in writing, and subscribed by the party to be charged, or his agent, thereunto, authorized, in writing; but this does not abridge the power of any court to compel the specific performance of any agreement for the sale of real property in case of part performance thereof."

The party to be charged in this action was the defendant, Otto Draeger, and his signature was absolutely essential to make an enforceable contract against him, except where his conduct has amounted to such a performance, or part performance, of the contract as to relieve the contract of the necessity of his signature. *Harper v. Goldschmidt*, 156 Cal. 245, 104 P. 451, 28 L. R. A. (N. S.) 689, 134 Am. St. Rep. 124. Therefore, unless the defendant did something to relieve the contract from the necessity of his signature, it cannot be enforced against him. In the case at bar the defendant, Draeger, paid \$500 to W. A. Sampson, and took Sampson's receipt

therefor, but did not go into possession of the property, or exercise any dominion or control over it, until after he had paid Kirkpatrick \$80 an acre for the land, and had received a deed from him. This is wholly insufficient to show a part performance on the part of Draeger.

In the case of *Harper v. Goldschmidt*, supra, the court said:

"But where as in this case, the contract is wholly executory, and the evidence of it amounts to nothing more than a receipt signed by the vendor, and the alleged part performance is nothing more than the payment of a small amount of money by the nonsigning vendee, and the acceptance of a receipt therefor, no case can be found which holds such to be sufficient part performance to relieve from the statute of frauds. * * * The statute is satisfied and the nonsigning defendant is held where the contract has been executed upon the part of the vendor, or lessor, by the giving of a deed or lease which has been accepted by the vendee or lessee. * * * In such a case the contract has been wholly executed by the one party, and the acceptance of the deed or lease is consistently held to be a sufficient part performance to charge the other party. So, also, in case of executory contracts where the nonsigning vendee enters into possession, or exercises dominion in other ways over the land, it is held that this amounts to such a part performance as will bind the nonsigning vendee. But where the act of the vendee is no more than the payment of a small amount of the purchase price, and the acceptance of a receipt for that amount, leaving all of the rest of the contract executory, both upon his part and upon the part of the vendor, no case has been pointed out which holds such acts to amount to a part performance which will bind the vendee. 'His refusal to complete the contract after paying part of the purchase money is no fraud upon the seller but his loss.'"

Therefore, if we admit that W. A. Sampson was the vendor, and the defendant, Otto Draeger, the vendee, yet, under the undisputed facts in this case, there was no such part performance of the contract on the part of the defendant as the law contemplates.

Plaintiff, while admitting that the contract, as far as defendant is concerned, was oral, nevertheless contends that defendant obtained and is enjoying the full fruits thereof, and cannot escape liability by pleading the statute of frauds. We find no merit in this contention. Defendant agreed orally to pay W. A. Sampson \$100 per acre for the land, and actually paid him \$500. Sampson did not own the land. Thereafter defendant bought the same land from the owners for \$80 per acre, and received no credit whatever for the \$500 he had paid to W. A. Sampson. In fact, the owners, at the time they sold to defendant, knew nothing of the negotiations carried on by W. A. Sampson; therefore the contract that defendant entered into with the owners of the land was an entirely different contract than the one made with W. A. Sampson. Defendant could have bought the land

from the owners at any time for \$80 per acre; therefore, under these facts, how can it be contended that defendant obtained the fruits of the contract entered into with W. A. Sampson?

The whole difficulty in respondent's case is that W. A. Sampson *did not take a binding and enforceable contract of purchase from the defendant, and the defendant did not perform the contract so as to take out of the statute of frauds.*

If it be conceded that the plaintiff's action is one to collect a commission from the defendant, still he cannot maintain the action, for the reason that there is no note or memorandum of any kind signed by the defendant agreeing to pay a commission to W. A. Sampson.

From the view we have taken of the case, the other points raised become wholly immaterial. We find no basis upon which the judgment can be sustained.

The judgment is reversed.

We concur: FINCH, P. J.; PLUMMER, J.

BUFFALO WEAVING & BELTING CO. v. BOYLE MFG. CO. (Civ. 4870.)*

District Court of Appeal, Second District, Division 2, California. Dec. 22, 1927.

Rehearing Granted Jan. 20, 1928.

1. Sales ⚡384(6)—Contract for purchase of luggage straps to be manufactured held breached, as respects damages, as of date of seller's declaration after permitting extension.

Where seller of automobile luggage straps permitted extensions of delivery period for more than year, date of purchaser's breach, as respects damages, was fixed by seller's declaration of breach; reasonable time for shipping instructions having expired.

2. Sales ⚡384(6)—Market value of straps manufactured under contract on date of breach should have been excluded on objection that it was improper basis for measuring damages (Civ. Code, §§ 3300, 3353).

In action for damages for alleged breach of contract under which defendant agreed to purchase web automobile luggage straps manufactured by plaintiff, testimony by president of plaintiff company as to market price of straps on date breach was declared should have been excluded, in view of Civ. Code, §§ 3300, 3353, on objection that market value was not proper basis for measuring damages.

3. Sales ⚡384(6)—Loss for breach of contract to purchase straps to be manufactured held difference between manufacturing cost and contract price.

Loss of seller under contract for sale of web automobile luggage straps to be manufactured by seller *held*, under proof, one of loss of profits, being the difference between costs of manu-

facturing in the finished ready to deliver state and the contract price.

4. Appeal and error ⚡241—Objection to testimony of market value as improper basis of damages held waived by motion to strike solely on ground that contract was not breached on date in question.

Objection to testimony of market value as improper basis for measuring damages for buyer's breach of contract for luggage straps to be manufactured *held* waived by motion to strike testimony solely on ground that contract was not breached on date in question.

5. Appeal and error ⚡171(1)—Appellate court cannot change rule of damages after objection to such rule as applied in lower court was waived.

Objection to application of erroneous rule of damages having been waived in lower court in motion to strike testimony thereon, appellate court cannot change the rule.

6. Sales ⚡384(1)—Evidence that selling price, on date of declared breach of contract protecting buyer against seller's price decline, had declined to market price precluded recovery.

Where contract for purchase of web automobile luggage straps contained provision that buyer would be protected against seller's own price decline, there can be no recovery for breach of contract where plaintiff's own evidence showed that its selling price on date of declared breach was the same as goods would bring in open market, since in such case no damage accrued.

Appeal from Superior Court, Los Angeles County; George H. Cabaniss, Judge.

Action by the Buffalo Weaving & Belting Company against the Boyle Manufacturing Company. Judgment for plaintiff, and defendant appeals. Reversed.

G. C. De Garmo and H. B. Cornell, both of Los Angeles, for appellant.

Fredericks & Hanna, of Los Angeles, for respondent.

STEPHENS, Justice pro tem. This is an action for damages for the alleged breach of a contract, under which defendant agreed to purchase a large quantity of web automobile luggage straps from plaintiff. The contract is based on an order and correspondence had between plaintiff and defendant directly and through plaintiff's agent, with headquarters in San Francisco. For convenience we shall occasionally refer to plaintiff as the "Weaving Company," to defendant as "Boyle Company" or "Boyle" and to the San Francisco representative of plaintiff as "agent." Judgment went for plaintiff according to the prayer of the complaint, and defendant appeals.

The case is here on a bill of exceptions, which contains some oral testimony and a number of letters. For convenience, the es-

sententials of the letters have been condensed under our own numbers, which do not conform to numbers used in the transcript.

The negotiations begin with letter No. 1, from agent to Boyle, April 22, 1920. Agent solicits business for his principal, Weaving Company herein, and states that Weaving Company "would like to have * * * sample of your trunk strap." Advises it would be good time to place order for next season, with shipment later.

Letter No. 2, April 23, 1920. Boyle replies, asking quotations on 50,000 to 75,000 for future delivery; 10,000, immediate delivery.

Letter No. 3, April 27, 1920, agent to Boyle:

He has communicated with his principal for low quotations, and "we are pretty well sold up on trunk straps, but if we should take on our [sic] order for a quantity of 50,000 to 75,000 for future delivery, I assume it would mean some time in September or October, and that would give us ample time to get these made up."

Letter No. 4, May 10, 1920, agent to Boyle, quoting \$40 per gross f. o. b. Buffalo, subject to change. Wire reply so buckle can be arranged for.

Letter No. 5, May 11, 1920, Boyle Company to agent:

"We are in receipt of your favor of the 10th inst. quoting \$40 per gross f. o. b. Buffalo on quantities of 50,000 to 75,000 1¼" 6' trunk straps, as per sample submitted, and herewith inclose our order No. 280 covering 80,000 of same. We would ask you to kindly wire this order in to your factory and ask them to make a 'special rush' of the 10,000 referred to in order. The order is, of course, placed on the understanding that these straps will match up with the samples submitted."

The order was dated May 11, 1920, inclosed with letter No. 5, and, omitting salutation, signature, and two or three additional, but nonessential, requirements under subtitle "Important Instructions," is as follows:

"Enter our order as follows, for shipment. * * * Route via Santa Fé at Chicago. Terms: * * *

"Order No. 280. Quantity: 80,000. Description: 6' straps made from 1¼" russet trunk. Web. Complete with nickel plated buckle and tip, as per sample submitted. \$40.00 per gross f. o. b. Buffalo.

"N. B.—10,000 of the above to be shipped very earliest possible—balance later.

"Important Instructions. Please acknowledge receipt of this order, show price, and state when shipment will be made."

Letter No. 6, May 13, 1920, agent to Boyle, acknowledges order.

Letter No. 7, May 14, 1920, agent to Boyle. Received information permitting him to assume 10,000 will be shipped within a month.

Letter No. 8, Weaving Company to Boyle, May 18, 1920: Acknowledgment of order No. 280. In good position to get off first lot of straps. Only waiting for express shipment

of buckles to rush forward. Fortunate having webbing on hand.

Letter No. 9, May 24, 1920, agent to Boyle: Sending today's mail sample web strap. Different from stock strap; therefore would like approval.

Letter No. 10, May 26, 1920, Boyle to agent:

Strap O. K. "In regard to shipment of this order, as previously advised, we wish 10,000 straps shipped at the earliest possible moment. The balance of the order however we do not want shipped until about the first of next year. * * * We would ask that you take up the matter of shipping instructions with us some time about the 1st of December. * * * We are wondering if we would be protected on this order in the event of a decline in price prior to date of shipment."

Letter No. 11, May 28, 1920, agent to Boyle:

Order simply stated, as to delivery after first 10,000, "balance later." Agent quite sure Weaving Company inferred they were to make up and ship from time to time as completed. Weaving Company arranging for raw material on this basis. Writing as to protection against factory price decline. "Manufacturing conditions abnormal; help and raw materials scarce. If you could permit us to make monthly shipments, beginning about July 1st, you would then be sure of a sufficient quantity to take care of your requirements, instead of making shipment to you of the entire order complete, some time after December 1st."

Letter No. 12, June 2, 1920, Boyle to agent:

Note you have written Weaving Company about price decline. We appreciate factory position. Apart from the 10,000 straps, will need none until spring. "We do not think it unreasonable to ask you to protect us against your own decline, a practice quite common in our own business. * * * In regard to shipping instructions, we could agree to your making monthly shipments commencing about the 1st of October and ending January 1, 1921."

Letter No. 13, June 4, 1920, agent to Boyle:

Have written Weaving Company about protecting you against factory price decline and reason you ordered early was to be sure having straps in time. "I fully agree with you that as a rule, orders of this kind are taken with a protection against the manufacturer's own decline. I am quite sure there will be no question about this, but would prefer to have this come direct from my principals. * * * Also note your shipping instructions, commencing about October 1, 1920, and ending January 1, 1921."

Letter No. 14, June 7, 1920, agent to Boyle:

"Our people inform me they will protect you against their own decline, although they say you must take into consideration the fact that they * * * have had to buy this material outright * * * and can get no protection. * * * Now further with reference to shipment, they state it would be some little time before they complete the first 10,000 straps, and in view of increasing freight congestion * * *

they feel it would be well for you to have these monthly shipments coming along to you, and in that way you would be assured of having the straps on hand; whereas, if you call upon us to furnish the entire quantity in two or three months we might be held up owing to * * * contingencies that might arise. * * * Furthermore, it would mean we would have to accumulate a lot of web for the next five or six months, before we start on your order. Inasmuch as we are going to protect you in our own decline in price, you will undoubtedly yield to our point of making monthly shipments, as we shall certainly not crowd you with an enormous amount of goods each month. When they wrote their letter they did not have my letter with reference to beginning shipments October 1st and ending about January, 1921. I am in hopes, however, when they receive these instructions, they will be able to make up the straps and get them ready to ship monthly, beginning October 1st and completing the entire order by January 1, 1921. If, however, you will permit us to begin shipments a little earlier, will be glad to have you advise us."

Letter No. 15, June 15, 1920, agent to Boyle:

"They [respondent company] feel inasmuch as you are permitting them to make monthly shipments beginning October 1 and ending January 1, 1921, this is very satisfactory, and as I have already informed you we would protect you in the event of a decline in our own price."

Letter No. 16, July 9, 1920, agent to Boyle: Refers to another order.

Letter No. 17, October 28, 1920, Weaving Company to Boyle: Adjusting shipments to date at \$32 per gross.

No. 18, telegram, Boyle to agent, November 30, 1920:

"Cancellation of many orders for automobile accessories necessitate our cancellation of all orders on your files unshipped at this date."

Letter No. 19, November 30, 1920, Boyle to Weaving Company: Incloses telegram sent agent. Regrets necessity of cancellation because of lack of orders.

Letters No. 20 and No. 21, November 30 and December 6, 1920, Weaving Company to Boyle:

Acknowledge receipt of cancellation telegram and advise consultation with agent. "Asking him to take the matter up with you, as he did the original order."

Letter No. 22, December 7, 1920, agent to Boyle:

Gives history of deal and argument. "At the time you placed this order with us, it was undoubtedly placed in good faith, and our people accepted the same at a fixed price, with the understanding that in the event of a decline on our own price, we would protect you and give you the benefit of same. * * * However, we gave you the benefit of a decline of 20 per cent. unsolicited, and it has been our intention that in the event of our making further declines that we continue to give you the benefit of same on

unfilled portion of your order. Now our people do not feel as though they should accept cancellation of this order, as you will recall when it was placed we had to commit ourselves for the hardware, which we purchased at a fixed price, without any protection in the event of a decline by the manufacturer. We have all this material in our plant, and all paid for. Now there is no doubt but what you are going to want these straps as soon as business revives, which we all hope will be shortly after the first of the year. Our people feel you should be willing to allow the order to stand on our books for future shipment. We have a lot of straps all made up for shipment this month, and trust you will permit us to send them along, as they are made up special to your order."

Letter No. 23, December 11, 1920, Boyle to agent:

"Your letter of the 7th inst. regarding cancellation of our order on made up web straps received and contents noted. Your proposal to keep this order on your books for future shipment is agreeable to us, but we wish it to be understood that no part of this order is to be shipped without written instructions from us to that effect." Hopes business conditions will soon permit permission to ship part of order.

Letter No. 24, December 13, 1920, agent to Boyle:

Appreciate your position. Believe revival of business about first of year. Believe Boyle probably be asking for shipments by first of year. "If there is any further declines our people propose to give you the benefit of same."

Letter No. 25, December 21, 1920, Weaving Company to Boyle:

"We have heard from our Mr. Wirtner [agent] with reference to your order, and have noted the correspondence which you have had with him. We are very glad indeed that you have decided to keep this order on our books, and we earnestly hope that conditions will improve so that you will find the usual heavy demand for your goods. You will see that we are going to protect you on declines and shall do all in our power to give you good service in every way."

Letter No. 26, October 5, 1921, agent to Boyle: Complains about not receiving orders. Reminds Boyle buckles purchased. Asks for webbing business.

Letter No. 27, November 12, 1921, Weaving Company to Boyle: Calling attention to special buckles carried for Boyle's work, and asks for orders.

Letter No. 28, November 21, Boyle to agent:

Checked over stock. " * * * We have * * * enough to give us a good start for the coming season. We will, however, undoubtedly be in the market later on for a further supply of this commodity, and you will certainly hear from us as soon as the writer is able to get a better line of what our requirements are likely to be."

Letter No. 29, November 23, 1921, agent to Boyle: Appreciate advising conditions. Very

much like to receive your order, but very glad to hold special buckles until your requirements bring you in the market.

Letter No. 30, February 11, 1922, Weaving Company to agent:

Expresses disappointment regarding Boyle orders, and says: "Their promise to give us an opportunity of figuring when they are in the market does not sound good to us; we want some relief. * * * Our loss on the web is not so serious as the buckles, as we have, of course, other uses for the webbing. If he can't use the straps, we want shipping instructions on the buckles which were ordered especially for him. We want no profit and are willing to bill them out to him at cost."

Letter No. 31, February 15, 1922, agent to Boyle: About the same as letter No. 30. Suggests buckles be taken off their hands.

Letter No. 32, February 18, 1922, Boyle to agent:

Declines to receive buckles. Hopes for revival of business. "Rest assured that we will place no strap orders without consulting you."

Letter No. 33, March 1, 1922, is a bill for the buckles, sent to Boyle. (But buckles were not shipped.)

Letter No. 34, March 8, 1922, Boyle to agent: Returns buckle invoice. Says charge not in order at this time. Will give additional order in line with agent's letter of November 23d.

Letter No. 35 (no date), Weaving Company to Boyle:

Recites history of deal. Demands shipping instructions for rest of order to specify shipping within three months after receipt of instructions at the factory decline price, if any, not to exceed \$40 per gross at time of shipment. "If we do not receive shipping instructions from you as above outlined within the time mentioned, we shall consider you in default and that you have breached your contract with us, and that the modification of the contract to guarantee you against our decline in price having been made on your agreement to take the straps out in a certain time, and you not having done so, that such modification is of no further force or effect, and that the original agreement to pay \$40 per gross is reinstated, and that our damage will be the difference between such \$40 per gross and the market price, whatever it may be at the time of your default."

Letter No. 36, April 25, 1922, Boyle to Weaving Company: Acknowledges receipt of last letter from Weaving Company. Surprised attitude assumed. States they are purchasing no straps from other source. Assures Weaving Company will purchase from them when in need.

Letter No. 37, February 7, 1923, Boyle to Weaving Company: States conditions are such that they can use 3,000 more straps, and orders same.

Letter No. 38, February 16, 1923, Weaving

Company to Boyle: Refers to former correspondence and states they have placed the matter in attorney's hands.

No goods other than the 1,400 gross delivered and paid for were ever shipped. Suit was brought on the 13th of February, 1923, whereby plaintiff sought to recover the sum of \$6,755.50 damages, estimated by deducting the market price of straps as of the date of defendant's letter of April 25, 1922, from the contract price. According to the complaint and the testimony of the president of the plaintiff corporation, this sum as damages is arrived at as follows: \$40 per gross contract price, less \$25.25 per gross market price, times 458 gross undelivered, equals \$6,755.50.

[1] Appellant herein (Boyle Company) contends that the original contract was voluntarily nullified, and that another and different contract became effective by the exchange of the cancellation telegram, the reply thereto, and appellant's letter of December 11, 1920. The trial court found that the original contract remained in force, and gave judgment in accord with the pleadings and plaintiff's (Weaving Company's) theory of the case.

We are of the opinion that the original contract was never nullified, but remained in full force and effect, except that the time of shipping the goods was extended for a reasonable time, and that such reasonable time had expired on the 15th of April, 1922, the date of letter declaring a breach of the contract.

[2] George L. Mathewson, president of the respondent company, was called as a witness for the purpose of proving the market value of the straps in question, and after proper qualification was asked:

"What was the market price of the straps covered by the Boyle Manufacturing Company contract on April 15, 1922?"

To which counsel for appellant interposed the following objection:

"We object to that question and also the answer on the ground that it is immaterial, irrelevant, and incompetent for the reason that under the pleadings the market value is not the basis for the fixing of the damages and is not material."

The court overruled the objection, with leave to move to strike. On pages 77 and 78 of the transcript is the following:

"At the conclusion of the hearing defendant moved to strike out all of the testimony of the witness George L. Mathewson concerning the market value of such straps and buckles in 1922 on the ground that it was incompetent, irrelevant, and immaterial, in this, that no breach of contract was shown to have been created at that time, and the court thereupon denied the motion."

Mr. Mathewson's testimony was as follows:

"A. [to question above quoted]: \$25.25.

"Q. Per gross? A. Per gross.

"Q. Do you know the market price during the balance of the month of April, 1922? A. The same.

"Q. And you do know it, and that was the price? A. Yes.

"Q. Do you know the market price during May and June, 1922? A. \$25.25.

"Q. And that is the market price f. o. b. Buffalo? A. Yes.

"Q. So that the difference then between the contract price of \$40 and the market price of \$25.25 per gross is \$14.75 a gross? A. I base my opinion of market value during this period from April 15, 1922, to July, 1922, partly upon sales of straps similar to those covered by the Boyle Manufacturing Company contract."

He then testified that sales were made by his (respondent) company of similar straps on June 23, July 19, June 5, June 30, May 15, and June 24, 1922, at \$25.25 per gross, and said:

"Those dates I have just given in my answer to the last question are the dates upon which sales were made by the Buffalo Belting & Weaving Company of similar straps to those covered by the Boyle Manufacturing Company contract at the price I have stated, f. o. b. Buffalo. Those were sales made in the usual course of business."

He then testified that there were other sales on or prior to April 15, 1922, to wit, April 8, May 26, April 24, April 18, April 11, and March 28, 1922, at \$25.25 per gross; and that "the market value of these straps as covered by the contract from March 1, 1922, to August 1, 1922, was \$25.25 per gross f. o. b. Buffalo."

[3-5] We believe the objection to the original question which elicited this testimony was good and should have been sustained; but when counsel for appellant moved to strike Mathewson's testimony he seems to have narrowed the ground of his objection to one point, viz., that *the contract was not breached as of the date stated in the question*—April 15, 1922—claiming it would seem that the breach, if there ever was one, occurred on some other date, and, therefore, that the market price of the goods of that date is not applicable in the estimation of damages. The motion to strike was not that the method of measuring damage sought to be applied through the question was erroneous. That it was erroneous is clear. *Lund v. Lachman*, 29 Cal. App. 31, 154 P. 295. There is no contention that the straps were made up, except in the letter of December 7, 1920, where it is stated that Weaving Company has "a lot of straps all made up for shipment this month," or that they were ever all made up and actually sold in the market so as to afford the smallest possible loss. The damages, if any, should have been estimated under section 3300, rather than under section 3353, of the Civil Code. The loss, under the proof in this case, was clearly one

of loss of profits—the difference between the cost of manufacturing in the finished, ready to deliver state and the contract price. *Utter v. Chapman*, 38 Cal. 659, 665; *Connell v. Higgins*, 170 Cal. 541, 549, 150 P. 769; *Hale v. Trout*, 35 Cal. 229; *Cederberg v. Robinson*, 100 Cal. 93, 34 P. 625; *Johnson v. Hinkel*, 29 Cal. App. 78, 154 P. 487. The objection to the rule of damages as applied below seemingly having been waived in the motion to strike, this court cannot here change the rule. *Durkee v. Chino Land & Water Co.*, 151 Cal. 561, 569, 570, 91 P. 389; *Merrill v. Kohlberg*, 29 Cal. App. 382, 385, 386, 155 P. 824. Since the date of the breach of the contract is by us herein determined as contended for by respondent, to wit, April 15, 1922, Mathewson's testimony is proper, and the trial court was right in denying the motion to strike.

[6] There is, however, an insurmountable obstacle to the recovery of the plaintiff on the testimony introduced. The time of shipping the straps (other than the 10,000) was left open in the original order. The correspondence before the order was given showed that it was given for seasonal and not immediate delivery. Many letters passed between the parties in which respondent tacitly conceded the choice of date of shipment to rest with appellant. Appellant wanted to be protected against factory price decline, and finally the parties' minds met when respondent, by agent, writes appellant that "they feel inasmuch as you are permitting them to make monthly shipments beginning October 1 and ending January 1, 1921, this is very satisfactory, and, as I have already informed you, we would protect you in the event of a decline in our own price"; and, in another letter, that, "inasmuch as we are going to protect you in our own decline in price, you will undoubtedly yield to our point of making monthly shipments." Here we have the parties construing each other's rights when all is amicable between them.

"It is to be assumed that parties to a contract best know what was meant by its terms, and are the least liable to be mistaken as to its intention; that each party is alert to his own interests, and to insistence on his rights, and that whatever is done by the parties contemporaneously with the execution of the contract is done under its terms as they understood and intended it should be. Parties are far less liable to have been mistaken as to the intention of their contract during the period while harmonious and practical construction reflects that intention, than they are when subsequent differences have impelled them to resort to law, and one of them then seeks a construction at variance with the practical construction they have placed upon it. The law, however, recognizes the practical construction of a contract as the best evidence of what was intended by its provisions. In its execution, every executory con-

tract requires more or less of a practical construction to be given it by the parties, and when this has been given, the law, in any subsequent litigation which involves the construction of the contract, adopts the practical construction of the parties as the true construction, and as the safest rule to be applied in the solution of the difficulty." *Mitau v. Roddan*, 149 Cal. 1, 14, 15, 84 P. 145, 150 (6 L. R. A. [N. S.] 275).

The subsequent extension of time to deliver carried the full contract along unimpaired. When respondent decided to consider the time unreasonable and declared a breach, it could not eliminate any part of the contract. The contract at all times contained the provision that the Boyle Company would be protected against Weaving Company's own price decline. By the testimony of the latter's president, the company's own selling price on the date of the declared breach *had declined* to \$25.25 per gross, the very figure the goods would bring in the open market. Applying the rule of damages used in the case, no damage at all accrued. Had the objection to the questions put to Mathewson been sustained, the same result would have obtained, as there was no testimony whatever as to loss of profits.

Judgment reversed.

We concur: WORKS, P. J.; CRAIG, J.

88 Cal. App. 82

BIRCH et al. v. ORANGE COUNTY
(two cases). (Civ. 3361.)★

District Court of Appeal, Third District, California. Dec. 28, 1927.

Hearing Denied by Supreme Court Feb. 23, 1928.

1. Taxation §40(3)—Assessment of oil land at \$600,000 and surrounding oil lands at \$40,000 to \$177,250, held irreconcilable with impartial performance of official duties.

Inequality between assessment of oil land, producing 138,601 barrels during three-month period at \$600,000, and assessment of surrounding lands, producing from 72,185 to 135,587 barrels of oil of about same specific gravity, and water content during same time, at \$40,000 to \$177,250, held too gross to be reconciled with impartial performance of official duties, though it was more difficult to drill on other properties, and former property was in center of oil field.

2. Taxation §40(3)—Much lower assessment of few other properties does not warrant reduction of assessment; "equalize."

Mere fact that a few properties are assessed much lower in proportion to value than others is not sufficient ground for reducing assessment of latter, though showing at least constructive fraud, as assessment must be compared with average assessment of all other properties in county in determining whether unequal burden of taxation has been imposed; "to

equalize" being "to make equal, to cause to correspond, to be like in amount or degree, as compared with something."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Equalize.]

3. Taxation §543(7) — Assessment officials' testimony as to valuing oil land at nearly four times maximum estimate of owners and experts, held not to create conflict, requiring that assessment be upheld.

Assessor's and equalization board members' testimony that they estimated value of certain oil land at about \$2,000,000, held not to require that assessment thereof be upheld; being insufficient to create conflict with owners' testimony that they tried unsuccessfully to sell land for \$500,000, and testimony of petroleum geologists and engineers that market value was from \$400,000 to \$539,000.

Appeal from Superior Court, Orange County; R. Y. Williams, Judge.

Actions, consolidated for trial, by A. Otis Birch and others, copartners, doing business under the firm name and style of the Birch Oil Company, against the County of Orange. Judgment for defendant, and plaintiffs appeal. Reversed.

Clyde C. Shoemaker, of Los Angeles, for appellants.

Alex P. Nelson, and L. A. West, both of Santa Ana, for respondent.

FINCH, P. J. The plaintiffs brought two actions, under the provisions of section 3819 of the Political Code, to recover excess taxes paid by them under protest for the fiscal year commencing July 1, 1916. The actions were consolidated and tried together. Judgment was entered in favor of the defendant, and this appeal is from the judgment. In a former trial judgment of nonsuit was entered. That judgment was reversed on appeal. *Birch v. County of Orange*, 186 Cal. 736, 200 P. 647. The second trial was had upon the same pleadings as the first.

[1] The plaintiffs own a tract of oil land about a quarter of a mile in length from north to south and an eighth of a mile wide, containing 21.16 acres. This land is bounded on the north by lands of the Crown of the Valley Oil Company, under lease to the Columbia Oil Producing Company; on the east by those of the Brea Canyon Oil Company; on the south by those of the General Petroleum Company; and on the west by those of the Fullerton Oil Company. These surrounding holdings are much larger in area than that of the plaintiffs. This fact is not of great significance, however, because only parts of such surrounding lands have been proved to contain oil, and they have but little value other than for the oil therein. Nearly all the plaintiffs' oil wells are located about 120 feet from the boundaries of their land, and many of the best wells

of the surrounding owners are about the same distance on opposite sides of the Birch boundaries. The year 1916 "was the first year in which there was an attempt made to readjust the valuations of the oil properties" of the county "on a production basis." The following table has been compiled from facts to which the county assessor testified at the trial; the first column of figures giving the number of producing wells upon each holding, the second the number of barrels of oil produced during the three months next preceding March 1, 1916, the third the assessor's valuations placed upon the lands and the mineral rights therein, and the fourth the valuations fixed by the county board of equalization:

Birch Oil Co.	8	138,601	\$645,120	\$600,000
Fullerton Oil Co.	8	108,982	34,915	47,155
General Petroleum Co.	8	84,554	40,000	40,000
Brea Canyon Oil Co.	23	135,587	130,000	177,250
Columbia Oil Producing Co.	5	72,185	111,690	111,690

Nearly all the oil produced by the Brea Canyon Oil Company came from ten of its wells, most of which are near the Birch property; that property being fully developed, and "the center of the developed territory in that oil district." The wells of all the five companies produced gas in commercial quantities, but the comparative value thereof and the proportionate amounts produced by the respective companies were not such as to materially affect the problem of equalization. The gross annual returns from the Birch property were \$290,000, and the operating expenses \$200,000. About half the product of the Birch wells at the time of the assessment was "light oil, * * * bringing 71 cents, and the other oil * * * was about 62 cents." The foregoing facts were substantially proved at the hearing before the board of equalization and at the former trial. These assessments were considered by the Supreme Court on the former appeal and, in relation thereto, at page 740 (200 P. 649), it is said:

"On the very basis used by the assessor the excessive and unreasonable disparity between the assessments upon plaintiffs' lands and others of like value and similarly situated is so obvious and inconsistent with any theory of fair dealing that it cannot be reconciled on the mere presumption that the assessor and board of equalization did their duty as they saw it. In the absence of any explanation or justification for this inequality (and there is none offered), it stands out so glaringly and out of all reason that of itself it raises an inference of bad faith."

No reasonable explanation of such disparity appears in the record on this appeal. The assessor testified at the last trial that the specific gravity of the oil produced from the Birch property was from 19 to 29, "more of the higher gravity than the lower," that of the General Petroleum 19, Brea Canyon 23,

Columbia 28, and Fullerton 23; that the oil of the other companies contained a higher water content than that of the Birch Company, although other and specific evidence shows that the percentage of water in the oil from the Birch wells is about the same as the average in that of the other companies; and that it was more difficult to drill wells on the other properties than on the Birch land. The difficulty of drilling would be an important factor in determining the value of undeveloped oil land, but it is a false quantity in fixing the value of lands in which drilling has been completed, as were the lands immediately surrounding those of the plaintiffs, and which were adopted by the assessor as a basis of comparison. Giving the fullest consideration to the evidence tending to support the assessment, the inequality is too gross to be reconciled with the impartial performance of official duty by the assessor and the county board of equalization. It is true that the Birch property appears to be in the center of the oil field, but the difference in oil production between the plaintiffs' wells and those of the surrounding lands, making all due allowance for difference in quality, is not such as to justify the astonishing difference in valuations. That the assessor and the board of equalization must have realized this gross inequality is evidenced by the fact that in the year 1917 the same properties, under similar conditions, were assessed as set forth in the following table, arranged in the same manner as the one already given:

Birch Oil Co.	8	51,918	\$454,390
Fullerton Oil Co.	9	73,010	345,000
General Petroleum Oil Co.	8	64,489	197,155
Brea Canyon Oil Co.	23	98,679	392,820
Columbia Oil Producing Co.	6	45,166	406,465

[2] The mere fact, however, that a few other properties are assessed much lower in proportion to value than those of the plaintiffs, while showing at least constructive fraud, is not a sufficient ground for reducing plaintiffs' assessment. "To equalize is to make equal, to cause to correspond, or be like in amount or degree, as compared with something." *Wells Fargo & Co. v. State Board of Equalization*, 56 Cal. 194, 196. Obviously, in determining whether an unequal burden of taxation has been placed upon him, a complaining taxpayer's assessment is to be compared with the average assessment of all the other properties in the county. *Wild Goose County Club v. County of Butte*, 60 Cal. App. 339, 212 P. 711; *Mahoney v. City of San Diego*, 198 Cal. 388, 397, 245 P. 189. Of course, if the taxpayer shows that his property is assessed at a greatly higher proportion of its value than that of several other persons, the inference may arise therefrom, in the absence of evidence to the contrary, that his assessment is disproportionate to the assessments of the county as a whole, but, when it is shown that

his assessment is not disproportionate to that of other property generally, to reduce his assessment merely because the property of a few others is assessed too low would only increase the inequalities already existing in the assessment roll of the county.

[3] In this case, however, the uncontradicted evidence shows that the plaintiffs' property was assessed for a greater percentage of its value than other property in the county generally. The assessor testified that the property of the county as a whole was assessed at one-third of its value. Two of the plaintiffs testified that the Birch property was of the value of only \$500,000 in March, 1916 and that during the latter part of 1915 and the early part of 1916 they endeavored to sell it at that price, but were unable to do so. Harry R. Johnson, a "petroleum geologist and valuation engineer," testified that the market value of the Birch property on the first Monday in March, 1916, was \$530,000. Robert B. Moran, a "geologist and petroleum engineer," testified that the value was \$400,000. Carl H. Beal, another "petroleum geologist and engineer," placed the value at \$539,000. Walker S. Clute, a geologist, placed it at \$460,000. Against this testimony is that of the assessor, not that the value of the Birch property was any particular sum in March, 1916, but that, in making the assessment in that year, he "estimated this piece of property at nearly \$2,000,000; that is, \$1,955,175," and the testimony of some of the members of the board of equalization that, based on the evidence produced before the board, they "figured" or "fixed" the value at about \$2,000,000. Clearly, such testimony is not sufficient to create a conflict, especially in view of the striking disparity between the valuation placed upon the Birch property and those upon the surrounding lands, which the assessor and such members of the board estimated as one-third the value thereof.

The assessment of 1918, proportionately the same as that of 1917, was upheld. *Birch v. County of Orange*, 59 Cal. App. 133, 210 P. 57. That assessment was based on a much higher market price of oil than prevailed in 1916. It appears from the decision in that case that for the year 1918 the assessor computed the value of the oil lands and the mineral rights therein by multiplying the net annual income therefrom by 10, and then taking 40 per cent. of such total value as the assessed value. In this case the uncontradicted evidence shows that the net annual income from the Birch property at the time of the assessment was \$90,000. Multiplying this by 10 would give a total value of \$900,000. Taking one-third thereof, as in the assessment of other property in the county during that year, would give an assessed valuation of \$300,000, or only half the amount fixed by the board of equalization. The personal property and the wells of the

several companies were assessed separately from the lands and mineral rights, and generally without apparent inequality. The assessments upon such personal property and wells, therefore, have been left out of consideration in this discussion. Of course, to arrive at the total assessment of any owner, the amount of such additional assessment must be added to the valuation as stated herein.

Viewed from any angle, the inequality of which plaintiffs complain is so great that the assessment of their property cannot be upheld.

The judgment is reversed.

We concur: PLUMMER, J.; HART, J.

83 Cal. App. 100
BRYSON v. INTERNATIONAL INDEMNITY CO. (Civ. 3395.)★

District Court of Appeal, Third District, California. Dec. 29, 1927.

Hearing Denied by Supreme Court Feb. 27, 1928.

1. Insurance ☞616½—Judgment against automobile owner held not conclusive against indemnity insurer, who had refused to defend, as to issue not adjudged (St. 1919, p. 776; Civ. Code, § 2778, subd. 5).

Judgment against insured automobile owner, in action for personal injuries, held not conclusive, in action under St. 1919, p. 776, by special administrator of injured person's estate against the indemnity insurer, who had refused to defend, as to issue whether injured person was passenger for consideration, which issue was not adjudged, notwithstanding Civ. Code, § 2778, subd. 5, providing that, if indemnity insurer neglects, on request, to defend person indemnified, a recovery against the latter is conclusive against the former.

2. Insurance ☞435—In action by injured person's administrator against indemnity insurer, insurer may defend by proving policy does not cover injuries to class to which injured person belonged (St. 1919, p. 776).

In action under St. 1919, p. 776, by injured person's administrator against indemnity insurer, after judgment has been obtained against the insured for damages for injuries, insurer may defend by proving that the policy does not indemnify against liability for damages to persons of class to which injured person belonged.

3. Appeal and error ☞1071(1)—Where finding on issue was not unequivocal, because confused by erroneous legal theory, parties held entitled to retrial of issue.

Where finding on material issue in automobile indemnity insurance case was not an unequivocal finding because trial court erroneously considered defendant was estopped by another judgment from contesting the issue, both parties held entitled to retrial of issue.

Appeal from Superior Court, Los Angeles County; Ira F. Thompson, Judge.

Action by Frank Bryson, special administrator of the estate of Ciriaco P. Sordia, deceased, against the International Indemnity Company, upon a policy of automobile liability insurance. Judgment for plaintiff, and defendant appeals. Reversed with direction.

Hearing denied by Supreme Court; SEAWELL and PRESTON, JJ., dissenting.

W. I. Gilbert, of Los Angeles, for appellant.

Cooper, Collings & Shreve, of Los Angeles, for respondent.

FINCH, P. J. June 17, 1921, the defendant issued its policy of indemnity insurance to Avran S. Tomich against liability for injuries by accident in the use of his Ford truck to "any person or persons other than passengers carried for an expressed or implied consideration" up to an amount not exceeding \$10,000 in any one accident and not exceeding \$5,000 to any one person, but excluding "any liability imposed by any Workmen's Compensation Act." Under the heading "Schedule of Statements," the following appear:

"(5) The automobiles are used for the following purposes only: Hauling.

"(6) None of the automobiles herein described are rented to others or used to carry passengers for any express or implied consideration, except as follows: No exceptions."

The policy provides:

"No action for the indemnity provided by this policy shall lie against the company except for reimbursement of the amount of loss actually sustained and paid in money by the insured in full satisfaction of a judgment duly recovered against the insured after final determination of the litigation. * * * It is a condition of this policy that the insolvency or bankruptcy of the insured shall not release this company from the payment of damages for injuries sustained or loss occasioned during the term this policy is in force; and provided, further, that, in the event judgment shall be secured against such insolvent or bankrupt assured hereunder in an action brought by any injured person, or his heirs or personal representatives in case of death from any accident covered hereunder, then an action may be brought against the company on this policy, and subject to its terms and conditions, by such injured person, his heirs or personal representatives, as the case may be, to recover on said judgment an amount not in excess of the amount of such judgment nor in any event an amount in excess of the limits of indemnity as set forth in this policy."

Tomich was a sewer contractor, engaged in repair work and in new construction. The truck in question was used in connection with such work. In his employ was a man named Ciriaco P. Sordia, who during the life of the policy was injured through the negligence of Tomich in causing the truck to overturn while he and Sordia were riding therein on their way from the place of employment. Sordia brought an action against Tomich for damages caused by such negligence and recovered judgment therein in the sum of \$6,300. After the commencement of that action and before

the trial thereof, Tomich gave notice thereof to the defendant herein and demanded that it take charge of his defense therein, as provided in the policy, but the defendant refused and denied all liability in the matter. Tomich became insolvent, and Sordia made demand upon the defendant for payment of the sum of \$5,000 in accordance with the terms of the policy, and, upon defendant's refusal to make such payment, this action was commenced to recover the sum demanded. The defendant answered, denying liability on the ground, among others, that at the time of the accident Sordia was "being transported by the insured for an implied consideration." Thereafter Sordia died, and the special administrator of his estate was substituted as plaintiff. Judgment was entered in favor of plaintiff, and the defendant has appealed.

The provisions of the policy giving a right of action against the company to an injured person in the event of the insolvency of the insured are in literal compliance with the statute of 1919 relating to actions of that character. (Stats. 1919, p. 776.) Since the briefs herein were filed, that statute has been considered in three cases. *Malmgren v. Southwestern Automobile Ins. Co.* (Cal. Sup.) 255 P. 512; *Pigg v. International Indemnity Co.* (Cal. App.) 261 P. 486; *Marple v. American Automobile Ins. Co.* (Cal. App.) 255 P. 260. It is unnecessary to discuss any of the points raised by the appellant herein which were decided in those cases.

As stated, the answer alleges that at the time of the accident Sordia was "being transported by the insured for an implied consideration." It appears from the record that the issue thereby raised was not carefully tried; counsel for the plaintiff being of the opinion that the defendant was estopped to raise the question by the judgment against Tomich. Apparently on that theory, the court made the following finding:

"The court finds that, by reason of the decision and judgment heretofore entered in that certain action in the superior court of the state of California, in and for the county of Los Angeles, entitled 'Ciriaco P. Sordia, Plaintiff, versus Avran S. Tomich, Defendant,' being numbered 102747 on the docket of said court, and having been entered on the 11th day of October, 1922, and for that reason only, that it is not true that the said Ciriaco P. Sordia at the time of the collision and accident on the 19th day of November, 1921, was being transported by the said Avran S. Tomich for an implied, or any consideration, and further finds that, had it not been for the judgment hereinbefore rendered, it would have been true that the said C. P. Sordia at the time of the collision and accident on the 19th day of November, 1921, was being transported by the said A. S. Tomich for a consideration express or implied."

[1, 2] The judgment roll in *Sordia v. Tomich* was introduced in evidence. The complaint therein stated a simple cause of action for damages resulting from the negli-

gence of the defendant, Tomich, and the answer consisted of a denial of such negligence and a defense of contributory negligence. The findings were limited to the issues raised by the pleadings. The judgment roll therein contains no reference to the defendant in this action or to any policy of indemnity insurance. To have established in the action against Tomich the facts which the defendant herein sets up as a defense would have only strengthened the case against him, because a higher degree of care is required of a carrier of persons for reward than of such a carrier without reward. Civ. Code, §§ 2100 and 2096. The statute cited requires a provision in such a policy, that, in the event of the insolvency of the insured and the recovery of judgment for damages against him by an injured person, "an action may be brought against the company, on the policy and subject to its terms and limitations, by such injured person, * * * to recover on said judgment." Had the insured paid the amount of the judgment, it would have been conclusive in his favor against the company on every issue properly tried in the action against him, he having notified the company of the action and requested it to defend the same. Civ. Code, § 2778, subd. 5. Since the policy provides for an action on such a judgment by the injured person against the company, under the circumstances stated, the evident intent is that such person shall have the rights which the insolvent insured would have had if he had paid the judgment. Such a judgment is conclusive only in respect to the matters adjudged. No one would contend that it precludes the company from defending on the ground that it did not issue the alleged policy or that the policy issued by it does not cover the motor vehicle which caused the injury. It seems equally clear that the company may show in defense that its policy does not indemnify against liability for damage to persons of the class to which the injured person belongs. In other words, before the company can be held liable as an indemnitor, it must be proved that it is an indemnitor. "While one who is required to protect another from liability is bound by the result of litigation to which such other is a party, provided the former had notice of such litigation, and an opportunity to control its proceedings, a judgment against a party indemnified is conclusive in a suit against his indemnitor only as to the facts thereby established. The estoppel created by the first judgment cannot be extended beyond the issues necessarily determined by it." 14 R. O. L. 62; 31 C. J. 461; *Pezel v. Yerex*, 56 Cal. App. 304, 309, 205 P. 475.

[3] The finding herein quoted may mean that at the time of the accident Sordia "was being transported by the said A. S. Tomich for a consideration express or implied," but

that, by reason of the judgment in favor of the former against the latter, the defendant herein is estopped to defend on that ground, but it is not an unequivocal finding either one way or the other on the issue whether Sordia was a passenger for a consideration. Tomich has a poor command of the English language. As testified by the adjuster of the defendant, it was difficult "to get from Mr. Tomich the facts as to the accident." From some of his answers to leading questions it may be inferred that Sordia was a passenger for a consideration. On the other hand, his testimony as a whole would warrant the inference that Sordia was not a passenger for a consideration. In this state of the evidence, the case having been tried on an erroneous theory of the law, both parties are entitled to an unequivocal finding on the issue, which is the only material issue in substantial controversy, but it appears to be unnecessary to retry any other issue.

The judgment is reversed, and the trial court is directed to retry the single issue whether Sordia was a passenger for an express or implied consideration at the time of the accident and thereupon to enter judgment for the party in whose favor such issue may be found.

We concur: PLUMMER, J.; HART, J.

87 Cal. App. 584
Ex parte CARLSON. (Cr. 1428.)

District Court of Appeal, First District, Division 1, California. Dec. 15, 1927.

1. Constitutional law ☞88—Right to engage in lawful and useful occupation is subject to legislative regulation in public interest.

While the right to engage in a lawful and useful occupation cannot be taken away under the guise of regulation, such occupation may be subjected to regulation in the public interest, even though the exercise of power to regulate involves in some degree a limitation upon the exercise of the right regulated.

2. Constitutional law ☞70(3)—Court cannot interfere with legislative regulation of occupations for public interest, in absence of clear showing statutes are arbitrary and unreasonable.

The manner and extent of the regulation of occupations for the public interest are matters primarily for legislative determination, with which the courts cannot interfere unless it clearly appears that a statute enacted ostensibly for the purpose of regulation imposes an arbitrary and unreasonable burden upon the pursuit of the occupation.

3. Insurance ☞3—In exercise of police power, state may adopt statutes for regulation of insurance agents.

In the exercise of police power, the state may adopt statutes for the regulation of insurance agents.

4. Insurance ☞12—State may require agents to be licensed.

The state may require that any agent doing business in the state shall have a certificate or license under state authority for the transaction of such business.

5. Constitutional law ☞238(1), 240(1)—Persons following commonly designated business or vocation may be classified by Legislature for regulatory purposes into new classes, where there exists reasonable basis for distinction.

Persons following a commonly designated business or vocation may be classified by the Legislature for purposes of regulation into new classes or subdivisions, where there exists a reasonable basis for a distinction between them.

6. Insurance ☞12—Fees imposed upon insurance agents for carrying on business are not a "tax" (Pol. Code, § 633, and § 633aa, as added by St. 1927, p. 1931).

The fees provided by Pol. Code, § 633, and section 633aa, as added by St. 1927, p. 1931, for the licensing of life, health, or accident insurance agents and insurance agents in general, are in no proper sense a tax on the business conducted by insurance agents, but are imposed by virtue of police power for the purposes of regulation.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Tax—Taxation.]

7. Constitutional law ☞101—Insurance ☞12—Licenses issued to insurance agents are not contracts and create no vested rights (Pol. Code, § 633, and § 633aa, as added by St. 1927, p. 1931).

Licenses required of and issued to insurance agents under Pol. Code, § 633, and section 633aa, as added by St. 1927, p. 1931, for the purposes of regulating the business, are not contracts, and create no vested rights.

8. Constitutional law ☞101—Licenses issued in exercise of police power for regulatory purposes may be modified by Legislature in public interest (Pol. Code, § 633, and § 633aa, as added by St. 1927, p. 1931).

Licenses, such as the licenses required of insurance agents under Pol. Code, § 633, and section 633aa, as added by St. 1927, p. 1931, issued in the exercise of the police power, are for the protection of the public and not for the benefit of the licensee, and may be modified by the Legislature, or conditions may be imposed when the public interest requires, regardless of whether the time for which the license was issued has expired.

9. Insurance ☞4—Statute requiring licenses for life, health, and accident insurance agents, repeals general act licensing insurance agents to the extent its provisions revise or supersede former act (Pol. Code, §§ 633, 633c, and § 633aa, as added by St. 1927, p. 1931).

Pol. Code, § 633aa, as added by St. 1927, p. 1931, requiring licenses to be taken out by life, health, and accident insurance agents, repeals sections 633, 633c, relative to the general licensing of insurance agents, to the extent that

the provisions of sections 633 and 633c are revised or superseded by section 633aa.

10. Constitutional law ☞230(2)—Legislature could, by licensing act, place life insurance agents in separate class from other insurance agents (Pol. Code, § 633aa, as added by St. 1927, p. 1931).

It was competent for the Legislature, by Pol. Code, § 633aa, as added by St. 1927, p. 1931, to place life insurance agents in a separate class, for the purposes of a regulatory license, from general insurance agents.

11. Constitutional law ☞230(2)—Insurance ☞4—Act licensing life, health, and accident agents, held not discriminatory (Pol. Code, § 633aa, as added by St. 1927, p. 1931).

Pol. Code, § 633aa, as added by St. 1927, p. 1931, providing for the licensing of life, health, and accident insurance agents, held not discriminatory, in view of its requirements, which impose no unreasonable burden upon such agents.

12. Constitutional law ☞70(3)—Legislative determination that regulation of business or vocation is essential under police power will not be disturbed, in absence of clear showing regulation has no relation to ends for which police power exists.

The determination by the Legislature that a necessity exists for the regulation of businesses and vocations under the police power will not be disturbed by the courts, in absence of clear showing that such regulation has no relation to the ends for which the police power exists.

Application by Walter M. Carlson for a writ of habeas corpus, prayed to be directed to the Chief of Police, City and County of San Francisco, to secure the release of petitioner. Writ discharged, and petitioner remanded.

Knight, Boland & Christin, of San Francisco, for petitioner.

U. S. Webb, Atty. Gen., and John H. Rioridan, Deputy Atty. Gen., for respondent.

CASHIN, J. Petitioner was charged in the police court of the city and county of San Francisco with a violation of section 633aa of the Political Code (as added by St. 1927, p. 1931). The complaint alleges that he acted as the agent for a life insurance company, to wit, Metropolitan Life Insurance Company, without first obtaining a license to do so from the insurance commissioner of the state of California. A warrant for his arrest issued, upon which he was taken into custody, and he seeks to be released on habeas corpus.

The above section was adopted at the legislative session of 1927, and took effect on August 2, 1927. It provides that:

"No person shall, within this state, act as a life, health or accident agent for any life insurance company until such person shall have first obtained a license under the provisions of

this section from the insurance commissioner authorizing him so to act."

The section further provides that the applicant for a license shall file with the commissioner a statement from the life insurance company which he seeks to represent, setting forth certain facts, and, further, that the applicant shall answer under oath such interrogatories as may be propounded by the commissioner, and that no license shall issue until the latter has satisfied himself as to the qualifications of the applicant. The section also provides that:

"Nothing herein contained shall be construed as giving such agent authority to act under the provisions of either sections 633 or 633a of the Political Code, without obtaining a license thereunder, nor shall any licensee under said sections 633 or 633a of the Political Code have authority to act as a life insurance agent under the provisions of this section, without obtaining a license hereunder."

Section 633 of the Political Code, which in its present form has been in effect for several years, provides that:

"No person shall within this state act as the agent of any insurance or surety company or society [other insurer] until such person shall have first obtained a license from the insurance commissioner authorizing him or it so to act,"

—its other provisions being the same as those of section 633aa. Under each of the sections the insurance commissioner is required to collect from the applicant a fee of \$1 for issuing the license, and each provides that the license shall expire on the 1st day of July following its issuance.

It is admitted that since the year 1924 there has been issued to petitioner annually the license provided by section 633, the last—which was dated July 1, 1927, being for the year ending on July 1, 1928. Petitioner contends that section 633aa renders void and ineffective the license issued under section 633, and thus deprives him of a property right without due process of law, that by requiring life insurance agents to procure an additional license the section is discriminatory and deprives such agents of the equal protection of the law, and, further, that the license he now holds is essentially a contract, the obligation of which the section impairs.

[1, 2] While the right to engage in a lawful and useful occupation cannot be taken away under the guise of regulation, such occupation may be subjected to regulation in the public interest even though the exercise of the power to regulate involves in some degree a limitation upon the exercise of the right regulated (*Riley v. Chambers*, 181 Cal. 589, 185 P. 855, 8 A. L. R. 418), and the manner and extent of the regulation are matters primarily for legislative determination (*County of Plumas v. Wheeler*, 149 Cal. 758, 87 P.

909), with which the courts cannot interfere unless it clearly appears that a statute, enacted ostensibly for the purpose of regulation, imposes an arbitrary and unreasonable burden upon the pursuit of the occupation (*Ex parte Whitwell*, 98 Cal. 73, 32 P. 870, 19 L. R. A. 727, 35 Am. St. Rep. 152; *People v. Ratledge*, 172 Cal. 401, 156 P. 455; *In re Bruce*, 54 Cal. App. 280, 201 P. 789).

[3, 4] In the exercise of its police power, the state may adopt statutes for the regulation of insurance agents, and may require that any agent doing business in the state shall have a certificate or license under state authority for the transaction of such business. *Commonwealth v. Roswell*, 173 Mass. 119, 53 N. E. 132; *Stern v. Metropolitan Life Ins. Co.*, 90 Misc. Rep. 129, 154 N. Y. S. 283; *Swearingen v. Bond*, 96 W. Va. 193, 122 S. E. 539, 540; *Noble v. English*, 183 Iowa, 893, 167 N. W. 629; *La Tourette v. McMaster*, 248 U. S. 465, 39 S. Ct. 160, 63 L. Ed. 362.

[5] Although under section 633 all insurance agents, irrespective of the kind of insurance business transacted, were placed in the same class, under the rule that the classification of occupations and forms of business may be made whenever the difference or distinction on which it is founded is not wholly without reason, it is an established rule that those who follow a commonly designated business or vocation may, where a basis for a reasonable distinction exists, be classified or subdivided into new and separate classes. 17 R. C. L. "Licenses," § 38, p. 518. Accordingly, it has been held that an act is not illegally discriminatory because it places automobile dealers (*In the Matter of Schuler*, 167 Cal. 282, 139 P. 685, Ann. Cas. 1915C, 706) or professional chauffeurs (*In the Matter of Stork*, 167 Cal. 294, 139 P. 684) in a class by themselves, or that it distinguishes between collectors of rent and other collectors, or between real estate brokers and salesmen (*Riley v. Chambers*, supra).

[6-8] The fees provided for by sections 633 and 633aa are in no proper sense a tax on the business conducted by insurance agents, but are imposed by virtue of the police power upon persons engaged therein to defray the necessary cost of regulation. *Schmidt v. Indianapolis*, 168 Ind. 631, 80 N. E. 632, 14 L. R. A. (N. S.) 787, 120 Am. St. Rep. 385; *Phœbus v. Manhattan Club*, 105 Va. 144, 52 S. E. 839, 840, 8 Ann. Cas. 667; *Commonwealth v. Boyd*, 188 Mass. 79, 74 N. E. 255, 108 Am. St. Rep. 464; *State v. Hovorka*, 100 Minn. 249, 110 N. W. 870, 8 L. R. A. (N. S.) 1272, 10 Ann. Cas. 398. Moreover, such licenses are not contracts (*Stone v. Fritts*, 169 Ind. 361, 82 N. E. 792, 15 L. R. A. [N. S.] 1147, 14 Ann. Cas. 295; *Lowell v. Archambault*, 189 Mass. 70, 75 N. E. 65), and create no vested rights (*State v. Hovorka*, supra; *People v. N. Y. Health Department*, 189 N. Y. 187, 82 N. E. 187, 13 L. R. A. [N. S.] 894; 17 R. C. L. "License," § 5, p. 476); and, licenses issued in the exer-

cise of the police power being for the protection of the public and not for the benefit of the licensee (State v. Reeves, 112 S. C. 383, 99 S. E. 841), the regulations prescribed may subsequently be modified by the Legislature, or new conditions imposed, whenever the public interest requires (State v. Hovorka, supra; Stone v. Fritts, supra), regardless of whether the time for which the license was issued has expired (Portland v. Cook, 48 Or. 550, 87 P. 772, 9 L. R. A. [N. S.] 733).

[9-12] It is evident from the fact that section 633aa places the agents of life insurance companies in a separate class, and from the provision therein that such agents should not be authorized to act by procuring the license provided by sections 633 and 633c, that the Legislature intended to revise the latter sections, in so far as they applied to the class created by the new section; and, as held in the following cases, where such intention appears the former statute is repealed to the extent that its provisions are revised or superseded by the later act. *Pierpont v. Crouch*, 10 Cal. 315; *State v. Conkling*, 19 Cal. 501; *In the Matter of Yick Wo*, 68 Cal. 294, 9 P. 139, 58 Am. Rep. 12. Where a license is required for the purpose of regulation, the licensee is bound to know that the license so held is subject to a modification or repeal of the law under which it was issued, from the making of which change, if the public interest requires it, no incidental inconvenience suffered by the licensee can stay the power of the state. *McMillan v. Knoxville*, 139 Tenn. 319, 202 S. W. 65. Although the earlier statute included all insurance agents in the same class, it was competent for the Legislature, if necessary for the purpose of regulation, to place those engaged in the business of life insurance in a separate class. As indicated by the act, such reclassification was found to be necessary; and we cannot say but that differences in the manner of conducting the business of those engaged in the several branches of insurance furnished a reasonable basis therefor. Moreover, in view of its requirements, which impose no unreasonable burden upon agents for life insurance companies, the act was not discriminatory. As stated above, it is primarily for the legislative body, clothed with the power, to determine when regulation is essential (*County of Plumas v. Wheeler*, supra), and its determination in this regard, in view of its better knowledge of all the circumstances and the presumption that it is acting with due regard for the rights of all the parties, will not be disturbed by the courts, unless it can plainly be seen that the regulation has no relation to the ends for which the police power exists (*Ex parte Hadacheck*, 165 Cal. 416, 132 P. 584, L. R. A. 1916B, 1248).

We find no merit in the grounds urged for declaring the section to be invalid, and the

writ is therefore discharged, and the petitioner remanded.

We concur: TYLER, P. J.; KNIGHT, J.

87 Cal. App. 724

PEOPLE v. SPRAIC. (Cr. 1515.)★

District Court of Appeal, Second District, Division 1, California. Dec. 21, 1927.

Hearing Denied by Supreme Court Feb. 16, 1928.

1. Criminal law §1023(5), 1134(8)—Appeal from verdict was nugatory, but points made could be considered on appeal from judgment.

Where defendant appealed from judgment of conviction and from the verdict, appeal from verdict was nugatory, since law authorizes no appeal from a verdict, but points made could be considered on appeal from judgment.

2. Jury §128—Court properly required accused to exercise all challenges for cause before talesman were submitted to prosecution for examination (Pen. Code, §§ 1067, 1072, 1073, 1086, 1087).

Where accused questioned first twelve prospective jurors regarding general qualifications under Pen. Code, § 1072, and passed them, court properly required accused to exercise all his challenges for cause under section 1073, before talesman were submitted to prosecution for examination under section 1072, since section 1067, dividing challenges into either peremptory or for cause, and section 1087, specifying order in which each party shall exercise challenges for cause, do not have bearing on order of parties inter se, but matter was covered by section 1086, requiring defendant to exhaust all challenges, except peremptory challenges before prosecution began.

3. Criminal law §1166½(6)—Excluding questions to prospective jurors, made to show bias, after defendant exhausted peremptory challenges, held not error, where jurors answered similar questions satisfactorily.

Sustaining objections to questions whether jurors would follow instruction that insane person is incapable of committing crime asked two prospective jurors, later sworn on jury, after accused had exhausted peremptory challenges, held not error, where jurors, replying to other questions, had stated that they had no prejudice against insanity as defense, and would follow court's instructions.

4. Criminal law §1166(1)—Where court appointed insanity experts to examine defendant three days before trial, defendant, suffering no prejudice because of delay, could not complain of refusal to appoint expert on motion made under statute two months previously (Code Civ. Proc. § 1871, as added by St. 1925, p. 305).

Where defendant's principal defense in murder prosecution was insanity, and court, on stipulation of both sides, appointed experts to examine defendant regarding insanity three days

before trial, and both testified, defendant, not showing that he suffered prejudice because of delay in making appointments, could not complain of refusal of court to grant motion for appointment of expert witnesses under Code Civ. Proc. § 1871, as added by St. 1925, p. 305, made more than two months before trial.

5. Criminal law ⚡438—In murder prosecution, admitting photographs of slain persons lying on floor, where first discovered, to explain testimony, held not error.

In prosecution for murder, admitting in evidence photographs of slain persons as they lay on floor, where they were first discovered, referred to by some witnesses, and used to explain their testimony regarding position of bodies, held not error, even though photographs had gruesome appearance.

6. Homicide ⚡300(3)—Instruction, in substance, that one may justify homicide as in self-defense on such view of circumstances as man without reason would take, held erroneous (Pen. Code, § 198).

Instruction, mingling doctrines relating to insanity and self-defense, and declaring, in substance, that one may justify homicide as in self-defense on such view of circumstances as would be taken by man without reason, held erroneous, and properly refused under Pen. Code, § 198, since one attempting to shield himself behind doctrine of apparent necessity can do so only if necessity would have been apparent to reasonable man under all circumstances of case as known to slayer.

7. Homicide ⚡190(7)—Evidence of previous threats by deceased against defendant, not communicated to defendant, is not admissible on issue of self-defense, where there is no evidence that deceased was aggressor.

In homicide case, where self-defense is in issue, evidence of previous threats by deceased against defendant, and not communicated to latter, is not admissible, where there is no evidence tending to show that deceased was aggressor.

8. Homicide ⚡244(1)—Evidence of abusive conduct held insufficient on which to predicate self-defense in murder prosecution.

In murder prosecution, evidence of abusive conduct of deceased toward defendant held insufficient on which to base a claim of self-defense.

9. Homicide ⚡151(3)—Burden was on defendant to prove justification for homicide, where there was no evidence on which to base claim of self-defense.

In murder prosecution, where, at time defendant offered evidence to show deceased had threatened to kill defendant, there was no evidence of the circumstances of the homicide, burden was on defendant to prove circumstances of justification or excuse at least, to extent of raising a reasonable doubt in minds of jury on that point.

10. Criminal law ⚡680(1)—Order of proof rests largely in court's discretion.

Order of proof rests largely in discretion of trial court.

11. Homicide ⚡190(7)—Court did not abuse discretion in excluding proposed evidence of threats by deceased against defendant, not communicated to defendant, where defendant proposed to supply evidence that he killed in self-defense.

In prosecution for homicide, court did not abuse discretion in excluding proposed evidence, on issue of self-defense, of threats by deceased against defendant not communicated to defendant, where defendant's counsel declared at time that he expected to show later by defendant's testimony that he acted in self-defense.

12. Homicide ⚡244(1)—Evidence held not to show deceased was aggressor, justifying admission of evidence of threats by deceased against defendant not communicated to defendant.

In murder prosecution, evidence held not to show that deceased was aggressor so as to justify admission of evidence that deceased had made threats against defendant, which were not communicated to defendant, on issue of self-defense.

13. Homicide ⚡294(1)—Instruction on mental derangement, including statement that irresistible impulse would be defense to murder, held properly refused.

In murder prosecution, instruction regarding defendant's derangement of mind, including statement that an irresistible impulse would be defense, held properly refused.

14. Criminal law ⚡829(1)—Refusal of instruction covered by instructions given is not error.

Error cannot be predicated on refusal of instruction covered by instructions given.

15. Criminal law ⚡770(1)—Trial court must give instructions on proper request therefor, regarding law applicable to any state of facts logically deducible from any evidence.

It is duty of trial court to give instructions on proper request therefor as to law applicable to any state of facts that may be logically deducible from any evidence, regardless of weight or credibility of that evidence which is within sole province of jury.

16. Criminal law ⚡1172(1)—Instruction to effect that jury need not consider rules of law not applicable to facts though possibly superfluous held not error.

In murder prosecution, giving instruction that fact that court gave instructions regarding particular rules of law must not be taken as an indication that rules applied to case on trial, or as indicating that court considered them necessarily applicable, and that they should not consider instructions not applicable to facts found, although possibly superfluous, was not error.

Appeal from Superior Court, Los Angeles County; Douglas L. Edmonds, Judge.

John Spraic was convicted of manslaughter, and he appeals from the judgment and from the verdict. Judgment affirmed. Appeal from the verdict dismissed.

L. E. Dadmun and C. L. Welch, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and John L. Flynn, Deputy Atty. Gen., for the People.

SHAW, Justice pro tem. [1] Defendant was tried on an information charging him in two counts with murder of Homer E. Ranes and Mildred Ranes, who were husband and wife, and was convicted of manslaughter on each count. He appeals from the judgment and "from the verdict." The law authorizes no appeal from a verdict, and hence the latter appeal is nugatory, but all the points made may be considered on the appeal from the judgment.

[2] Appellant's first point relates to the procedure on the impanelment of the jury. When the first twelve prospective jurors were seated in the box, defendant questioned them as to their possession of the general qualifications of jurors, or, in other words, as to the existence of any ground of challenge under section 1072 of the Penal Code, and passed them. He then claimed that, before he was required to examine them further with a view to making any challenge for cause under section 1073, the people should examine them for general qualifications, and make any challenge they desired under section 1072. The court ruled against this contention, and required defendant to exercise all his challenges for cause before the talesmen were submitted to the prosecution for examination. Section 1067 of the Penal Code, on which appellant seems to rely, merely divides challenges into classes—peremptory and for cause. Neither that section nor section 1087, which specifies the order in which each party shall exercise his challenges for cause, has any bearing upon the order of the parties inter se. That matter is covered by section 1086 of the Penal Code, as follows:

"All challenges to an individual juror, except peremptory, must be taken, first by the defendant, and then by the people, and each party must exhaust all his challenges before the other begins."

This means that the defendant shall exhaust all of his challenges other than peremptory challenges before the prosecution are required to begin. The ruling complained of was clearly right.

[3] Defendant further complains of the rulings of the court sustaining objections to questions which he put to two prospective jurors who were later sworn on the jury after his peremptory challenges had been exhausted. The questions put to these two jurors were substantially alike; one of them being as follows:

"Q. If the court would instruct you that, an insane person is incapable of committing a crime as a matter of law, would you have any hesitancy in following that instruction?"

Replying to other questions, each of these jurors stated, in substance, that he had no prejudice against insanity as a defense, and that he would follow the instructions of the court as to the law, even though he should not agree with the court as to what the law ought to be. This was sufficient to show that the jurors were in an unbiased frame of mind so far as the defense of insanity was concerned, and defendant was not entitled to examine them in greater detail as to suggested instructions.

[4] The defendant's principal defense at the trial was insanity, and he now complains of the refusal of the court to grant his motion for the appointment of expert witnesses under the provisions of section 1871 of the Code of Civil Procedure (St. 1925, p. 305) to examine him as to his sanity. This motion was made more than two months before the trial, and was not then ruled on. Three days before the trial, on stipulation of both sides, the court did appoint two experts to examine the defendant as to his sanity, and they both testified at the trial. There is nothing in the record to show that the defendant suffered any prejudice by reason of the delay in making these appointments, and, in the absence thereof, he cannot complain of the action of the court, even if section 1871 confers any rights at all on the parties to an action—a question which we do not decide.

[5] There was no error in admitting in evidence photographs of the two slain persons as they lay on the floor where they were first discovered. These photographs were referred to by some of the witnesses, and used to explain their testimony as to the position of the bodies, and were hence admissible, even though they had a gruesome appearance. *People v. Saenz*, 50 Cal. App. 382, 195 P. 442.

[6] Defendant complains of the refusal of the trial court to give the following instruction asked by him:

"If you find by preponderance of testimony that the defendant, at the time of the homicide, was deprived of his reason, and you further find that he was deprived of his reason by the acts, statements, and conducts of the deceased, and that, while defendant was so deprived of his reason, he thought he was acting in self-defense, and according to his lights he was acting in self-defense, though those lights, supplied by a vacant mind, were dim and unsatisfactory, yet they were all the defendant had at the time, and defendant, under those conditions, acted on the facts as they appeared to him, and he (the defendant) had an honest belief that he was in danger of his life or immediate bodily harm at the hands of the deceased, then killed the deceased, he could not be found guilty as charged in the information, and it will be your duty to find defendant not guilty."

The jury was fully instructed as to the law concerning insanity as a defense. This instruction mingles the doctrines relating to insanity and self-defense, and declares, in

substance, that one may justify a homicide as in self-defense on such a view of the circumstances as would be taken by a man without reason, whereas the true rule is that one who attempts to shield himself behind the doctrine of apparent necessity can do so only if the necessity would have been apparent to a reasonable man under all the circumstances of the case as known to the slayer. Pen. Code, § 198. It was therefore properly refused.

At the trial it was proved that defendant shot and killed Mr. and Mrs. Ranes at the time alleged in the information, the shooting of the two being almost simultaneous, and this was admitted by him at the time of his arrest and in his testimony at the trial. There was, however, no eyewitness of the fatal encounter other than defendant himself, and no testimony was given in behalf of the prosecution as to the circumstances thereof. Mr. Ranes and Mrs. Ranes lived directly across the street from defendant, and were accustomed to address to him opprobrious epithets commenting on his foreign nationality. There was testimony that they also made threats to him that they would drive him out of the community, and that they interfered with his property, business, and affairs, causing him financial loss. In his defense defendant offered evidence to show that each of the persons killed had at various times made threats to kill or shoot defendant, none of which were made in the presence of or communicated to the defendant. This evidence was objected to on the ground that the threats were not communicated to the defendant, and also that no evidence had been given tending to show that the killing was done in self-defense, and hence no proper foundation had been laid. The court excluded the testimony thus offered, and defendant now complains of the ruling.

[7] In a homicide case where self-defense is in issue, and the evidence is conflicting, or leaves a doubt as to which party was the aggressor in the affray, evidence of previous threats made by the deceased against the defendant but not communicated to the latter is admissible as tending to establish the fact that the deceased put his threats into execution and began the affray. But to make evidence of such threats admissible there must be some evidence tending to show that the deceased was the aggressor.

In *People v. Thomson*, 92 Cal. 506, 511, 28 P. 589, 590, the court said:

"Again, in this case a deadly encounter took place; one party was killed; the survivor insists that the killing was done in self-defense, and that the deceased made the first attack. Who was the aggressor was an issue of vital importance to the jury; justice could only be reached by its proper solution, and, as disclosed by the evidence, it was enveloped in doubt. Under these circumstances, all the acts and

conduct of the deceased, either in the nature of overt acts of hostility, or threats communicated or uncommunicated, were proper evidence to be considered by the jury as shedding light—to some extent, at least—upon the issue as to whether the deceased or the defendant was the aggressor in this fatal affray."

There are other authorities to the same effect, but they all condition the admissibility of such evidence upon the fact that the evidence is otherwise equivocal as to whether the deceased was the aggressor. *People v. Arnold*, 15 Cal. 476; *People v. Scoggins*, 37 Cal. 676; *People v. Lamar*, 148 Cal. 564, 83 P. 993.

In *People v. Gonzales*, 33 Cal. App. 340, 164 P. 1131, the court sustained an order striking out evidence produced by the defendant of previous threats by the deceased against defendant, some of which appear to have been uncommunicated, and said:

"When this evidence was tendered there was no testimony whatsoever tending to show any act of aggression committed by deceased at the time of the homicide indicating that he intended to attack defendant. Since there was neither claim nor proof of a hostile demonstration by deceased at the time of the homicide, the fact that he had theretofore made threats against defendant, could not justify the latter in killing him."

[8-11] In the case at bar there was, when defendant's offer was made, no evidence at all of the circumstances of the homicides, and hence nothing on which to base a claim of self-defense. The evidence of the abusive conduct of the Ranes toward defendant could not serve that purpose. In this condition of the record, the burden was on the defendant to prove circumstances of justification or excuse, at least to the extent of raising a reasonable doubt in the minds of the jury on that point. One of the grounds of the objection to defendant's offer was that no showing of this kind had been made, and the objection was properly sustained on this ground. When the objection was made, defendant's counsel declared that he expected to show later by defendant's testimony that he acted in self-defense. In this respect the case differs from *People v. Gonzales*, supra, where, on motion to strike, defendant failed to make such an offer of proof, but we do not think this difference calls for a different decision. The order of proof rests largely in the discretion of the trial court, and we cannot say that its discretion was abused in this matter. It might well have concluded that, if the proposed evidence of threats were admitted, and then defendant failed to supply the promised evidence, it would be difficult for the jury to eradicate from their minds the evidence of such threats.

[12] Furthermore, the event justified the action of the court, for, when the defendant took the stand, he testified to no acts on the part of either of the slain persons at the time

of the killing which could reasonably be construed as a hostile demonstration against him, or give rise to an application of the rules of law relating to self-defense. He testified in substance that just before the homicides he met Mr. Raney on the street coming from the store with a package in his hand, and entered into a conversation with him for the purpose of trying to get Raney to leave defendant alone once more; that Raney denied doing anything to defendant or bothering him, and said: "Let us go and see my wife and talk with her"; that they both started toward Raney's house, and just as Raney came off of the sidewalk he said "he was going to get me out of there"; that, when they were on the porch, Raney went into the house, leaving defendant outside, slammed the screen door in his face, called him an unpleasant name, and said, "Stay out," and "the next thing I heard the shots. I don't know how I fired them." On cross-examination defendant said that Raney was shaking and angry at the time they met on the street, and then "acted like he was going to show me that he was going to be friends"; that, as Raney shut the screen door, "he started to act like he was going to grab something, and said he was going to get me at that time"; and that he was trying to close the screen door when the shots were fired. The defendant in his testimony made no mention whatever of Mrs. Raney or of any action on her part at the time of the shooting. The defendant could not reasonably have believed from these circumstances that he was in imminent danger of great bodily injury or of the commission of a felony at the hands of either of the Raney's, or that such danger could be averted only by killing them or either of them.

[13, 14] Another ruling complained of was the court's refusal to give this instruction:

"If, after listening to all the evidence introduced, and instructions of this court, you should find that the defendant, at the time he is charged with the commission of the crime, as alleged in the information, was so affected with disease of mind as thereby to have lost the power to choose between right and wrong, and committed the act charged in the information without being conscious thereof, and did not possess will power sufficient to control the impulses arising from his mental derangement and thereby avoid doing the act, it will be your duty to find the defendant not guilty."

Taking this instruction as a whole, it is erroneous, because it includes a statement that an irresistible impulse would be a defense, which is not the law. *People v. Morisawa*, 180 Cal. 148, 179 P. 888. Defendant claims that this instruction embodies the rule established by subdivision 5 of section 26 of the Penal Code; that persons who commit-

ted the act charged without being conscious thereof are incapable of committing crimes. There was no evidence that defendant was unconscious of what he was doing, and the argument in support of this instruction is merely that he was unconscious of the moral nature of the act he was committing. If it can be so construed it was fully covered by other instructions given on the subject of insanity.

[15, 16] The court gave the jury the following instruction:

"The court has given you instructions embodying such rules of law as may be necessary to assist you in arriving at a verdict. As to some of these instructions, their application depends upon the light in which you view the evidence.

"The fact that the court has given you instructions as to particular rules of law must not be taken by you as an indication that such rules are necessarily applicable to the cause on trial, or as indicating that the court considers them necessarily applicable. Where there is a conflict of evidence, the question as to whether a particular rule of law is applicable depends frequently and solely upon the conclusion as to what the facts are, and the jury are the sole judges of the facts.

"If any instruction is applicable only if a particular situation or state of facts exists, and if you find that no such situation or state of facts exists, then you should not take such instructions into consideration in your deliberations."

Defendant complains of this instruction, and discusses it at considerable length, his grounds of attack being that thereby the court abdicated its function of declaring the law, repudiated all its other instructions, and left the jury to determine for themselves what constituted the law applicable to the case. We do not think the instruction is open to the criticisms thus directed at it by the defendant. It is the duty of a trial court to give instructions on proper request therefor as to the law applicable to any state of facts that may be logically deducible from any of the evidence, regardless of the weight or credibility of that evidence, which are within the sole province of the jury; and this duty the court performed in this case. But when the jury, in the exercise of their function of passing on the evidence, reject the evidence tending to prove a fact, and conclude that the fact does not exist, there is no longer any occasion for them to consider or apply to the case any instruction as to the legal effect of the existence of that fact. The instruction complained of did no more than inform them of this obvious rule, and the giving of it, although possibly superfluous, was not error.

No other points are made for reversal, and, as we find no error, the judgment is affirmed. The appeal from the verdict is dismissed.

We concur: CONREY, P. J.; HOUSER, J.

87 Cal. App. 736

STANDIFORD v. CANTRELL. (Civ. 5466.)

District Court of Appeal, First District, Division 1, California. Dec. 22, 1927.

1. Executors and administrators ⇨227(1)—Claim against decedent's estate need not state facts with detail of complaint, and sufficiency is not tested by rules governing pleadings (Code Civ. Proc. § 1494).

Under Code Civ. Proc. § 1494, claim against deceased person's estate need not state facts with all precision and detail of a complaint, and sufficiency of claim is not tested by rules governing pleadings.

2. Executors and administrators ⇨221(1)—Where executrix allowed claim as prepared without question except regarding amount, it must be inferred nature was understood and form approved.

Where executrix allowed claim as presented without question except as to its amount, it must be inferred from such allowance that nature of demand was understood and form of claim approved.

3. Executors and administrators ⇨202(2)—Claim for damages consequent upon services in submitting to blood transfusion which deceased agreed to pay, held not "contingent claim."

Where plaintiff had put in claim with executrix "to reasonable value of services in submitting to blood transfusion to deceased and to damages consequent thereupon, \$2,500," which deceased had agreed to pay, that portion of claim relating to damages consequent to services did not constitute "contingent claim," for reason that liability for all elements of damage proximately resulting from plaintiff's services became absolute at time contract was made, and did not depend upon happening of future possibility.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Contingent Claim.]

4. Executors and administrators ⇨202(2)—That part of claim against deceased's estate is contingent does not invalidate entire claim, but merely requires such part to be particularized (Code Civ. Proc. § 1494).

That part of claim presented to executrix against deceased's estate was contingent would not invalidate entire claim, but only effect thereof would be to require particulars of contingent portion to be set forth under Code Civ. Proc. § 1494.

5. Executors and administrators ⇨227(4)—Executrix waived requirement that claimed contingent portion of claim be set forth by failing to object to sufficiency prior to allowance (Code Civ. Proc. § 1494).

Executrix waived requirement that claimed contingent portion of claim for value of services in supplying blood transfusion and for damages consequent thereupon be set forth under Code Civ. Proc. § 1494, by failure to object to sufficiency of claim on any ground prior to its allowance.

6. Executors and administrators ⇨227(1)—Form of claim for compensation for submitting to blood transfusion and damages consequent thereupon held sufficient to cover decedent's contract to pay resulting damages and to identify action as founded on claim.

Claim against decedent's estate "to reasonable value of services in supplying blood transfusion to deceased and to damages consequent thereupon, \$2,500" was sufficient in form to cover portion of decedent's contract to pay plaintiff all damages which she might suffer as consequence of her services, and action instituted by plaintiff was founded on it and conformed to claim as presented.

7. Executors and administrators ⇨205(2)—Where action for services in supplying blood transfusion was based on express contract, jury was not restricted to amounts customarily paid for services.

Where action against deceased's estate for services in supplying blood transfusion and damages consequent thereupon was based upon terms of an express contract and not upon ordinary quantum meruit, jury was not restricted in fixing value of services to amounts customarily paid, but was entitled to take into consideration all peculiar circumstances under which contract in question was entered into.

8. New trial ⇨162(1)—If amount awarded be excessive, court may make conditional order denying new trial if prevailing party remits excess (Code Civ. Proc. § 657).

Under Code Civ. Proc. § 657, providing for new trial, where damages appear excessive as given under influence of passion or prejudice, court may, if amount awarded be excessive, make a conditional order denying motion for new trial, if prevailing party will consent to remit excess, and granting it in absence of such consent.

9. Appeal and error ⇨933(4)—It cannot be assumed, from court's making order denying new trial if excess damages be remitted, that court concluded verdict was product of passion and prejudice (Code Civ. Proc. § 657).

It is not to be assumed, from court's making conditional order denying new trial if prevailing party consents to remit excess damages, that trial court concluded that verdict was product of passion and prejudice justifying new trial, under Code Civ. Proc. § 657.

10. New trial ⇨77(2)—That award of \$2,495 for services in submitting to blood transfusion and damages therefrom was influenced by passion held not shown as affecting right to new trial (Code Civ. Proc. § 657).

Facts and circumstances did not justify determination that, as a matter of law, award of damages of \$2,495 for plaintiff's services in supplying blood transfusion and damages resulting therefrom was influenced by passion or prejudice warranting new trial under Code Civ. Proc. § 657, where plaintiff's actual expenses were about \$776 and plaintiff suffered continuous pain and carried scar, and another operation was necessary.

Appeal from Superior Court, City and County of San Francisco, Ross Campbell, Judge.

Action upon an express oral contract for services by Leona Pearl Standiford against Harriet E. Cantrell, executrix of the last will and testament of Sarah Jane Hilliard, deceased. From a judgment for plaintiff, defendant appeals. Affirmed.

T. J. Sheridan and Harry L. Horn, both of San Francisco, for appellant.

I. M. Peckham and Sherman G. Blood, both of San Francisco, for respondent.

KNIGHT, J. A verdict for the sum of \$2,495 was awarded against defendant, as executrix of the last will and testament of Sarah Jane Hilliard, deceased, in an action based upon an oral contract the decedent is alleged to have made to pay plaintiff for services rendered decedent during her last illness, in submitting to a blood transfusion and for the damages plaintiff might suffer as a consequence of said operation. Pursuant to a conditional order made by the trial court on motion for a new trial, plaintiff remitted \$995 of the sum awarded by the jury, thereby reducing the amount of the judgment to \$1,500, from which judgment defendant appeals.

Briefly stated, the grounds urged for reversal are that no valid claim for damages consequent to plaintiff's services was presented against the decedent's estate, and that therefore plaintiff was limited in her action to a recovery of the reasonable value of the services rendered; also that the elements of damage pleaded were not sustained by the proof; that the court erred in refusing to give certain instructions proposed by defendant; that excessive damages were awarded under the influence of passion and prejudice; and that consequently the court erred in not granting a new trial.

The essential facts are as follows: For some time prior to Mrs. Hilliard's death, which occurred on December 9, 1922, she suffered from a malignant ailment necessitating treatment by blood transfusions. She had undergone four transfusions, and was unable to obtain more of the particular type of blood required. Plaintiff and her parents were friends and acquaintances of Mrs. Hilliard, and during the early part of October, 1922, Mrs. Hilliard told Mrs. Standiford, plaintiff's mother, of her serious condition and asked if she would furnish the necessary blood for a transfusion. Mrs. Standiford's husband objected to her doing so, and finally Mrs. Hilliard persuaded plaintiff, who was present, to submit to the transfusion. There is some conflict as to the exact words used at that time, but there is ample testimony to show that plaintiff's consent was given only after Mrs. Hilliard had made promises to the effect that, if the service was rendered, she would "make it right" with plaintiff; that plaintiff

"would be well taken care of and not be out anything"; that the operation would not require an incision to be made, the blood being taken, as Mrs. Hilliard explained it, through a needle, and would result in no pain and leave no scar; that plaintiff would not lose more than three days from her employment; that Mrs. Hilliard would bear all of the hospital and other expenses which might be incurred by plaintiff as a consequence of the transfusion, and would "stand by" plaintiff, "take care" of her, and "do the right thing" by her. At first plaintiff was disinclined to enter into the arrangement, but, owing to Mrs. Hilliard's importunities and critical condition, she finally consented. The next day plaintiff's blood was typed and proved satisfactory; and the transfusion operation was performed, but, in order to perform a successful direct transfusion, it became necessary for Mrs. Hilliard's physician to cause an incision to be made in plaintiff's arm an inch or more in length, and to destroy one of the veins, so as to allow the blood to pass directly from the vein of the "donor" to the vein of the patient through a paraffine receptacle. Approximately a half pint of plaintiff's blood was taken. The physician testified that before attempting to operate he was "rather skeptical as to taking very much of her blood," on account of plaintiff's youth, but, upon being assured by her that she was of age and was willing to submit to the transfusion, he proceeded with the operation.

The evidence further shows that upon arriving home after the operation plaintiff was in a very weakened condition, and collapsed after entering the house. Later her mother assisted her to bed, and it was three days before she was about. As a result of the transfusion, she continued to suffer much pain; the wound, although stitched, did not heal readily, and she remained under the daily treatment of Mrs. Hilliard's physician until about the date of Mrs. Hilliard's death, at which time a "keloid" formation developed on plaintiff's arm. Thereupon she consulted a physician of her own choosing, who immediately sent her to the hospital and operated for the removal of the keloid, which he described as being about an inch long and half an inch wide. Upon recovering from the anesthetic, she found her arm in a cast which extended from the elbow to the wrist, reinforced with steel braces on the upper and lower sides, which she was compelled to wear for a month. During that time an infection started in the wound which required daily treatment by the doctor for three or four months. With reference to plaintiff's condition at the time of trial, her physician testified that she was still suffering pain; that as a result of the operation a scar tissue had developed affecting one of the nerves, causing continuous pain along the radial side of the arm, and that to relieve the pain another op-

eration was necessary which might eventually require the process of skin grafting.

Prior to the blood transfusion operation, plaintiff had been employed in a telegraph office at a minimum wage of \$16 a week. The trial took place in November, 1923, approximately 13 months after the transfusion, and the evidence shows that from the time of the operation to the time of trial plaintiff was able to work only a month, and was then compelled to give up on account of the painful condition of her arm. The actual expenses incurred by plaintiff for medical and hospital treatment following the transfusion amounted to \$285, and besides she suffered loss of wages for approximately a year, amounting to about \$776. It would therefore appear that the total amount she was allowed by the judgment for her services in submitting to the transfusion operation, for the continuous pain suffered, the scar she carried, and for the payment of the medical and hospital expenses to be thereafter incurred, was approximately \$439.

The claim presented against the estate of the decedent was in the following form: "To reasonable value of services in supplying a blood transfusion to said deceased and to damages consequent thereupon, \$2,500"—but, not being supported by the affidavit required by section 1494 of the Code of Civil Procedure, the claim was returned to the claimant for the purpose of having such affidavit attached. After conforming to the legal requirement mentioned, the claim was again presented, and on February 19, 1923, was allowed by the executrix for the sum of \$15. It does not appear that said claim was ever approved by the judge of the court, however, and four months subsequent to the filing of the action herein the executrix endeavored to cancel the allowance by indorsing thereon, "The within claim is rejected this 5 day of July, 1923."

The allegations of the complaint relating to the making of the contract and its terms were as follows:

"On October 23, 1922, at the city and county of San Francisco, Sarah Jane Hilliard employed plaintiff to submit to a transfusion of blood from this plaintiff to said Sarah Jane Hilliard, to the extent of one pint or more, on the following terms: Plaintiff agreed to submit to certain blood tests at the St. Francis Hospital, in the city and county of San Francisco, and, if said blood tests proved plaintiff a satisfactory subject for making the said blood transfusion, said plaintiff was to submit to a blood transfusion and supply to Sarah Jane Hilliard not less than one pint of plaintiff's blood, and, in consideration therefor the said Sarah Jane Hilliard agreed to pay to this plaintiff such sum of money as would 'make it right' with this plaintiff, and to pay all expenses made necessary by said blood transfusion, and save plaintiff harmless from damage or expense incidental thereto or resulting therefrom. And the said Sarah Jane Hilliard then and there, as part of said transac-

tion, warranted to this plaintiff that the said blood transfusion would not require cutting or incision in this plaintiff; that it would not hurt plaintiff at all; that plaintiff would not be sick or indisposed; that the said blood transfusion would leave no scar."

[1-6] We are unable to sustain defendant's contention that the form of claim presented limited plaintiff's recovery to the reasonable value of the services rendered and precluded any recovery for damages consequent thereto. The facts hereinabove set forth prove beyond question, we think, that Mrs. Hilliard made an express contract to compensate plaintiff, first, for services as "donor" in submitting to the blood transfusion, the value of which service was left open for further determination; and, secondly, for all damages proximately resulting from such service, the amount of which obviously was not ascertainable at the time the contract was made. The claim as presented fairly covered both provisions of the contract; it being expressly set forth in the claim that the demand was for the reasonable value of the services rendered and for damages consequent thereupon.

Nowhere does the Code define the precise form of a claim (*Doolittle v. McConnell*, 178 Cal. 697, 174 P. 305; *Elizalde v. Murphy*, 163 Cal. 681, 126 P. 978; *McGrath v. Carroll*, 110 Cal. 79, 42 P. 466); and it is held that it need not state facts with all the precision and detail of a complaint, nor is the sufficiency of a claim to be tested by the rules governing pleadings (*Pollitz v. Wickersham*, 150 Cal. 238, 88 P. 911; *Thompson v. Koeller*, 183 Cal. 476, 191 P. 927). The purpose of presenting a claim is merely to advise the representative of the estate and the judge before whom the claim comes for allowance of its nature and amount; and if, when the claim is presented, the representative of the estate is uncertain as to any matter connected therewith, the insufficiency should be pointed out or request made for further particulars or details with reference thereto; otherwise, even in cases of general rejection, objections to the formal insufficiency thereof are deemed to be waived. *E. Martin & Co. v. Brosnan*, 18 Cal. App. 477, 123 P. 550; *Smith v. Furnish*, 70 Cal. 424, 12 P. 392; 11 Cal. Jur. 702. As shown, the executrix here allowed the claim as presented without question, except as to its amount; and it must be inferred from such allowance that the nature of the demand was understood and the form of the claim approved.

That portion of the claim relating to damages consequent to the services did not, in our opinion, constitute a "contingent" claim, for the reason that liability for all elements of damage proximately resulting from plaintiff's services became absolute at the time the contract was made, and did not depend upon the happening of any future possibility. *Verdier v. Roach*, 96 Cal. 467, 31 P. 554. But, even assuming that a portion of the damages

claimed was not definitely ascertainable in amount at the time the claim was presented, and that consequently that portion of the claim be deemed to be contingent, the entire claim for damages was not invalidated thereby, and the only effect thereof would be to require the particulars of the contingent portion to be set forth (section 1494, Code Civ. Proc.); and, as already pointed out, defendant waived such requirement by failure to object to the sufficiency of the claim on any ground prior to its allowance (*Western States Life Ins. Co. v. Lockwood*, 166 Cal. 185, 135 P. 496). We conclude, therefore, that the form of the claim presented was sufficient to cover that portion of Mrs. Hilliard's contract to pay plaintiff all damages which she might suffer as a consequence of her services and that the action instituted by plaintiff was founded on and conformed to the claim as presented.

[7] The contention defendant makes that the evidence is insufficient to prove the amount of damages awarded is directed chiefly to the question of the reasonable value of the services. In this connection defendant offered the testimony of physicians and hospital executives to prove that the customary price paid for transfusions ranged from \$25 to \$75. But it should be kept in mind that the action herein is based upon the terms of an express contract and not upon the ordinary quantum meruit. The jury was therefore not restricted in fixing the value of the service to the amounts customarily paid, but was entitled to take into consideration all of the peculiar circumstances under which the contract in question was entered into. With respect thereto, the evidence shows that in the vicinity of San Francisco blood for transfusion purposes was usually purchased from men in the military service stationed near by, who are entitled to free hospitalization and medical treatment by the government in case of illness. The blood for the previous transfusions was so obtained for Mrs. Hilliard; but, as she stated to plaintiff, she was unable to obtain any more of the particular type of blood necessary for her treatment, and that consequently her condition was becoming extremely grave; and it was under these circumstances that plaintiff consented to submit to the operation. But in any event, assuming that she be allowed only \$75 for the service, it would still leave only \$364 to compensate her for a year's suffering, and the scar she will bear, to defray the medical and hospital expenses to be incurred, by reason of the future operation to relieve the pain, and cover loss of time while undergoing and recovering from the operation.

[8-10] With reference to the trial court's order directing the remission of a portion of the damages awarded by the jury, the Code provides that, where it appears that exces-

sive damages have been given under the influence of passion or prejudice, a new trial may be granted (Code Civ. Proc. sec. 657); but it has long since been settled that the court may, if the amount awarded be excessive, make a conditional order denying the motion if the prevailing party will consent to remit the excess and granting it in the absence of such consent (*Bentley v. Hurlburt*, 153 Cal. 796, 96 P. 890); and, furthermore, it is not to be assumed from the making of such conditional order that the trial court concluded that the verdict was the product of passion or prejudice (*Swett v. Gray*, 141 Cal. 63, 74 P. 439). In the present case defendant does not point out, nor have we been able to discover, any facts or circumstances which would justify the determination that as a matter of law the award of damages by the jury here was influenced by passion or prejudice.

The refusal of the court to give defendant's proposed instructions numbered 3, 4, 5, 6, 8, and 9 was not error. They were all based upon the legal proposition contended for by plaintiff that the claim plaintiff presented against the estate did not include a demand for damages resulting from the services in submitting to the blood transfusion, and that therefore plaintiff was not entitled to any award therefor. We have already pointed out that this contention is without merit.

In our opinion, defendant has not shown error, and the judgment is therefore affirmed.

We concur: TYLER, P. J.; CASHIN, J.

87 Cal. App. 783
PEOPLE v. KIRWIN. (Cr. 1541.)

District Court of Appeal, Second District, Division 2, California. Dec. 23, 1927.

1. Embezzlement $\S$ 23—Statute does not make restitution of embezzled property a defense, except under certain circumstances (Pen. Code, § 512).

Pen. Code, § 512, does not, in view of section 513, provide that restitution of property embezzled is a defense to embezzlement charge, but that it is not a defense except under certain circumstances.

2. Embezzlement $\S$ 23—Accused could not plead restoration as defense where restoration was not made before embezzlement prosecution was laid before magistrate, though made before district attorney filed "information" (Pen. Code, § 512).

Defendant, in an embezzlement case, could not, under Pen. Code, § 512, plead restoration of embezzled property as a defense, where restoration was not made before the case was laid before the magistrate, although it was made before the district attorney filed his information; "information," as used in section 512, meaning, in view of sections 809 and 811, not the formal filing of a complaint by the district

attorney, but the laying of the facts constituting embezzlement before a magistrate preliminary to further action thereon.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Information (in Criminal Law).]

3. Embezzlement $\hookrightarrow$ 28—Information stating defendant embezzled "shares" of stock, though embezzlement statute referred to "certificates" of stock, held to state public offense (Pen. Code, §§ 967 and 1131).

Although Pen. Code, §§ 967 and 1131, relating to the crime of embezzlement, refer to "certificates" of stock, and information stating that defendant embezzled "shares" of stock held to state a public offense.

4. Embezzlement $\hookrightarrow$ 32—Information held sufficient without charging facts showing accused was bailee, and character and purpose of bailment.

An information charging embezzlement need not allege facts showing accused was bailee and showing character and purpose of the bailment; hence an information charging that defendant was the agent and bailee of complaining witness, that he was a person intrusted with and having in his control personal property, allegedly embezzled, and, by virtue of his trust as such agent and bailee, the embezzled property came into his care, possession, custody, and control, was sufficient to state the offense of embezzlement.

5. Embezzlement $\hookrightarrow$ 44(4)—Evidence held to show that shares of stock embezzled represented by certificate were the property of complaining witness.

Evidence that shares of stock embezzled were represented by single certificate known as a "street certificate" passing by delivery, and that before inception of bailment to defendant it was in possession of complaining witness and was by her delivered to defendant, and there being no evidence that certificate was property of any other person, held to show that shares represented by certificate were the property of the complaining witness.

6. Criminal law $\hookrightarrow$ 1147—Power to deny probation rests exclusively in trial court, and is not reviewable by District Court of Appeal.

The power to deny probation rests exclusively in the trial court, and a refusal to grant it is not reviewable by the District Court of Appeal.

Appeal from Superior Court, Los Angeles County; Fletcher Bowron, Judge.

L. J. Kirwin was convicted of embezzlement, and he appeals. Affirmed.

Jas. W. Bell, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and James S. Howie, Deputy Atty. Gen., for the People.

WORKS, P. J. Defendant was informed against for the crime of embezzlement, and was convicted. He appeals from the judgment and from an order of the trial court denying his motion for a new trial.

[1] The subject of the offense, as alleged in the information, was "100 shares" of the capital stock of a certain corporation, which it was charged that appellant held as bailee. During the preliminary examination of appellant, and while the complaining witness was on the stand in the committing magistrate's court, appellant offered to her and she took from him a certificate for an equal number of the shares of the stock of the same corporation. Appellant contends that this restitution was a complete defense to the charge upon which he was later committed, under the provisions of section 512 of the Penal Code, which reads:

"The fact that the accused intended to restore the property embezzled, is no ground of defense or mitigation of punishment, if it has not been restored before an information has been laid before a magistrate, or an indictment found by a grand jury, charging the commission of the offense."

It will be observed, however, that this section does not provide that restitution is a defense, but that it is not a defense except under certain circumstances. The enactment must be read in connection with section 513 of the same Code, which is to the effect that, when all proper circumstances are present, the fact of restitution "is not a ground of defense, but it authorizes the court to mitigate punishment, in its discretion."

[2] The question now to be determined is whether the law as declared in these sections has any application to the case of appellant. He contends that the word "information," as employed in section 512, refers to the pleading of that name which is filed by district attorneys, and he therefore insists that the restitution made by him was not too late, for the reason that an information is not filed by a district attorney in a particular case until after the preliminary examination of the accused. We think the word, as used in the section, cannot be given the meaning which appellant would ascribe to it. This seems apparent from the language of the enactment itself, for the information must have "been laid" before the magistrate himself, while the information prepared by a district attorney is filed with the superior court after a magistrate has concluded his labors and a commitment has resulted. Pen. Code, § 809. We think the word used in section 512 was intended to import the laying before a magistrate of a charge, or of "information," that a public offense has been committed and that it has been committed by the person whose preliminary examination is sought. A somewhat similar use of the word "information" occurs in section 811 of the Penal Code. As the word in section 512 must be so read, it follows that the restitution came too late, for it was made while appellant's preliminary examination was in progress. We do not de-

cide whether sections 512 and 513 would have been available to appellant on appeal merely because the trial court resolved against him the discretion referred to in the latter section, if the discretion was so resolved, and even if the restitution had been made before the committing magistrate had been "informed" of the charge against appellant.

[3] In view of the fact that two sections of the Penal Code (967 and 1131), relating to the crime of embezzlement, refer to certificates of stock, appellant contends that the information failed to state a public offense, in that it was alleged therein that he embezzled "shares" of stock. The contention is answered by *People v. Williams*, 60 Cal. 1, which was decided after sections 967 and 1131 of the Code had assumed their present form, in so far as, if at all, they may be said to give any support to appellant's claim. The information was not, therefore, subject to the assault which appellant makes upon it. Notwithstanding the decision in *People v. Williams*, which arose out of the exigencies of the particular case, we think it were better if the information now before us had charged the embezzlement of a certificate of stock for the number of shares evidenced by it.

[4] The information charged that appellant "was the agent and bailee of" the complaining witness, that he "was a person intrusted with and having in his control the personal property" alleged to have been embezzled, and "by virtue of his trust as such agent and bailee" the property embezzled "came into the care, possession, custody, and control of him" (the appellant). It is insisted that these allegations were insufficient, for it is said that the information should have alleged facts showing that appellant was a bailee and showing the character and purpose of the bailment. There is other matter in the information which, while not strictly descriptive of the nature of the bailment, perhaps affords some aid to the allegations above quoted. It is charged that appellant, in committing the embezzlement, did "appropriate the said personal property to his own use, and to uses and purposes not in the due and lawful execution of his said trust as agent and bailee and person so intrusted as aforesaid." However, although the rule was as contended for by appellant, under an old line of cases decided before the adoption of the Codes (*People v. Cohen*, 8 Cal. 42; *People v. Peterson*, 9 Cal. 313; *People v. Poggi*, 19 Cal. 600; *People v. Smith*, 23 Cal. 280), it is now different. The information, without the aiding allegation to which we have referred, is sufficient in its averment that the bailment was in existence. *People v. Gordon*, 133 Cal. 328, 65 P. 746, 85 Am. St. Rep. 174; *People v. Goodrich*, 142 Cal. 216, 75 P. 796; *People v. O'Brian*, 8 Cal. App. 641, 97 P. 679; *People v. Riccardi*, 50 Cal. App. 427, 195 P. 448.

[5] The information alleged that the shares charged to have been embezzled were the property of the complaining witness, a married woman. The evidence showed that the shares were represented by a single certificate of stock, and it is contended that there was no showing that the paper, or shares represented by it, was the property of the complaining witness. We think the evidence was sufficient to show the ownership as alleged. The certificate was one of the character known as a "street certificate," that is, one which showed the indorsement of the original holder and therefore passed by delivery. Before the inception of the bailment it was in the possession of the complaining witness and was by her delivered to appellant. There was no evidence that the shares, or the certificate, were the property of any other person.

[6] It is contended that the trial court erred in refusing to allow appellant to make an application for probation. The power to deny probation rests exclusively in the trial court, and a refusal to grant it is not reviewable here. *People v. Laborwits*, 74 Cal. App. 401, 240 P. 802.

Other points are stated by appellant, but they are not argued, nor is authority cited to support them. As to such points, there is nothing for us to decide. *People v. Zarate*, 54 Cal. App. 372, 201 P. 955.

Judgment and order affirmed.

We concur: CRAIG, J.; THOMPSON, J.

NEWTON v. INDUSTRIAL ACC. COMMISSION OF CALIFORNIA et al. ★
(Civ. 3415.)

District Court of Appeal, Third District, California. Dec. 29, 1927.

Hearing Granted by Supreme Court Feb. 27, 1928.

1. Master and servant ⇨372—Compensation is not allowable for injury resulting from inherent bodily defect or not superinduced by extraordinary movement or action.

Where physical injury results from inherent bodily defect, and not an outside cause, or is not superinduced by some extraordinary movement or action, compensation is not allowable.

2. Master and servant ⇨417(7)—Review of Industrial Accident Commission's decision extends only to ascertainment of whether there is testimony supporting findings.

Appellate court, on review of decision by Industrial Accident Commission, cannot draw its own inferences from testimony set forth in record and conclude therefrom whether or not petitioner is entitled to compensation, since jurisdiction extends only to ascertainment of whether there is testimony supporting the findings of the commission.

⇨For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

★For opinion of Supreme Court adopting opinion of the District Court of Appeal see 267 P. 542.

3. Master and servant **405(4)—Finding that knee injury, while running to catch truck, did not arise in course of employment, held sustained.**

Evidence held sufficient to support finding of Industrial Accident Commission that injury to knee of employee, while running to catch truck on highway, was not caused by injury arising out of or occurring in course of his employment.

Proceeding under the Workmen's Compensation Insurance & Safety Act by Dudley Newton, Jr., a minor, by his guardian ad litem, Mrs. Dudley Newton, opposed by H. Brown and the Eagle Indemnity Company. To review and annul a decision of the Industrial Accident Commission of California denying compensation, petitioner brings certiorari. Affirmed.

Bronson, Bronson & Slaven, of San Francisco, for petitioner.

G. C. Faulkner, of San Francisco, for respondent.

R. P. Wisecarver, of San Francisco, for respondent Eagle Indemnity Co.

PLUMMER, J. This cause is before us upon the application of the petitioner for a writ of certiorari to review and annul the decision of the Industrial Accident Commission denying compensation to the above-named petitioner. The facts in this matter are uncontradicted. The record shows the following: Dudley Newton, a boy 20 years of age, was in the employ as a general roustabout of H. Brown, a highway contractor, on or about October 6, 1926, and had been in such employment for some months. On the 6th day of October, 1926, while working in the county of Yolo, on a public highway, he was sent by his employer to a point about one mile distant on the highway to get a truck. He went to a point on the highway where he knew the truck would pass, and waited for it. As he was waiting, the truck came along, but at about the same instant of time another automobile passed between the truck and the boy, so, being afraid, as the boy testified, that the truck driver did not see him, he halloed to the truck driver, and ran down the highway after the truck. The truck slowed down, and, as the boy was running along the dirt portion of the highway, he heard or felt his knee snap. He did not fall, although he felt his leg crumple under him. He recovered without falling, and continued to the truck, got on the truck, and rode on the truck for about one hour. His knee started to ache and swell, and his employer sent him to Dr. Harris. Hospitalization and treatment thereafter followed. On December 19, 1926, a refracture occurred when the boy stepped into a hole or depression while walking. The testimony shows that the boy did not stumble, trip over any-

thing, or step into any depression while running after the truck. The only inference that can be drawn from the testimony is that the ground on which the boy was running did not have anything to do with the injury, and that the troubles of the kneecap simply occurred as the boy was running after the truck. The opinion testimony of the attending physician and surgeon, Dr. Harris, is as follows:

"From this man's history, and from the fact that there was no bruise, excoriation, or contusion at or about the knee joint, I would be led to believe that the fracture of the patella was caused spontaneously while the boy was running to catch a truck. I do not believe there was any extraordinary strain or trauma or exaggerated movement, but that the fracture occurred as a result of the normal motion of the leg in running. The recurrence, in my opinion, was not caused by an extraordinary movement, but simply by a misstep. Operative findings at the second setting showed the fracture to have recurred through previous fracture lines. I do not believe there was any period of partial disability following either fracture."

The testimony of Dr. Harbaugh is as follows:

"A fracture of the patella could occur in the manner described in the record, without any particular accidental feature."

Upon these facts the commission found as follows: (1) Dudley Newton, Jr., aged 20, was employed as a roustabout on October 5, 1926, at Sacramento, Cal., by H. Brown, whose insurance carrier was Eagle Indemnity Company, a corporation; (2) on said date, while running, the employee sustained spontaneous fracture of the patella of the left knee; (3) the evidence does not establish that said fracture was caused by injury or strain arising out of or occurring in the course of his employment.

[1] Compensation was accordingly denied. A petition for a rehearing being denied, application was made to this court for a writ of certiorari. By finding that the injury to the petitioner's patella was spontaneous, the commission found, in effect, that the injury was the result of some internal impulse, energy, or natural law without external force; that being one of the definitions of the term used by witnesses. In other words, the finding of the commission is that the injury to the minor resulted from an inherent defect in the patella, although the record does not show any previous diseased condition of the patella, or that the petitioner had experienced any previous trouble therewith. The finding can only be interpreted in the light that the injury resulted from an inherent defect, and not through any extraneous, accidental, or inducing cause, and therefore did not arise out of the course of the minor's employment, or by reason of his employment,

but simply occurred during the course of, or time of, employment. It would appear that the theory of the commission was and is that the injury complained of is a matter which would come, probably, under health insurance, and not under the provisions of "the Workmen's Compensation, Insurance and Safety Laws." That the injury occurred during the time of employment or during the course of employment is unquestioned. The testimony of the petitioner shows that the injury to the patella of his left leg occurred while he was on a mission to obtain a truck for his employer. The testimony of the petitioner likewise shows that there was no extraneous or outside force or accidental means present to induce or produce injury to the patella. While the layman would naturally infer that the running of the petitioner caused the patella to snap, there is no testimony to that effect. The testimony only is that it occurred while the petitioner was running. The medical or expert testimony is to the effect that there was no extra strain upon the kneecap, but "that the fracture occurred as a result of the normal motion of the leg in running." While the word "accident" has been eliminated from section 6 of "The Workmen's Compensation Act" (St. 1917, p. 834) the phrase "arising out of, and in the course of the employment" has been interpreted to mean that the injury must result by reason of the employment in which the employee is engaged, and not by reason of some inherent natural defect which simply culminates during the time of employment. In other words, if the agency which culminates in a physical injury is an inherent defect, and not an outside cause, or if the injury is not superinduced by some extraordinary movement or action, compensation is not allowable. Again, as stated in *William Simpson Construction Co. et al. v. Industrial Accident Commission*, 74 Cal. App. 239, 240 P. 58:

"In the first place, the burden of proof is upon the applicant to prove that the injury received was one which would sustain an award. It must be conceded that the burden is upon the applicant for compensation to show that the injury arose out of as well as in the course of the employment; and there is no presumption, as contended by respondents, that because an injury occurs in the course of the employment it arises out of or because of that employment." *Eastman Co. v. Industrial Accident Commission*, 186 Cal. 587, 200 P. 17.

[2, 3] Likewise, in the *Simpson Case*, it was also held:

"Whenever the subject under consideration is one within the knowledge of experts only, and is not within the common knowledge of laymen, the expert evidence is conclusive upon the question in issue."

Again, this court is not in a position to draw its own inferences from the testimony

set forth in the record and conclude therefrom that the petitioner is or is not entitled to compensation. Our jurisdiction extends only to the ascertainment of whether there is testimony in the record, and was testimony before the commission supporting its findings. As said in *Dearborn v. Industrial Accident Commission*, 187 Cal. 591, 203 P. 112, quoting from the case of *Southern Pacific Co. v. Industrial Accident Commission*, 177 Cal. 378, 170 P. 822:

"This court, in reviewing awards of the commission, is not acting as the court of appeal. It has no power to waive the effect of positive evidence. It must assume that the commission believed all the evidence given which tends to sustain the award. * * * The findings are not subject to review except in so far as they may have been made without any evidence whatever in support thereof."

The opinion of the medical experts in this case is of the same binding force and effect after the commission has acted thereon as any other portion of the testimony set forth in the record. Neither layman nor expert has testified that the injury was not "spontaneous." The opinion of the experts that it was such is admissible testimony, and, when the commission has acted thereon and so found, the law seems to be well settled that appellate courts are bound thereby. This statement of the rule appears in the case of *Tartar v. Industrial Accident Commission*, 191 Cal. 703, 218 P. 39, to wit:

"It is well settled that the findings of the Industrial Accident Commission upon questions of fact are conclusive, and are not subject to review where there is any substantial evidence to support them"—citing a number of California cases.

Further, to the same effect, and also as to the definition of the term "arising out of, and in the course of the employment," we may cite the case of *Storm v. Industrial Accident Commission*, 191 Cal. 4, 214 P. 874, where it is said:

"An injury, in order to be compensable under the terms of the Compensation Act, * * * must have been sustained by the employee 'arising out of, and in the course of the employment,' and must have been 'proximately caused by the employment.'"

The opinion in the *Storm Case* then quotes the following, which is supported by a number of authorities:

"The accidents arising out of the employment of the person injured are those in which it is possible to trace the injury to the nature of the employer's work, or to the risks to which the employer's business exposes the employee. The accident must be one resulting from a risk reasonably incident to the employment." "But it excludes an injury which cannot fairly be traced to the employment as a contributing proximate cause."

If the expert testimony in this case had been to the effect that the injury to the petitioner's left patella resulted from some extraordinary strain or accidental stumbling or striking against some protruding object on the highway, then and in that case a finding that compensation was allowable could readily have been upheld under the ruling of this court in the case of *Elk Grove District v. Industrial Accident Commission*, 34 Cal. App. 589, 168 P. 392, where the petitioner suffered an injury by reason of an extraordinary strain in the course of her employment in endeavoring to remove heavy benches or seats from in front of a bookcase in order to obtain a desired book to be used in connection with her duties as a teacher. The finding in this case is based upon testimony of medical experts exactly contrary to that in the case just cited, and whether correct or incorrect, supports the finding of the commission, and by that finding we are bound. It being a question of fact as to whether the injury to the petitioner arose out of or in the course of his employment, or was simply spontaneous, and occurred during the time of his employment, and that fact, being found adversely to the petitioner's contention, and being based upon the expert testimony to which we have referred, supports the findings of the commission, and, being a question of fact determined by the commission, cannot be disturbed upon appeal. The only question of law involved herein is as to whether there is any testimony supporting the finding of the commission, and, having found such testimony, our inquiry there stops.

The decision of the commission is affirmed.

We concur: FINCH, P. J.; HART, J.

WITTER et ux. v. BANK OF MILPITAS
et al.* (Civ. 6047.)

District Court of Appeal, First District, Division 2, California. Dec. 13, 1927.

Hearing Granted by Supreme Court Feb. 9, 1928.

1. Mortgages $\S$ 369(7)—Evidence held to sustain finding beneficiary of trust deed had not waived provision authorizing it on interest default to consider whole debt due, and require trustee to sell.

Finding that trust deed provision, on default of payment of interest on secured debt, beneficiary could consider whole debt due and payable, and, on written application, require trustee to sell, had not been waived, *held* warranted by the evidence.

2. Appeal and error $\S$ 1041(1)—Sale under trust deed will not be disturbed, where findings against contention of unfairness were supported by conflicting evidence.

Findings against plaintiffs' contention that unfair advantage was taken of them in sale un-

der trust deed will not be disturbed, where record showed that as to some of the findings there was no evidence contradicting them, and, as to others, evidence was conflicting.

3. Mortgages $\S$ 341—Sale under trust deed is not void merely because trustee was officer in beneficiary corporation.

Sale made under trust deed by trustee who is also officer in beneficiary corporation is not void merely because of trustee's relation to beneficiary.

4. Mortgages $\S$ 369(7)—Evidence held to show that trustee did not wrongfully withheld portion of proceeds of sale paid for necessary work on premises authorized by trust deed.

Where plaintiffs, in attack on sale made under trust deed empowering trustee to care for property, claimed that portion of proceeds from sale was wrongfully withheld, evidence *held* sufficient to show trustee had not wrongfully withheld portion of proceeds paid for such care.

5. Mortgages $\S$ 342—Where beneficiary under trust deed was empowered to appoint new trustee, and it did so, sale by new trustee carried title.

In attack on trustee's sale under trust deed, which provided that beneficiary could at any time appoint successors of trustees named in instrument who should have same power as original trustee, and beneficiary appointed such other trustee who conducted sale, *held* such sale was good, since, on appointment, new trustee became vested with title to trust premises.

6. Mortgages $\S$ 369(1)—Statutes authorizing court to appoint expert to investigate and testify, and statutes as to mode of transfer, *held* inapplicable to action to set aside foreclosure of trust deed (Civ. Code, $\S\S$ 1091-1135; Code Civ. Proc. $\S$ 1871 as added by St. 1925, p. 305).

In attack on sale made by trustee under trust deed, where plaintiff invoked Civ. Code, $\S\S$ 1091-1135, providing mode for transfer of real property, and Code Civ. Proc. $\S$ 1871, as added by St. 1925, p. 305, empowering court to appoint expert to conduct investigation and report to court, *held* statutes were inapplicable.

7. Mortgages $\S$ 354—Notice of sale under trust deed that should have read "front door of county courthouse," but omitted word "house," *held* cured by reference to recorded deed containing correct information.

In attack on trust deed providing that, in making sale, trustee should publish time and place of such sale at "front door of county courthouse," and notice, as published, omitted word "house," and was worded "front door of county court," but contained exact reference to book and page where deed was recorded, which contained correct information, *held* that reference in deed cured slight defect in published notice.

8. Appeal and error $\S$ 662(1)—Where record contained no evidence contrary to finding of court, contention that finding was not sustained by evidence *held* unavailing.

Where sale under trust deed was attacked on ground that notice was not published in news-

paper of general circulation, and notice was published in paper decreed by superior court to be newspaper of general circulation two years prior to date of sale, but record contained nothing to show that finding was not sustained by evidence, it cannot be so argued.

9. Mortgages ⚡357—Where there was no request to adjourn sale under trust deed, plaintiffs cannot complain because there was but one bidder.

In attack on sale made under trust deed, where only one bid was made, and no request was made that sale should be adjourned, plaintiff may not complain, in absence of other facts supporting claim, that sale should have been adjourned.

10. Mortgages ⚡363—Sale under trust deed was not nullity because representative of beneficiary made bid without written instructions; writings subsequently made being sufficient.

In attack on sale made under trust deed, where plaintiffs contended that attorney for beneficiary appeared at sale, and made bid, which was nullity because he had no written instructions at time, and no writing was issued or money passed, *held*, it was not necessary to have written instructions, or that contract be executed on doorsill of courthouse at time of sale, but writings subsequently made were sufficient.

11. Mortgages ⚡349—Sale made by trustee under trust deed, not conducted by licensed auctioneer, held at "public auction" within meaning of deed.

In attack on sale made under trust deed on ground that sale was not made at public auction, and was therefore void because not conducted by licensed auctioneer licensed by city of San Jose, under Charter art. 1, div. 2 (St. 1915, p. 1874), where no ordinance was introduced to show that auctioneers were licensed or regulated, words "public auction" must be taken in ordinary sense, and in that sense sale complied with terms of deed.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Auction.]

12. Mortgages ⚡360—Trust deed, authorizing two trustees to make sale, neither directed nor required that two attend sale, and sale by one was good.

In attack on sale made under trust deed by one trustee on ground that it was void, where trust deed authorized two trustees to make sale, *held*, that sale was good, since trust deed neither directed nor required two should attend sale, nor that both as in a duet conduct the auction.

13. Mortgages ⚡360—Notes need not be taken up by trustees selling under trust deed, where deed does not so provide.

Attack on sale made under trust deed on ground it was without consideration, since notes were not taken up by trustees, was not good, since, if makers wanted notes surrendered to them, it was their duty to apply therefor.

14. Mortgages ⚡364—Requirement for payment of price in cash at sale under trust deed did not require beneficiary purchasing to actually transfer cash to trustee and receive it back in payment of debt (Civ. Code, § 3532).

Beneficiary purchasing at trust deed sale *held* not required to actually pay cash to trustee and receive it back in payment of debt, notwithstanding cash provision of trust deed; Civ. Code, § 3532, not requiring idle acts.

15. Appeal and error ⚡762—Errors of law first raised in closing brief will not be considered.

Errors of law, first discussed in closing brief, will not be considered, since they should have been presented in opening brief.

Appeal from Superior Court, Santa Clara County; P. F. Gosbey, Judge.

Action by George F. Witter and wife against Bank of Milpitas and others to set aside a sale under deed of trust. Judgment for defendants, and plaintiffs moved for new trial, which was denied. From a judgment for defendants, and denial of new trial, plaintiffs appeal. Affirmed.

George F. Witter, of Oakland, for appellants.

C. L. Witten and William H. Johnson, both of San Jose, for respondent Bank of Milpitas.

L. D. Bohnett, of San Jose, for respondents Ramstad.

STURTEVANT, J. The plaintiffs commenced an action against the defendant bank and its grantee to set aside a sale made by the trustees under a deed of trust. The defendants appeared and answered, and a trial was had in the trial court before the court sitting without a jury. The court made findings in favor of the defendants, and a judgment was entered thereon. The plaintiffs made a motion for a new trial, the motion was denied, and the plaintiffs have appealed, bringing up a bill of exceptions. The portions of the record necessary to the consideration of any given point will be stated in connection with the discussion of the point.

[1] 1. The plaintiffs complain because they were not given actual notice of the intended sale. The trust deed did not contain a provision requiring actual notice. On the contrary, the sixth paragraph provided that, if the debtor failed to pay his interest at the time provided, in that event the beneficiary might consider the debt as immediately due and payable, and that the trustees on the written application of the beneficiary might proceed to sell the property. The plaintiffs contend that the defendant bank waived the provision just referred to by its conduct. They call to our attention that, from the time the loan was negotiated, they were frequently in arrears in the payment of interest, etc., and, notwithstanding that fact, their pay-

ments were accepted when tendered, and they cite and rely on the rule stated in *Boone v. Templeman*, 158 Cal. 290, 295, 110 P. 947, 139 Am. St. Rep. 126. The defendants do not question the doctrine of that case, but contend that the facts of the case at bar do not bring it within the rule. They call to our attention the conversations and correspondence set forth in the bill of exceptions. Turning to the bill of exceptions, it will be noted at once that the plaintiffs received their loan from the bank on the 19th day of January, 1915. It will also be noted that, by reason of the nonpayment of interest, the bank wrote to the plaintiffs on June 9, 1916, exercising its option to declare the principal due and payable. That act was never canceled. Thereafter numerous letters were sent to the plaintiffs by the defendant bank asking for its money. Excepting only the last payment, from the day the notes were signed until the very last payment, the payments made were made when the plaintiffs were in default, and no single payment paid all interest then due. The last payment paid the interest five days in advance. During the same time the plaintiffs were promising to pay, asking for extensions, and representing that they were negotiating a sale of the property so that they could take up the loan. On July 29, 1918, the bank wrote the plaintiffs that they could have an extension of time providing they paid up the interest due July 19, 1918, back taxes, and kept the interest paid up promptly, and kept some one on the place to take proper care of it. The letter closed with the statement: "You have ten days from date in which to make the payment as above provided." The interest mentioned was not paid until December 14, 1918. The discussions continued as above stated, and in October, 1918, Mr. Witter had a conversation with Mr. Reed, the vice president of the bank, regarding the possible foreclosure. Referring to that conversation, the plaintiff testified that Mr. Reed said no foreclosure would be undertaken without notice to the plaintiffs. Mr. Reed testified that he never made the statement. In December, 1918, the bank again threatened foreclosure in a letter addressed to Mr. Gehring, attorney for Mrs. Blais, who held a second trust deed. Mr. Gehring informed the plaintiffs. They handed to him a check for the interest. He delivered the check to the bank, and, at the time of the trial, he testified that on accepting the check "they said the loan was satisfactory." There was no evidence that Mr. Gehring was acting for the plaintiffs, nor that he repeated to them "that they (the bank officials) said the loan was satisfactory." The court found against the plaintiffs on the issue of lulling them into inactivity. The finding is sustained. *Sargent v. Shumaker*, 193 Cal. 122, 134, 223 P. 464. The payment last mentioned paid the interest to

December 19, 1918. No further payments were made, and, on February 4, 1919, the board of directors of the defendant bank ordered its agents to cause a sale of the premises.

[2] The plaintiffs contend that an unfair advantage was taken of them. They assert that they learned the foreclosure had taken place on March 24, 1919, and that on March 28, 1919, Mr. Gehring and Mr. Blais called at the bank and offered to pay plaintiffs' indebtedness, and the bank refused the offer. They call to our attention that on March 27, 1919, the defendant bank adopted a resolution to sell the property to A. G. Ramstad for \$8,500, whereas the bank had foreclosed on it for \$6,425.05. The plaintiffs cite and rely on *Winbigler v. Sherman*, 175 Cal. 270, 165 P. 943. In that case, at page 275 (165 P. 946), the court quotes with approval as follows:

"Where the inadequacy is palpable and great very slight additional evidence of unfairness or irregularity is sufficient to authorize the granting of the relief sought."

In their brief the plaintiffs cite many probative facts. Before we proceed to consider those probative matters, it is necessary to consider the state of the record. Those probative facts were introduced in response to the allegations of the complaint of the plaintiffs, wherein the plaintiffs had alleged separately: (1) Numerous irregularities on the part of the trustees; and (2) numerous fraudulent acts on the part of the trustees and the defendant bank. The trial court made findings in response to each of said allegations. Each and all of those findings are against the plaintiffs. The plaintiffs contend that such findings are not supported by the evidence. As to some of the findings, there was no evidence contradicting them, and as to some of the other findings the evidence was conflicting. This court may not disturb them.

[3] In connection with this point we understand the plaintiffs to contend that Mr. Giacomazzi could not act as trustee because he was an officer of the defendant bank. They cite and rely on *Wickersham v. Crittenden*, 93 Cal. 17, 28 P. 788. The case cited is not helpful. It was on an altogether different set of facts. The rule applicable is stated in *Copsey v. Sacramento Bank*, 133 Cal. 659, 66 P. 7, 204, 85 Am. St. Rep. 238; and *Herbert Kraft Co. v. Bryan*, 140 Cal. 73, 79, 73 P. 745.

[4] The plaintiffs say that the claim of the bank, "including costs and expenses of sale, was \$6,425.05"; that the property was sold for \$6,525.05; and they assert that the trustees have wrongfully failed to pay them the balance claimed to be \$100. Between the date of the execution of the notes and the date of the sale the property was vacant at times and in need of care. The trust deed

authorized the bank or the trustees, "4. * * * to enter, hold, protect, repair, and care for said property, including improvements, trees, vines and crops thereon, as they or either of them see fit * * * all at the trust and charge of said trustors. * * *" It also authorized the trustees, after sale made, out of the proceeds to pay "6. * * * first the expenses of sale and these trusts including reasonable compensation for their services, counsel fees of \$200, and cost of certificate or abstract of title to time of sale, all to accrue on any default of said trustors hereunder, next all amounts with interest due from said trustors pursuant to paragraph fourth of this instrument. * * *" The attorney for the bank, Mr. Witten, made the bid. He testified:

"The amount of the bid made by me was \$6,525.25, and was made up of principal and interest, \$6,300.05, advertisement, \$25.00, attorneys' fees, \$200.00. One hundred of my fee went to pay a party who had done work on the orchard."

There was no cross-examination and no contradictory evidence. It is clear that the trustees do not wrongfully withhold \$100 or any other sum.

[5] 3. The third point made by the plaintiffs is that there was no devolution of title. The point involves a consideration of the following fact: The deed of trust, as originally executed, conveyed the property to M. Lynn and A. L. Crabb as trustees. It also provided that, in the event of a default, the trustees could sell the property. Furthermore, it provided (omitting irrelevant parts):

"Said beneficiary may, at any time by instrument in writing appoint a successor, * * * or discharge and appoint a new trustee in the place of any trustee named herein or acting hereunder, * * * who shall have all the estate, powers, and duties of said trustee predecessor."

By an instrument in writing dated March 6, 1917, the bank appointed E. P. Giacomazzi in the place and stead of M. Lynn. Thereafter Giacomazzi and Crabb conducted the trustee sale and conveyed the property. Lynn did not join nor did he execute a deed. Under the facts it was not necessary. Wood v. Gridley, 217 Ill. App. 579. At page 585 the court said:

"Upon the appointment being made under the power, the new trustee becomes vested, ipso facto, with the title to the trust premises and is clothed with the same power as if he had been originally named in the will. No conveyance need be made to him by the former trustee, or by the former trustee's heirs or representatives, if he be dead. Craft v. Indiana, D. & W. Ry. Co., 166 Ill. 580 [46 N. E. 1132]; Reichert v. Missouri & I. Coal Co., 231 Ill. 238 [83 N. E. 166, 121 Am. St. Rep. 307]; Edwards v. Edwards, 22 Ill. 121; 39 Cyc. 312, and cases cited."

[6] The plaintiffs invoke sections 1091-1135 of the Civil Code and section 1871 of the

Code of Civil Procedure, as added by St. 1925, p. 305. Those sections have no application to the facts.

[7] 4. The trust deed provided that in making a sale the trustees should "publish the time and place of such sale * * * at public auction at the front door of the county courthouse in the county of Santa Clara. * * *" The notice as published omitted the word "house," and was worded "front door of the county court in San Jose." There is no claim that the sale as made was not made at the front door of the county courthouse at San Jose in the county of Santa Clara. The notice as published contained an exact reference to the date, parties, and the book and page of the recordation of the trust deed. That deed contained the correct information. That reference cured the slight defect of which the plaintiffs complain. *Lau v. Scribner*, 197 Mich. 414, 163 N. W. 914, and cases there cited. See, also, *Hinds v. Clark*, 173 Cal. 49, 54-55, 159 P. 153.

[8] 5. In this same connection it is contended that the notice was not published in a newspaper of general circulation. The notice was published in the *Daily Record*. A decree of the superior court adjudging the *Daily Record* to be "a newspaper of general circulation" was introduced in evidence. The trial court made findings on the issue against the plaintiffs. As we understand, the plaintiffs contend that the adjudication was made two years prior to the date of the sale, and that the adjudication is no evidence that the *Daily Record* was, at the time of the sale, a newspaper of general circulation. There was no evidence that the judgment determining the status of the *Daily Record* had been vacated. There is nothing in the record, therefore, from which it can be argued that the findings made by the trial court on this branch of the case are not sustained by the evidence. In *re Simpson*, 62 Cal. App. 549, 217 P. 789.

[9] 6. In making their sixth point, the plaintiffs state that the trustees did not do their duty, and continue the sale for want of bidders. They point out that there was only one bidder, the officer of the bank; they call attention to the fact that it is their claim that the property was sold for a little over \$6,000 when it was of a value of nearly \$25,000; and they argue that to uphold the sale would be to uphold a set of facts that was tantamount to a fraud. The argument would be impressive, if it were sustained by the record. But the record discloses that, at the time of the sale, there was only one bid. There was no request made by any one that the sale should be adjourned to a day certain. The court found that the property was not of a value of \$25,000, and that it could not have been sold for more than \$8,500. That finding is supported by the evidence. In the absence of any other facts

supporting the claim that the sale should have been adjourned, the plaintiffs may not complain. *Freeman on Void Judicial Sales*, § 32.

[10] 7. It is next contended that there was no sale. That fact was alleged in the plaintiffs' complaint, and the trial court made findings against the plaintiffs. In presenting the point to this court, we understand the plaintiffs to contend that, when Mr. Witten, the attorney for the bank, appeared at the sale and made a bid, his act was a nullity because he held no written instructions at the time, no writing was issued at the time, and no money was passed at the time. It was not necessary that he hold written instructions, nor that a contract be executed on the doorsill of the courthouse at the time of the sale, nor that money should pass at that same time and place, nor that the notes be surrendered. The writings subsequently made were sufficient. *Bank of Orland v. Finnell*, 133 Cal. 475, 478, 65 P. 976.

[11] 8. The eighth point made by the plaintiffs is that the sale was not made at public auction, and was therefore void. In other words, they contend that, because the auction was not conducted by a licensed auctioneer, then it was not a public auction. The power to license is vested in the city of San Jose by virtue of the terms of its charter, article 1, division 2. See *Stats.* 1915, p. 1874. No ordinance was introduced which shows that auctioneers are licensed at that place or which purports to regulate auctions or define what is a public auction. The words "public auction" are not defined by statute, and therefore they must be taken in their ordinary sense. *Estate of Gird*, 157 Cal. 534, 542, 108 P. 499, 137 Am. St. Rep. 131. Construed in that sense, the trustees fully complied with the terms of the deed.

[12] 9. The plaintiffs contend that the sale was made by one only of two trustees, and therefore void. They note the fact that the sale was actually conducted by *Giacomazzi*. The rest of their argument is the same as made under division 3, *supra*. For the reasons there stated, it is clear that the argument is without merit. Moreover, the deed of trust authorized the two trustees to make the sale. It neither directed nor required that the two should attend the sale, nor that both as in a duet conduct the auction.

[13, 14] 10. It is next contended that the sale was made without consideration. In this connection the plaintiffs make two complaints—they object because the trustees did not take up the notes and return the notes to the makers, and they object because the trustees did not require the bank to pay cash. As to the first complaint, it does not come within the terms of the trust deed. It is wholly silent on the subject. If the makers

wanted the notes surrendered to them, it was their duty to apply to the bank therefor. As to the second complaint, it is quite clear that the deed provided that the sale would be for cash; however, if the beneficiaries bid at the sale, the deed contained no language that commanded the trustees to require that the bank carry to the sale a sack of cash, make its bid, obtain its deed, pay in cash, and then demand back the cash and credit it as a payment on the notes. Having determined their duty to make a sale, the trustees had the right to conduct it as they did. The idle act of carrying around the sack of cash is not mentioned in the contract, and "the law neither does nor requires idle acts." *Civ. Code*, § 3532. In *Voorhies v. Voorhies*, 66 Misc. Rep. 78, 82, 120 N. Y. S. 677, at page 681, the court said:

"1. As the deed gave to the trustee a power in trust to sell and turn over the proceeds as he chose, to the extent of all the proceeds, equity will deem it a valid exercise of his powers to turn over the real property instead. * * * The same reasoning, applied in all the cases giving the beneficiary the right of election to take the property instead of the money, applies equally to these assumed facts, if the trustee were willing to convey the property directly, instead of selling and turning over the proceeds. While the beneficiaries could not elect or compel the trustee to convey the property and thus terminate the trust, yet, when the trustee had himself determined, in the exercise of his discretion, that he would thus terminate the trust by selling and turning over the proceeds, there is no reason why he could not instead convey the property directly. This he did, by his deed of January 25, 1875, giving good title to John James Voorhies and his wife."

11. The plaintiffs contend that plaintiffs have been deprived of their property without due process of law. That point is but another method of arguing the contentions presented in the preceding divisions. For the reasons stated above, the point must be ruled against the plaintiffs.

[15] We have taken up and discussed each point made in the opening brief. In their closing brief the plaintiffs, for the first time, set forth certain errors of law. There are two reasons why we do not take up each one and discuss it. If the plaintiffs relied on said errors or any one of them, the plaintiffs, in fairness to the defendants and to the court, should have presented such points in their opening brief. 2 Cal. Jur. p. 734, § 424. In the second place, it is clear, if we make a detailed comparison, that the points stated in the opening brief were but another method of stating the errors of law which plaintiffs enumerate in their closing brief.

We find no error in the record. The judgment is affirmed.

We concur: KOFORD, P. J.; NOURSE, J.

87 Cal. App. 787

RUTLEDGE v. RUTLEDGE. (Civ. 3389.)

District Court of Appeal, Third District, California. Dec. 24, 1927.

1. Divorce ⇨133(3)—Evidence of cruelty and removal of furniture and stove held to justify wife in leaving residence and warrant granting her divorce for desertion (Civ. Code, §§ 98, 104.)

Evidence of cruelty and removal of wife's furniture and stove held to justify wife in leaving residence and to warrant granting her a divorce for desertion under Civ. Code, § 98, providing that departure of one party from family dwelling caused by cruelty or threats of bodily harm is not desertion by the absent party, but is desertion by the other, and also under Civ. Code, § 104, providing that, if place selected by husband is unfit and wife does not conform thereto, it is desertion by husband from the time her reasonable objections are made known to him.

2. Divorce ⇨152—Decree reciting that an interlocutory divorce decree "should be granted plaintiff" held sufficiently definite to constitute "interlocutory decrees" under statute (Civ. Code, § 131.)

Decree reciting that "an interlocutory decree of divorce should be granted the plaintiff from the defendant on the grounds of desertion" held sufficiently definite to constitute an interlocutory decree, establishing plaintiff's right to a divorce, under Civ. Code, § 131, providing that, if court determines divorce should be granted, an interlocutory judgment must be entered declaring that party in whose favor court decides is entitled to a divorce.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Interlocutory Decree or Judgment.]

Appeal from Superior Court, Los Angeles County; C. W. Guerin, Judge.

Action for divorce by Rosa L. Rutledge against Gilbert W. Rutledge. Judgment for plaintiff, and defendant appeals. Affirmed.

E. W. Widney and Lorrin Andrews, both of Los Angeles, for cross-complainant and appellant.

Willis O. Tyler, of Los Angeles, for cross-defendant and respondent.

PLUMMER, J. Plaintiff had judgment in an action for divorce on the ground of desertion, and the defendant appeals.

It appears from the transcript that prior to the 1st day of September, 1923, the plaintiff had been occupying a certain residence constituting the community property belonging to the plaintiff and the defendant; that the defendant for some period of time had been occupying a garage situate on the same lot as the residence occupied by the plaintiff. It also appears that up until said date some litigation had been pending between the plaintiff and the defendant, and that the de-

fendant had been enjoined from entering upon the residence occupied by the plaintiff. On the 1st day of September, 1923, the complaint alleges, the testimony in the transcript shows, and the court found, that the defendant went to the house occupied by the plaintiff, tore open the screen door, broke the fastening hook thereon, entered the building and room occupied by the plaintiff, and removed from the front bedroom the furniture which the plaintiff was then and had theretofore been using in connection with her occupancy of the house referred to; that at the same time the defendant disconnected the gas range that plaintiff had used while occupying said residence, removed the same from the house, and left plaintiff no means for preparing her meals, heating water, etc.; that the defendant, in entering said house, did so with the intention then and there to abandon the plaintiff and force her from his company, etc. The court further found that the defendant did not return to said residence on the 1st day of September, 1923, for the purpose or with the intention of peaceably and properly occupying said home as his natural and lawful right. The court further found the existence of the community property of the value of about \$5,000 described in the complaint. The substance of the findings of the court is to the effect that the conduct of the defendant was such as to compel the plaintiff to leave the residence referred to, and that such conduct constituted desertion on the part of the defendant under the provisions of section 98 of the Civil Code.

[1] The contention made upon this appeal is not so much that the evidence is insufficient to support the finding of the court that the defendant's conduct was such as to justify the plaintiff in leaving the residence referred to, but that there is no corroborating testimony. In the first place, attention may be called to the testimony of the plaintiff on cross-examination partly set out in the appellant's opening brief. After setting forth the acts of the defendant in relation to the defendant forcibly entering the house occupied by the plaintiff, and his acts and conduct toward her, the appellant's brief sets forth the following:

"When asked if she left her home after this, she testified as follows: 'Possibly I might have stayed there after that, I guess maybe three or four days. Nothing happened there all that time between Mr. Rutledge and me.'"

Basing his argument upon this excerpt of the testimony, it is argued that the plaintiff shows thereby that she was not afraid of the defendant, and that nothing that he had done had put her in fear of any bodily injury or such as to induce in the mind of the plaintiff apprehension as to any future misconduct on the part of the defendant. This excerpt from the testimony, however, whether inten-

tionally or otherwise, omits the vital and significant portion thereof. The testimony of the plaintiff, from which this excerpt is lifted, is as follows:

"I was afraid of him when he first came to the door. After the police went away I went back to the house and I did stay there that night. Nothing happened because I got Yale locks put on the door that afternoon so I could stay locked in there. I locked myself in the room. Possibly I might have stayed there after that, I guess, maybe three or four days. Nothing happened there all that time between Mr. Rutledge and me. He could not get to me. If he was in, I was locked up when he was there. I could not stay in the house all that time, because I could not stay shut up in one room all the time. That was the only room I had to be in, that one room."

Comment is unnecessary. At the time the defendant forced his way into the premises occupied by the plaintiff, removed the plaintiff's belongings from the room that she had occupied, disconnected and took out the gas stove used by the plaintiff, and installed the stove used by himself and placed his own furniture in the bedroom from which he had removed the belongings of plaintiff, the defendant was assisted by two men who were called and examined and testified as to all of the acts testified to by the plaintiff, save and except as to the testimony of the plaintiff that defendant had seized her by the throat, which they did not see, and also pushed her over a slight railing. The defendant also testified upon the stand that at one time he did strike his wife; that his wife then drew a pistol upon him, and he did not ever strike her after that. The defendant also testified:

"I pushed her back. I just pushed her back. She kept trying to claw my eyes out; jumped on me like a tiger. I knew her point; I knew what she was up to; I just pushed her away. She caught hold of the banisters, stepped over; I think it was her dress being so narrow is what kind of threw her. She fell over; she fell down," etc.

There was considerable testimony as to the screams of the plaintiff and the noise made, which is wholly immaterial and need not be further referred to. The defendant, in his testimony, denied his intent to separate himself from the plaintiff or to drive the plaintiff from the premises, but this denial of intended desertion on the part of the

defendant is rebutted by the following significant fact: On the 5th day of September, 1923, after a four days' trip from South Carolina, a daughter of the defendant by a different wife arrived in Los Angeles in response to a letter that she had received from the defendant notifying her to come to Los Angeles, as he intended to make a place for her in the house into which he entered on the 1st day of September, 1923. This conclusively shows that he intended to make a place for his daughter to keep house for him by forcibly ejecting the plaintiff therefrom. All of which sufficiently corroborates the testimony of the plaintiff as to the acts and conduct of the defendant. Such conduct brings this case also within the terms of section 104 of the Civil Code. We think the finding of the court that the plaintiff reasonably apprehended danger from the hands of the defendant, sufficiently sustained, and that the defendant's conduct justified the plaintiff in leaving and remaining away from the premises referred to, and that such conduct on the part of the defendant constituted, in law, desertion.

[2] Appellant also urges that the trial court erred herein in its interlocutory decree, and that in fact no interlocutory decree has been entered. The language used by the court is as follows:

"That an interlocutory decree of divorce should be granted the plaintiff, Rosa L. Rutledge, from the defendant, upon the grounds of desertion."

Section 131, Civil Code, reads:

"* * * If it determines that the divorce ought to be granted, an interlocutory judgment must be entered, declaring that the party in whose favor the court decides is entitled to a divorce."

While the language used by the trial court in its interlocutory decree does not follow the literal wording of section 131, Civil Code, we think it sufficiently definite to all intents and purposes to constitute an interlocutory decree establishing the right of the plaintiff to a divorce. No complaint is made as to that part of the decree settling the property rights of the parties to this action.

There appearing no reason why a new trial should be granted herein, the judgment is affirmed.

We concur: FINCH, P. J.; HART, J.

WESTLAKE MERCANTILE FINANCE CORPORATION v. MERRITT et al. ★
(Civ. 5754.)

District Court of Appeal, First District, Division 1, California. Dec. 27, 1927.

Hearing Granted by Supreme Court Feb. 23, 1928.

1. Bills and notes ⇨343—Indorsee's knowledge that negotiable instrument was given in consideration of unperformed executory agreement does not prevent holding in due course.

Knowledge that an instrument negotiable in form was given in consideration of an executory agreement which had not been performed does not deprive indorsee of the character of a bona fide holder in absence of notice of breach.

2. Bills and notes ⇨343—Indorsee receiving bills before breach was not deprived of character of bona fide holder by recital in bills that they were accepted in consideration of purchase of goods.

Recital in bills that "the obligation of acceptor arises out of the purchase of goods from the drawer" held not to deprive indorsee of character of bona fide holder where sales contract had not been broken at time of transfer of instruments.

3. Bills and notes ⇨165—Statement of transaction of negotiable instrument does not render unqualified promise to pay conditional (Civ. Code, § 3084).

Fact that an unqualified promise to pay a negotiable instrument is coupled with statement of the transaction which gave rise to the instrument does not render the promise conditional under Civ. Code, § 3084.

4. Bills and notes ⇨165—Right of bona fide purchaser of trade acceptances containing recital that acceptors' obligation arose from purchase of goods, "maturity" "being" in "conformity" with original terms of purchase, held not impaired as against acceptors by drawer's subsequent breach (Civ. Code, §§ 1641, 1644, 1654, 3084).

In action by bona fide purchaser against acceptor of trade acceptances, reciting that "the obligation of the acceptor hereof arises out of the purchase of goods from the drawer, maturity being in conformity with original terms of purchase," it was no defense to acceptors that drawer had subsequent to time of transfer of bills breached sales contract, since "maturity" referred to due dates of instruments as conforming with dates under original terms of purchase, in view of Civ. Code, §§ 1641, 1644, 1654, 3084; and the word "being" used in recital is equivalent to "which is," and "conformity" means "correspondence in form and manner, resemblance, agreement, harmony."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Be—Being; Conformity; Maturity.]

5. Appeal and error ⇨757(3)—Printing in appellant's brief of testimony as to circumstances of purchase of bills warranted review of finding that purchaser had notice of condition (Code Civ. Proc. § 953c).

Where appealing plaintiff printed in its opening brief material portions of the testimony

of its witnesses respecting circumstances which attended purchase of bills sued on, there was a sufficient compliance with Code Civ. Proc. § 953c, requiring printing of portions of record on which appellant relies to permit review of finding of trial court that purchaser had notice that maturity of bills was conditional; rule that evidence must be printed being for convenience of court.

6. Appeal and error ⇨174—Objection to capacity of drawer or indorsee to sue cannot be urged for first time on appeal.

Question of capacity of drawer of bills to sue, or of right of indorsee of bills to maintain action thereon, must be raised by answer or objection at trial and cannot be urged for first time on appeal.

7. Appeal and error ⇨174—Objection of acceptors, sued by indorsee, that drawer doing business under fictitious name had not complied with statute, held not available for first time on appeal (Civ. Code, § 2466).

Objection that drawer of trade acceptances did business under fictitious name without having filed certificate with clerk as required by Civ. Code, § 2466, where not raised by answer or objection at trial in action by indorsee against acceptors, could not be urged on appeal.

8. Evidence ⇨594—Uncontradicted testimony of unimpeached witnesses cannot be disregarded.

Though credibility of witnesses is question for jury or trial court sitting as a jury, trier of fact is nevertheless bound by the presumption that witnesses speak the truth, and, in absence of contradictory evidence tending to impeach their credibility, their testimony cannot be disregarded.

9. Bills and notes ⇨337—Mere knowledge of facts putting prudent man on inquiry does not prevent transferee from being holder in due course (Civ. Code, § 3137).

Mere knowledge of facts sufficient to put a prudent man on inquiry, without actual knowledge, or mere suspicion of infirmity or defect in title, does not prevent transferee of negotiable instrument from occupying position of holder in due course, unless circumstances or suspicions are so obvious as to indicate bad faith under Civ. Code, § 3137.

10. Bills and notes ⇨525—Evidence held insufficient to sustain finding that indorsee suing acceptors on trade acceptances had actual notice of condition of sales agreement subsequently breached by drawer (Civ. Code, § 3137).

In action by indorsee of trade acceptances against acceptors on acceptances stating transaction arose from sale of goods, evidence held insufficient to support finding that indorsee had notice or actual knowledge of condition contained in sales agreement providing for shipment of goods within specified time and permitting return under Civ. Code, § 3137, which conditions, or some of them, were subsequently broken by drawer.

Appeal from Superior Court, Santa Clara County; P. F. Gosbey, Judge.

Action by the Westlake Mercantile Finance Corporation against Chas. A. Merritt and Chas. A. Parlier, individually and as copartners doing business under the firm name and style of Merritt & Parlier. Judgment for defendants, and plaintiff appeals. Reversed.

George H. Woodruff and Woodruff, Musick, Pinney & Hartke, all of Los Angeles, for appellant.

Elmer D. Jensen, of San Jose (H. A. Blanchard, of San Jose, of counsel), for respondents.

CASHIN, J. An appeal from a judgment entered for the defendants in an action on two bills of exchange, called trade acceptances each for the sum of \$420.

The bills were dated April 30, 1925, and were drawn on the defendants and accepted by them on the day they bore date. The instruments were drawn by Aristocrat Distributing Company, the name of this concern being affixed thereto by J. B. Vallen, were made payable on June 30, 1925, and July 30, 1925, respectively, and each contained the following recital:

"The obligation of the acceptor hereof arises out of the purchase of goods from the drawer, maturity being in conformity with original terms of purchase."

And defendants denied that the bills were due or payable, and alleged as a defense to each cause of action that maturity "was and is dependent upon conformity with the original terms of purchase, and * * * that the Aristocrat Distributing Company failed, refused, and neglected to perform the terms of purchase," and "that the Westlake Mercantile Finance Corporation, the plaintiff herein, and the assignee of said Aristocrat Distributing Company had notice that maturity of said bill of exchange was dependent upon conformity with the original terms of purchase."

The defendants conducted a mercantile business in San Jose, and the amounts for which the bills were drawn and accepted represented the price of certain washing machines which the drawer agreed to sell and deliver to the defendants. There was introduced in evidence over objection a written memorandum signed by the drawer and delivered to the defendants at the time the bills were accepted. This memorandum, by its terms which described the machines for the price of which the bills were accepted, granted to the defendants for the period of one year the sales right for Aristocrat washing machines, and contained the following provisions:

"Goods ordered below to be shipped at earliest convenience," and further "that if sufficient sales of above goods have not been made either in cash or time paper to cover amount of and before maturity of acceptances given herewith dated 90 and 120 days from date said dealer

may return at end of agreement any of above goods remaining unsold on shipping instructions furnished at the time."

The defendants also testified that the drawer agreed to ship the machines within two weeks, to furnish salesmen and advertising matter, and conduct an advertising campaign to further the sale of the machines, all of which it failed to do. According to this testimony, the machines did not arrive in San Jose until about July 3, 1925, at which time defendants refused to accept delivery, and it was shown that the latter on June 29, 1925, by registered letter addressed to the drawer, which, owing to a change in the drawer's address, was not delivered by the postal authorities, attempted to notify the drawer of their election to rescind the order on the ground of delay in delivery.

According to the witnesses for the plaintiff, whose testimony was taken by deposition, the bills were indorsed by the drawer to plaintiff on May 4, 1925, the consideration paid therefor being the sum of \$789.60, and, according to the same testimony, the purchase was made without knowledge or notice of any infirmity in the instrument. The testimony of these witnesses was not contradicted, nor were the witnesses cross-examined by the defendant.

The court found that it was agreed between the drawer and the defendants that the maturity of the bills would depend upon performance by the drawer of the original terms of purchase, that the latter had not performed, and that the plaintiff had actual notice at the time of the transfer of the bills that the maturity of both was dependent upon such performance by the drawer, and as conclusions of law therefrom that the bills were not due or payable, and that the plaintiff took the same subject to defenses.

The appeal was taken under the alternative method, and it is contended that the findings that the plaintiff had notice that the acceptances were conditional are unsupported.

It was not alleged or shown that the drawer at the time the agreement was made did not intend to perform, nor does the record disclose testimony which supports the conclusion that the indorsee had knowledge of the terms of the sales agreement or notice thereof other than the statement of the transaction contained in the recitals mentioned. Moreover, as shown by the testimony of defendants, no breach of agreement had occurred at the time the bills were indorsed to the plaintiff. The defendants contend, however, that the recitals were sufficient to put the indorsee on notice as to the provisions of the sales agreement, making the acceptances conditional, and that as a consequence the bills were not negotiable.

[1-3] Knowledge that an instrument negotiable in form was given in consideration of an executory agreement which has not been

performed does not deprive an indorsee of the character of a bona fide holder in the absence of notice of a breach (*Flood v. Petry*, 1655 Cal. 309, 132 P. 256, 46 L. R. A. [N. S.] 861; *Pratt v. Dittmer*, 51 Cal. App. 512, 197 P. 365), which in the present case had not occurred at the time of the transfer; nor does the fact that an unqualified promise to pay is coupled with a statement of the transaction which gave rise to the instrument render the promise conditional (Civ. Code, § 3084; *People's Bank v. Porter*, 58 Cal. App. 41, 208 P. 200).

[4] It is clear that the recital that "the obligation of the acceptor arises out of the purchase of good from the drawer" was but a statement of a transaction which gave rise to the instrument, but defendants contend that the concluding portion, "maturity being in conformity with original term of purchase," meant that maturity should depend upon performance by the drawer of the terms of the sales agreement, and that this agreement by reference was made a part of the acceptances.

The word "being," the present participle of the verb "be," is equivalent to "which is" (*Porter v. Ritchie*, 32 Utah. 381, 91 P. 24, 27), and has been held to be sufficient as an averment of an existing fact (*State v. Boncher*, 59 Wis. 477, 18 N. W. 335; *In re Nickodemus*, 18 Fed. Cas. 222, No. 10,254), and the word "correspondence" means "correspondence in form and manner, resemblance, agreement harmony" (*Webster's International Dictionary*).

The language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist, which is presumed to be the promisor (Civ. Code, § 1654), and in accordance with this rule it has been held that if a drawee intends to qualify or attach a condition to his acceptance he must do so distinctly and unmistakably, or his acceptance will be taken to be absolute (8 Cor. Jur., Bills and Notes, § 496, p. 323). In the present case the bills having provided definite dates of payment, viz., June 30, 1925, and July 30, 1925, the recitals when read with these provisions in accordance with the rule that contracts are to be construed as entireties (Civ. Code, § 1641), the words used being understood in their ordinary and popular sense (Civ. Code, § 1644), created no uncertainty as to when the bills should mature, but clearly referred to the due dates of the instruments as being the dates of maturity which conformed with the original terms of purchase.

It is urged by defendants that plaintiff has failed to print in its briefs, or in a supplement appended thereto, as required by section 953c, Code of Civil Procedure, the portions of the record upon which it relies in support of its contention that the finding of notice of the condition is unsupported, and, further, that it appears from the testimony that Aristocrat Distributing Company is a fictitious

name under which J. D. Vallen was conducting his business, and it not being shown that the provisions of section 2466 of the Civil Code were complied with, the action cannot be maintained.

[5] In the following cases the rule requiring the evidence relied upon on appeal to be printed was construed as one for the convenience of the court (*Oliver v. Robnett*, 190 Cal. 51, 210 P. 408; *Gibbons v. Yosemite Lumber Co.*, 190 Cal. 168, 211 P. 4; *People v. Woods*, 190 Cal. 513, 519, 213 P. 951; *O'Connor v. West Sacramento Co.*, 189 Cal. 7, 207 P. 527), and in the present case plaintiff having printed in its opening brief the material portions of the testimony of its witnesses respecting the circumstances attending the purchase of the bills, there is a sufficient compliance with the rule.

[6, 7] The question of the capacity of the drawer to sue, or of the right of plaintiff as indorsee of the bills to maintain an action thereon, was not raised by the answer or by objection at the trial, and cannot be urged for the first time on appeal. *Sweeney v. Stanford*, 67 Cal. 635, 8 P. 444; *Phillips v. Goldtree*, 74 Cal. 151, 13 P. 313, 15 P. 451; *Cook v. Fowler*, 101 Cal. 89, 35 P. 431; *Quan Wye v. Chin Lin Hee*, 123 Cal. 185, 55 P. 783; *Paff v. Ottinger*, 32 Cal. App. 439, 163 P. 230; *Helms v. Pacific Mill Co.*, 57 Cal. App. 442, 205 P. 708.

[8, 9] Defendants also contend that regardless of whether a condition was expressed in the acceptances the court was not bound to believe that the bills were purchased without notice of the condition contained in the sales agreement, and that the evidence justified a finding to the contrary. While the credibility of the witnesses is a question for the jury or the trial court sitting as a jury, they are nevertheless bound by the presumption that witnesses speak the truth, and in the absence of contradictory evidence or other facts tending to impeach their credibility their testimony cannot be disregarded. It is the declared law of the state that to constitute notice of an infirmity in an instrument negotiable in form or a defect in the title of the person negotiating the same, the person to whom it is negotiated must have actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith (Civ. Code, § 3137), and mere knowledge of facts sufficient to put a prudent man on inquiry without actual knowledge or mere suspicion of infirmity or defect in the title does not preclude the transferee from occupying the position of a holder in due course unless the circumstances or suspicions are so cogent and obvious that to remain passive would amount to bad faith (*Popp v. Exchange Bank*, 189 Cal. 296, 208 P. 113; *Goodale v. Thorne*, 199 Cal. 307, 249 P. 11).

[10] In the present case the bills were purchased for the plaintiff by its president,

whose employment, however, had ceased before his deposition was taken. This witness testified to the circumstances under which the purchase was made and the price paid, and no finding contrary to his testimony as to the amount was made. Moreover, nothing appears from his situation or the character of his testimony which would reasonably support a finding that his testimony was influenced by improper motives, nor was his account of the transaction inherently improbable. The same applies to the testimony of all the witnesses for the plaintiff, none of whom were cross-examined or contradicted, nor was the court for the reason above stated in a position to find against their credibility from the manner in which they testified.

The above testimony—and the record contains no other evidence respecting the transaction between the drawer and the plaintiff—was insufficient to support a finding that the latter had notice in fact or knowledge of the condition contained in the sales agreement, and it is manifest that the finding of notice was based upon the view of the trial court that the recitals in the bills were constructive notice of the condition.

It being our conclusion that the bills with the acceptances were in terms unconditional, and that the finding of notice was unsupported, the judgment is reversed.

We concur: TYLER, P. J.; KNIGHT, J.

88 Cal. App. 216

RYDELL v. BEVERLY HILLS PRINTING & PUBLISHING CO. (Civ. 4972.)

District Court of Appeal, Second District, Division 1, California. Dec. 31, 1927.

1. Landlord and tenant §290(5)—Defendant in unlawful detainer action cannot set up counterclaim or file cross-complaint.

In an unlawful detainer suit, a defendant cannot set up in his answer a counterclaim or file a cross-complaint, even though it arises out of subject-matter of original action.

2. Pleading §365(1)—Notice of motion to strike portion of answer designated as affirmative defense held sufficiently specific.

A notice of motion to strike portion of answer specifically designating such portion the "affirmative defense" was sufficiently specific to authorize court to order such portion stricken out.

3. Pleading §365(1)—Defendant proceeding to trial thereby waived right to notice of ruling on motion to strike portion of answer.

Defendant waived any right to notice of ruling on motion to strike portion of answer by thereafter proceeding with trial, and, where he failed to be present when case was called after due notice, he cannot thereafter be heard to complain.

Appeal from Superior Court, Los Angeles County; Arthur Keetch, Judge.

Action by J. A. Rydell against the Beverly Hills Printing & Publishing Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Porter C. Blackburn, of Los Angeles, for appellant.

Oscar W. Houge, of Los Angeles, for respondent.

HAHN, Justice pro tem. This appeal arises out of an action of unlawful detainer. The complaint is drafted in the usual form. Among other things, it is alleged that the defendant entered into possession of the property of the plaintiff under an oral agreement, by the terms of which the defendant agreed to pay on the first of each month as rental the sum of \$100. It is further alleged that at the time of the filing of the action there remained unpaid on account of rental for the month of July the sum of \$74.50, and the full monthly rental of \$100 for the month of August; also that a written notice demanding payment of the overdue rent within three days, or possession of the premises, had been given to the defendant, and that the defendant refused to either pay the rental or deliver up the possession of the premises.

An answer and cross-complaint were filed by the defendant. In his answer he does not deny the terms of the lease or that he entered possession or was in possession of the demised premises, but he does deny that there was due or unpaid the amounts charged in the complaint, and he further denies that he owes anything as rental to the plaintiff for the months of July and August. The answer further, under a heading designated as an "affirmative defense," alleges that the defendant suffered damage in the sum of \$193.80, by reason of the malicious interference by the plaintiff with defendant's possession of the demised premises, and more particularly alleges that this damage was suffered by the defendant because the plaintiff had made malicious and unbecoming remarks concerning the defendant to a subtenant who, perchance, by reason of having heard the remarks of the plaintiff, left the premises, failing to pay the rental he owed therefor, and failing also to pay other obligations he owed the defendant.

The cross-complaint contained two counts, the first charging in substance that, while the defendant was in lawful possession of the premises under the lease agreement referred to in the complaint, the plaintiff unlawfully trespassed upon the demised premises, at divers and numerous times, and that by "uttering unbecoming, slanderous, and libelous remarks about the cross-complainant addressed to his help and to the subtenants of cross-complainant," the cross-complain-

ant was damaged in the sum of \$500. The second count sets forth substantially the same matter contained in the answer under the special defense designated as "affirmative defense."

The plaintiff moved to strike the entire answer from the files, for the reason that it was not filed within the time provided in the order of the court overruling defendant's demurrer to the complaint. In the same motion plaintiff moved to strike the counterclaim from the answer (which is the portion designated under the heading "affirmative defense"), and also moved to strike the entire cross-complaint; this motion being based on the contention that the matter contained in the counterclaim and cross-complaint constituted "improper and illegal pleading," and, further, that the same did not constitute a defense to the cause of action set forth in the complaint. The motions were duly argued and submitted, and subsequently, on September 19th, the court made the following minute order:

"Motion to strike answer and cross-complaint, heretofore submitted, the court now orders that the order striking out all of line 29, page 1, to line 23, inclusive, of page 2, of answer and cross-complaint, granted; otherwise motion is denied."

On September 23d a formal order signed by the judge was filed, which contains the following language:

"It is hereby ordered that the cross-complaint of the Beverly Hills Printing & Publishing Company a corporation, defendant, and the counterclaim of the said defendant be and the same are hereby stricken out as an improper pleading in an answer to unlawful detainer, but the plaintiff's motion to strike defendant's answer from the files is hereby denied."

No notice of the court's ruling on the motions to strike appears to have been given to the defendant or his counsel, but on October 15th notice that the trial of the cause was set for the 31st was duly served on defendant's counsel.

On October 31st, the date set for trial, according to appellant's brief, "the parties proceeded to trial, and, upon appearing in court, the defendant learned for the first time that the court had stricken out part of his answer and all of his cross-complaint in response to plaintiff's motion to strike out the answer and cross-complaint." In the recitals in the judgment signed and filed in the case, it is declared that the plaintiff and his attorney were present, but that no one appeared for the defendant at the time of the trial.

The grounds urged by appellant for a reversal of the judgment may be considered under three heads: First, That the court erred in granting plaintiff's motion to strike out the portion of the answer designated as a counterclaim, and the cross-complaint; second, that the court under the notice of motion to strike did not have a right to strike

out a portion of the answer; and, third, That the court had no right to proceed to hear the case and render judgment, because no notice of ruling on the motion to strike had been given to the defendant.

[1] As to the first point, it has been so firmly settled that in an unlawful detainer suit a defendant may not set up in his answer a counterclaim or file a cross-complaint, that discussion of this contention would hardly seem necessary. Appellant concedes this to be the rule in California, but contends that there is an exception to the rule where the alleged wrong, which the defendant desires to set up as a counterclaim or cross-complaint, arises out of the subject-matter of the original action. This contention has been definitely held untenable in the case of *Knight v. Black*, 19 Cal. App. 527, 126 P. 516. In that case, an action of unlawful detainer, the defendant undertook to set up as a part of his defense a claim for damages which he alleged he suffered because of the acts of the plaintiff in attempting to evict him from the demised premises. The court in that case used the following language in sustaining the ruling of the trial court in refusing to permit the defendant to offer the defense in a cross-complaint:

"It is the law in this state and also in other jurisdictions where unlawful detainer statutes are in terms or essentially similar to our own that a counterclaim or cross-complaint of any kind or character is neither proper nor permissible in actions in unlawful detainer."

The cases cited by appellant in support of his contention are actions in ejectment, and, of course, are not applicable to the instant case.

[2] The next point urged by appellant is that, inasmuch as the notice of motion to strike did not specifically specify any particular words, or designate any particular lines in the answer, the court had no authority to grant the motion to strike portions of the answer. We find no merit in this contention, for the notice of motion specifically designates as the portion the plaintiff would move to be stricken out of the answer the "affirmative defense" therein contained. This is what the court ordered stricken out and designated as the counterclaim in its formal order.

[3] The next and last point urged by appellant is equally without merit. If we may assume that the defendant and his counsel were present at the time of the trial, as stated in appellant's brief, it nowhere appears in the record that any objection was made to proceeding with the taking of evidence in the case, and it will be presumed, assuming defendant was entitled to notice of ruling on the motion to strike, that he waived any right to such notice by proceeding with the trial. If, on the other hand, we are to accept the recital in the judgment that the de-

pendant was not present in person or by counsel when the case was called, the appellant is in no stronger position, because he had due notice of the trial, and, if he saw fit to ignore his day in court and there present his objections to proceeding with the trial, he cannot now be heard to complain. In closing, it may be pertinent to suggest that we have had no authorities submitted to us that would support appellant's contention that he was deprived of any substantial right in not having notice of sustaining the motion to strike served upon him.

As we find no error in the record, it is hereby ordered that the judgment appealed from be affirmed.

We concur: CONREY, P. J.; HOUSER, J.

88 Cal. App. 88

FORREST v. ROYAL INS. CO. et al.
(Civ. 3241.)

District Court of Appeal, Third District, California. Dec. 28, 1927.

1. Principal and agent ⇨22(1), 122(1)—Declarations of agent are not proof of agency or authority.

Declarations of alleged agent as to existence of agency and extent of his authority are not proof of agency.

2. Appeal and error ⇨1051(1)—Admission of insurance adjuster's declarations as to his agency for insurer held harmless, where agency was otherwise established.

The admission of improper evidence consisting of insurance adjuster's declarations as to his agency for insurer and extent of his authority was harmless, where facts stated thereby were established by other evidence.

3. Insurance ⇨92—Evidence held to show that person adjusting damages to recovered stolen automobile was insurer's adjuster, with authority to represent insurer.

Evidence held to show that person purporting to act as insurance company's adjuster in adjusting damages to insured's automobile, found after it had been stolen, was company's adjuster, with authority to act for it, and that garage man who repaired the car was justified in delivering it to insured owner on adjuster's promise that company would mail garage keeper a check for the repairs.

4. Novation ⇨12—That automobile repairer permitted insurer's adjuster to take possession of automobile on his promise that insurer would mail check for repairs held not to show intent to release insured owner from liability (Civ. Code, §§ 1530, 1532, and § 1531, subd. 2).

That garage keeper permitted insurance adjuster to take possession of recovered stolen automobile after he made repairs thereon on adjuster's promise that insurer would mail a check for repairs held not to show the intent

to release insured owner from liability for repairs and to substitute insurer, under Civ. Code, §§ 1530, 1532, and section 1531, subd. 2, as to novation.

5. Novation ⇨1, 12—Whether new agreement constitutes novation is question of intention, and must clearly appear (Civ. Code, § 1530, and § 1531, subd. 2).

Whether a new agreement amounts to a novation within Civ. Code, § 1530, and section 1531, subd. 2, is always a question of intention, and intention on the part of all parties that such agreement shall constitute a novation should clearly appear.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by Sterling P. Forrest, Jr., against the Royal Insurance Company and another. From a judgment for plaintiff, defendants appeal. Affirmed.

Ford, Johnson & Bourquin, of San Francisco, and Leo C. Dunnell, of Richmond, for appellants.

H. Nelson French and Ralph H. Cowing, both of Sacramento, for respondent.

WEYAND, Justice pro tem. Appellant C. H. Spurlock, on or about October 16, 1923, insured his automobile with the Royal Insurance Company, which said company is also an appellant herein. This insurance was secured by said Spurlock through one Augustine N. Trainor, who was at said time acting as agent of said company at Fairfield, Solano county, Cal. While this insurance was in force and effect, the car of Spurlock was stolen from Spurlock and the same was thereafter found in Oakland, Cal., in a damaged condition. Appellant Spurlock reported the theft of the machine to the agent Trainor, and Trainor in turn reported the theft to the Royal Insurance Company. Spurlock requested of Trainor that the repairs that were necessary to put the automobile in the condition it was before the theft be made by Sterling P. Forrest, Jr., the respondent herein. Forrest's place of business was, however, in the city of Sacramento. Spurlock agreed to tow the automobile to Forrest's place of business in Sacramento. The insurance company, through Trainor, consented to this arrangement, and the injured machine was by Spurlock brought to the garage of plaintiff for repairs. In addition to the repairs that were caused by reason of the theft, Spurlock on his own account had some small repairs made and for which he paid on the day of the delivery of the automobile by Forrest to one B. W. McKay, whose connection with the affair will be now stated. According to the policy of insurance, it became the obligation of the insuring company to have the car repaired and placed in as good a condition as it was before the theft. When appellant Spurlock was informed that the machine was fully repaired

and ready for delivery, he again went to the agent Trainor, and Trainor then instructed Spurlock to be in Sacramento at a certain hour next day to meet an adjuster, and Trainor, after a telephonic conversation with the general adjuster of the Royal Insurance Company in San Francisco, gave to Spurlock a slip of paper with the words, "Meet Mr. B. W. McKay, at 11 o'clock, at the Hupmobile Garage, Sacramento," written thereon. The evidence does not disclose that Spurlock ever knew or even saw this B. W. McKay until he went to Sacramento in obedience to the suggestions and directions of Trainor. At the appointed time, McKay proceeded to examine the repaired automobile, and he also examined the bill of charges. Spurlock then paid for his part of the garage bill, and McKay directed the plaintiff to deliver the machine to Spurlock, and stated that he (McKay) would have the insurance company pay to plaintiff the bill for the repairs that became necessary on account of the theft. The automobile was by the plaintiff delivered to the possession of McKay, who drove it out of plaintiff's garage and delivered it into the hands of Spurlock.

For some reason not made to appear the insurance company a few days later sent to Spurlock a check to pay for the damage this machine suffered. The check sent Spurlock was in the exact sum agreed by McKay as the amount the insurance company should pay to plaintiff. Spurlock cashed this check and gave to McKay a check on a Suisun bank signed by appellant, which McKay cashed, and thereafter left for parts unknown. Plaintiff's bill remains unpaid, and this action was instituted to compel payment. The appellant Royal Insurance Company now maintains that it is not liable for the bill of plaintiff. It contends that McKay had no right or authority to make any promises on the part of the company. That there is no legal proof in the record that McKay was an agent of the company. That they paid the amount of this bill to the party who held their policy, and they have the returned check showing that Spurlock received the money. Appellant Spurlock contends that he was relieved from the obligation because the Royal Insurance Company were substituted as debtors to the plaintiff when McKay made the promise that the insurance company would send plaintiff a check for the repair bill.

Plaintiff contends he is entitled to payment of the bill from both defendants. Plaintiff had judgment in the lower court, from which both defendants appeal. While the contentions of appellants are somewhat to cross purposes, yet they make common cause against the plaintiff, filing a joint brief herein.

[1-3] The only error claimed by appellant Royal Insurance Company is:

"That the court committed prejudicial error in admitting numerous declarations of Mr. McKay, from which the court concluded he was

authorized to and did enter into the agreement with Mr. Forrest above mentioned."

If the trial court did conclude, solely from the declarations of McKay, that he was such agent and had such authority, unquestionably there was error. We cannot hold that the court did determine the question as to agency from the testimony of McKay. There was in the record much testimony from other sources that clearly indicated that McKay was an adjuster of this company. Spurlock was given the name of McKay as the adjuster for the company by Trainor, who was the agent through whom Spurlock effected this insurance. The general adjuster of the company, one Rea, gave to Trainor the name of this man McKay as adjuster. The check of the insurance company sent Spurlock was strangely made out in the exact sum McKay fixed as the amount the company should pay. Upon the taking of the evidence, some witnesses testified as to what McKay said during the transactions at the time of adjustment as to being an agent of the company, but we think it clearly appears that the trial court was not at all impressed with that testimony. At the very outset of the testimony the judge of the trial court, speaking of this matter said:

"As to telling anything that Mr. McKay told him as to the repairs to be done, and that the Royal Insurance Company would pay for them, he could testify to that, subject, of course, to a showing later on that Mr. McKay had the authority to make that statement."

Again, on this same subject, the court said:

"His statement that he was the agent is not the proof of agency."

In addition to what has been said above, one witness testified directly that Spurlock, a codefendant, introduced McKay to plaintiff as an adjuster for the Royal Insurance Company.

In California Jurisprudence, vol. 2, p. 1020, it is said:

"The admission of improper evidence is harmless where the fact thereby sought to be shown is otherwise fully and properly established by evidence which is unobjectionable."

A long line of California cases support this text. In McGowan v. Burg Bros., 59 Cal. App. 223, 210 P. 545, it was held that the testimony of the alleged agent as to his agency was harmless when the fact was proven otherwise.

As to the authority of McKay to make a promise for and on behalf of the insurance company that they would pay this bill, we are of the opinion that he had the power to make any and all promises or arrangements, to the end that the bill be paid, and as to how it should be paid, McKay was sent there, as the evidence shows, after the company received a request from their agent Trainor to send him. Their agent told Spurlock to be at the

garage of plaintiff to meet an adjuster. Spurlock, as well as plaintiff, was interested in the adjustment of the claim for repairs. The promise of McKay that he would have the insurance company send plaintiff a check was the only logical thing that could be expected of McKay after adjusting the amount of the claim. It will be again noted that the company sent Spurlock a check for the exact amount McKay fixed as the amount the company should pay. In other words, they fully ratified every act of McKay, unless it be as to his promise that the check would be mailed to plaintiff. There was no testimony on the part of the defendant company that McKay did not have the authority he claimed. In *Lancashire Ins. Co. v. Barnard* (C. C. A.) 111 F. 702, as to the authority of an adjuster, the court said:

"An adjuster is empowered to settle the alleged loss. A settlement of the loss necessarily involves the exercise of the option to pay the damages sustained, or to rebuild or repair the building injured. The whole is always greater than and includes all its parts, and the authority to settle a loss includes the power to do any lawful act and to make any legal contract to fix the amount of and to discharge the liability. An adjuster of an insurance company authorized to settle an alleged loss has the power to determine its amount, and how, when, and where it shall be paid. * * *"

We therefore are of the opinion that plaintiff was justified in delivering the car to McKay upon his promise that the company would mail to plaintiff a check covering the amount sued for.

[4, 5] Appellant Spurlock claims there was a novation. His contention is that the plaintiff herein released him from the payment of this bill, and agreed to substitute in his place as the debtor the defendant company. Section 1530, Civil Code, defines novation as follows: "Novation is the substitution of a new obligation for an existing one." Section 1531, Civil Code, defines the manner in which novation is accomplished. In subdivision 2 of that section it is clearly stated that to accomplish a novation there must be the "intent" to release the old debtor. We cannot conclude that because the plaintiff permitted McKay to take possession of the car after its repair, upon his promise that the company would mail plaintiff a check, shows an intent to release Spurlock. Novation is proven by showing a meeting of the minds of the parties to the contract. The positive testimony of plaintiff is that he did not consent to a release of Spurlock, nor intend his release.

"Whether a new agreement amounts to a novation is always a question of intention; and intention on the part of all parties that such agreement should constitute a novation must clearly appear." Cal. Jur. vol. 20, p. 249.

"Novation is made by contract, and is sub-

ject to all the rules concerning contracts in general. Civ. Code, § 1532. As in the case of other contracts there must be competent parties and a mutuality of consent between them." 20 Cal. Jur. p. 247.

The trial court decided this point on the testimony before it, and that testimony was to the effect that plaintiff never agreed to nor intended any release of any claim as against Spurlock. We therefore conclude that the trial court was not in error in holding, as it did, upon this point.

There being no error of a prejudicial nature in the record, the judgment of the lower court is affirmed.

We concur: FINCH, P. J.; HART, J.

88 Cal. App. 60

DREW et al. v. LINDSAY NAT. BANK et al.
(Civ. 3304.)

District Court of Appeal, Third District, California. Dec. 28, 1927.

1. Contracts  171(1)—Deposit securing lessee's performance of lease of olive packing house held not to secure performance of contract to purchase olives from growers owning majority of lessor corporation's stock.

Contract to make deposit with bank as security for lessee's performance of conditions of lease of olive packing house held to negative contention that deposit was also made as security for lessee's performance of contract to purchase olives from certain growers, though latter owned about two-thirds of lessor corporation's capital stock when lease and other contracts were executed; contracts with corporation and such growers being independent transactions.

2. Pleading  236(2)—Denial of leave to file fourth amended complaint during trial, commenced over year after filing of original complaint, held not abuse of discretion.

Where original complaint, filed over year before trial, in sellers' action for amount deposited by purchaser of olives as security for performance of lease of packing house, set forth in full addendum contract requiring deposit, and plaintiffs were permitted to file three amended complaints, it was not abuse of discretion to deny leave during trial to file fourth amended complaint alleging intent to make such contract part of purchase agreement and failure to do so because of mutual mistake.

3. Reformation of instruments  1—Equity court may reform contract, but cannot make new contract, nor add or substitute new parties.

While court of equity will reform contracts under many varying circumstances, it has no power to make a new contract, and can neither add additional parties, nor substitute other parties for those appearing on face of writing.

4. Landlord and tenant $\Rightarrow$ 184(2)—Burden was on defendants, denying allegation that rent was unpaid, to prove payment thereof.

Where answer denied allegation of complaint, in action for deposit made as security for lessee's performance of lease, that rent was unpaid for certain year, burden was on defendants to prove payment of such rental.

5. Limitation of actions $\Rightarrow$ 127(13)—Action for rent, nonpayment of which was first alleged in second amended complaint, filed over four years after termination of lease, held barred (Code Civ. Proc. § 337, subd. 1).

Where plaintiffs, in action for deposit, made by one agreeing to purchase their olives as security for performance of lease of packing house, first alleged his failure to pay rent in second amended complaint, filed over four years after lessor's termination of lease, cause of action for such rent was barred by Code Civ. Proc. § 337, subd. 1.

Appeal from Superior Court, Tulare County; J. A. Allen, Judge.

Action by A. M. Drew and others against the Lindsay National Bank and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

Superseding opinion in 260 P. 372.

Feemster & Cleary, of Visalia, and A. M. Drew, of Fresno, for appellants.

D. E. Perkins, of Visalia, for respondents.

FINCH, P. J. August 1, 1918, the plaintiffs and R. M. Carr entered into a written contract with defendant Mennillo, by the terms of which Mennillo agreed to purchase the olives grown by the other parties to the contract during the succeeding five years at an agreed price per ton therefor. The contract contained the following clause:

"It is understood and agreed that this contract is not to be binding upon the said first parties until it is indorsed by some person, or firm, or corporation as security for the carrying out of the covenants and conditions thereof by the said second party, or that a satisfactory surety bond is furnished that the said second party will carry out all of the covenants and conditions of the said lease and the said contract."

In pursuance of the provisions of the clause quoted and for the purpose of giving effect to the contract, Mennillo caused the following indorsement upon the contract to be executed by the Santa Barbara Olive Company, B. J. Ruddle, and C. R. Mennillo:

"The undersigned, for and in consideration of the sum of one dollar and other valuable considerations to — running, does hereby indorse this contract and guarantee the said second party will carry out all the terms, covenants and conditions thereof during the running of the lease and contract."

At the time of the execution of the contract first mentioned, the Lindsay Ripe Olive

Company leased its olive packing house and equipment to Mennillo for a term of five years, at the semiannual rental of \$390, payable in advance on the "1st day of August and the 1st day of February" of each year during the term. The lease contained the following provisions:

"It is understood * * * that the said second party will use the said building for the processing of olives purchased from the members and stockholders of the said first party according to the terms and conditions of the agreement of even date herewith and hereto attached and made a part hereof, and that the said olives of the said stockholders of this corporation aforesaid shall have the first right to delivery and acceptance at such packing house according to the aforesaid agreement. It is understood, however, that the said second party shall have the right to purchase other olives from other parties on such terms and conditions as he may make and that the same shall be processed in the said house and that he may also use the said house for the packing of fruit and vegetables when not needed for olive packing."

Neither party was able to produce the lease at the trial, but the court found, from conflicting evidence:

"That by the terms of said lease it was agreed that in case said F. A. Mennillo did not pay the annual rental at the time in the lease provided, that the lessors, by giving thirty days' notice in writing of such default, should have the right to re-enter said premises and remove all persons therefrom and repossess and enjoy said property."

September 18, 1918, the Lindsay Ripe Olive Company, as party of the first part, and defendant Mennillo, as party of the second part, executed an instrument which was attached to the contract of August 1, 1918, between plaintiffs and Mennillo, and which reads as follows:

"This addendum, made this 25th day of September, 1918, to that certain contract dated August 1, 1918, made by the Lindsay Ripe Olive Company, first party, with F. A. Mennillo, second party, wherein the said first party agrees to lease a certain olive packing house in the city of Lindsay to the said second party for the term of five years, and whereas the said second party was to give a bond or indorsers to the contract sufficient to satisfy the said first party that the said second party would carry out all the terms in accordance with the conditions of said agreement and of said lease, and whereas the said second party has failed to give such bond. It is now agreed that the said second party will deposit with the Lindsay National Bank in the form of a certificate of deposit, and that the said certificate of deposit shall remain in the possession of the said Lindsay National Bank during the running of the agreement, or to such subsequent time as shall hereafter be agreed upon between the parties hereto, the said sum of twenty-five hundred (\$2,500.00) dollars, to be held as security by the said bank for the said first party to said agreement, that the said second party will carry out the covenants and con-

ditions of the lease and the agreement required as aforesaid. * * * Should the said second party fail, neglect or refuse to carry out the provisions and conditions of the aforesaid contract the said sum of \$2,500.00 shall be delivered to the said first party, or such proportion thereof as may be necessary to meet the liquidated damages incurred by any breach of said contract."

The sum of \$2,500 was deposited in compliance with the terms of the agreement. Mennillo went into possession of the packing house and performed the covenants of the lease and of his contract to purchase plaintiffs' olives until the early part of the year 1920, when he disappeared and apparently abandoned the packing house and his business at Lindsay. It does not appear that he thereafter, at any time, asserted any right to use the premises or made any claim thereto. At the time of his departure, he was heavily indebted to the defendant bank. He assigned his stock of processed olives to the bank, and the bank thereafter sold the same and applied the proceeds thereof upon the indebtedness. After such application, however, his remaining indebtedness to the bank was in excess of \$2,500. In an action thereafter brought, the bank recovered judgment against Mennillo for the balance of such indebtedness and caused the money deposited as aforesaid to be seized under a writ of execution and applied in partial satisfaction of the judgment.

About September 1, 1920, the Lindsay Ripe Olive Company re-entered into possession of the packing house. During the remainder of the time covered by the lease and the sales contract, the plaintiff and Carr were unable to sell their olives for the prices specified in the contract, and they sold them at lower prices. The court found that on September 1, 1920, Mennillo was in default in the payment of rent in the sum of \$390. The uncontradicted evidence shows that he was in default in a larger sum. Drew testified that the sum of \$800 was then due as rent. This testimony was doubtless based on his previous testimony that the lease provided for a monthly rental of \$100. He later testified that the lease provided for a semiannual rental of \$390. A simple computation, based on such testimony, shows that the unpaid rental on September 1, 1920, amounted to \$520. The plaintiffs and Carr and the Lindsay Ripe Olive Company made demand on the defendant bank that said sum of \$2,500, deposited with the bank, be paid over to them, but the bank refused to pay any part thereof to any of them. After making such demand, Carr and the Lindsay Ripe Olive Company "assigned and transferred unto plaintiffs herein all of their claim to and all of their right, title, and interest in the said \$2,500." Thereafter this suit was brought to recover the amount of the de-

posit. Judgment was entered in favor of defendants for costs of suit, and the plaintiffs have appealed.

[1-3] Appellants contend that the deposit of \$2,500 with the defendant bank was made as security for the performance by Mennillo of the terms of the sales contract as well as those of the lease. The addendum contract of September 25, 1918, is so certain and explicit in its terms as to furnish a complete answer to this contention. It is true that the plaintiffs and Carr owned about two-thirds of the capital stock of the Lindsay Ripe Olive Company at the time the lease and other contracts were executed, but it is not perceived that that fact is at all material. Mennillo's contract with the corporation and that with the plaintiffs and Carr were independent transactions. During the progress of the trial, the plaintiffs asked leave to amend their third amended complaint by alleging "that what was intended by the addendum was to make it a part of the purchase agreement"; that the failure to so provide in the addendum contract was due to the mutual mistake of the parties thereto. In asking leave to so amend, counsel for the plaintiffs stated that the granting of the request "will * * * necessitate the continuance of the case, and we are perfectly willing to take care of any expenses that have been incurred up to this time as a condition to the continuance." The court denied the motion. The trial was commenced in March, 1925. The original complaint, filed January 4, 1924, set forth the addendum contract in full. The plaintiffs were permitted to file three amended complaints. Under the circumstances stated, it was not an abuse of discretion to deny leave to file a fourth amended complaint. Further, the plaintiffs were not parties to the addendum contract. "While a court of equity will reform contracts under many varying circumstances, still it has no power to make a new contract. * * * A court of equity can neither add additional parties nor substitute other parties for those already appearing upon the face of the writing." *Mabb v. Merriam*, 129 Cal. 663, 664, 62 P. 212; *Wilson v. Shea*, 194 Cal. 653, 657, 229 P. 945.

[4] As stated, the court found that on September 1, 1920, Mennillo was "in default in the payment of said rent to the extent of \$390," while the uncontradicted evidence shows that he was then in default in the sum of \$520. The complaint alleges that the rent was unpaid for the year 1920, and the answer denies that allegation. The burden was on defendants to prove payment of such rental if made. 20 Cal. Jur. 952. It must be taken as established, therefore, that Mennillo paid no rent for the year 1920.

[5] The court found that plaintiffs' cause of action for such rent was "barred by the

provisions of subdivision 1 of section 337 of the Code of Civil Procedure," to the effect that an action upon a contract in writing must be commenced within four years after the cause of action accrued. The transcript on appeal does not show when the action was commenced, but the third amended complaint, upon which the action was tried, was filed March 27, 1925, more than four years after the last payment of rent to which the lessor was entitled became due, the lessor, as stated, having terminated the lease about September 1, 1920. The original complaint and certified copies of the first and second amended complaints have been forwarded to the clerk of this court, but an examination of the allegations thereof shows that the original complaint and the first amended complaint were based solely on Mennillo's alleged breach of his agreement to purchase the plaintiffs' olives. In the second amended complaint, filed December 15, 1924, the plaintiffs, for the first time, alleged that Mennillo had failed to pay rent; the allegation therein being "that said defendant in the year 1920 * * * wholly failed and refused to pay the rental under said lease." The finding, therefore, that plaintiffs' cause of action was barred is fully sustained by the evidence, and, since this finding is decisive of the case, it is unnecessary to consider appellants' contention that the court erred in finding that they conspired together to oust Mennillo from the premises further than to say that no evidence has been discovered which tends to support that finding.

The judgment is affirmed.

We concur: PLUMMER, J.; HART, J.

87 Cal. App. 336

PEOPLE v. STOERKEL. (Cr. 1544.)

District Court of Appeal, Second District, Division 2, California. Dec. 7, 1927.

1. Criminal law ⇨1159(5)—Conviction of robbery on sufficient evidence of prosecuting witnesses who identified defendant will not be disturbed.

Conviction of robbery on sufficient testimony of prosecuting witnesses who had opportunity to observe and properly identify defendant will not be disturbed on appeal.

2. Criminal law ⇨1159(2)—Appellate tribunal should not disturb verdict unless it is unsupported by evidence, or testimony is improbable or false.

An appellate tribunal should not disturb verdict in criminal case unless there is no evidence to support it, or unless testimony is so improbable or false as to be incredible.

3. Criminal law ⇨404(4)—In robbery prosecution, admitting testimony of circumstances of defendant's arrest and gun and flash-light found on ground at time held not error.

Where defendant was arrested 17 days after alleged robbery by officers when he suddenly appeared in the street ahead of them, admitting testimony as to circumstances of arrest and admitting in evidence gun, belt, holster, and flash-light which fell to the ground when he threw up his hands held not error, since gun and flash-light so found, though not positively identified as ones used in the robbery, were similar to those used therein.

4. Criminal law ⇨369(2)—Admitting testimony of circumstances of arrest and gun and flash-light found held not error because it aroused suspicion of other robberies.

Where defendant was arrested by officer 17 days after alleged robbery, admitting circumstances of arrest and gun and flash-light which fell from his person at the time held not error, because it might arouse suspicion that defendant had committed or was about to commit a separate offense.

5. Criminal law ⇨1169(1)—Admitting evidence of defendant's arrest in possession of gun and flash-light similar to those used in robbery held not prejudicial (Pen. Code, § 836, subsec. 3).

Under Pen. Code, § 836, subsec. 3, authorizing officers to arrest without warrant when they had reasonable cause to believe defendant guilty of felony, admitting in robbery prosecution evidence of fact of defendant's arrest in addition to circumstances of defendant's arrest without warrant by officers in the street and gun and flash-light which dropped from his person at the time, and which were similar to those used in the robbery, was not prejudicial error since defendant's denial of possession of the gun evidenced consciousness of guilt.

6. Criminal law ⇨1036(1)—Defendant, not objecting to testimony as to arrest, could not predicate error on admission of such testimony.

Where defendant in robbery prosecution did not object to question to witness as to whether he was officer who made arrest and as to conversation when witness arrested defendant, defendant could not predicate error on admission of evidence.

7. Criminal law ⇨1171(3)—Remark of deputy district attorney during cross-examination that it sounded as though prosecuting witness was being tried held not prejudicial.

In robbery prosecution, remark of deputy district attorney during cross-examination of prosecuting witness that examination had run to most inordinate length, and that it sounded to him as though witness was on trial rather than defendant, held not prejudicial to defendant.

8. Criminal law ⇨1171(1)—Argument of deputy district attorney in answer to argument of defendant's attorney held not prejudicial nor reflection on defendant's counsel.

In robbery prosecution, statement of deputy district attorney in argument that defendant's attorney did not give him much to answer be-

cause he went too far afield, and that defendant's attorney was not justified in stating that he would not willfully withhold anything jury ought to know and would not try to save a criminal from being convicted, though inappropriate, held not prejudicial error, being his interpretation of testimony, and not a reflection on defendant's counsel.

Appeal from Superior Court, Los Angeles County; C. P. Vicini, Judge.

Henry A. Stoerker was convicted of robbery, and he appeals. Affirmed.

Rosecrans & Emme, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., John L. Flynn, Deputy Atty. Gen., and John D. Richer, of Los Angeles, for the People.

THOMPSON, J. The defendant was convicted and sentenced for the crime of robbery and appeals from the judgment and order denying his motion for a new trial. The principal basis of his complaint is that the evidence is insufficient to justify the verdict, although he does assign as error the admission of certain testimony, and also charges misconduct on the part of the district attorney.

[1, 2] At about 9:45 p. m. on the evening of May 2, 1927, two of the people's witnesses, Arthur M. Taube and Emma A. Kropp, were held up and robbed of \$118 in money and a diamond ring worth approximately \$500 as they sat in an automobile on the top of a hill at City Terrace, just east of Los Angeles. Some minutes after they had stopped their machine at this point a man threw a flash-light in their faces, pointed an automatic gun at Taube with the command to "Stick 'em up; I mean business." Taube was first searched for money; then the robber went to the other side of the car and took Miss Kropp's ring; came back again to Taube's side of the automobile, and after another search secured the remainder of the latter's money. Both of these witnesses identified the defendant as the man, and picked him out of five or six other men at the county jail as being the one who committed the robbery, as did also the witness Miss Goldie Blasman. The last-named witness was driving out Ramona boulevard with a Mr. Rosen on the evening of April 27, 1927, returning home from "some doings" at the schoolhouse, at about 10 p. m., when Mr. Rosen stopped to fix the muffler. As he did so a man approached with flash-light and gun and ordered Rosen to "stick 'em up." He took Mr. Rosen's watch and money, and then took from Miss Blasman's finger her diamond ring and also took her wrist watch.

On the night of May 14, 1927, at 11:30 p. m., Deputy Sheriffs E. J. Small and C. H. Pearson were driving east on Manchester avenue, when suddenly the defendant appeared in the middle of the street ahead of them. The officers turned a spot light on him and as

they did so he threw his hands under the overcoat he was wearing and something fell to the ground, which later it developed was a 38-caliber gun fully loaded, with belt and holster. A few feet from here the officers also picked up a flash-light. The witnesses Taube, Miss Kropp, and Miss Blasman all testified that the gun and flash-light were similar in appearance to those used by the man who held them up. The defendant introduced evidence of an alibi, which, had it been believed by the jury, would have amply supported a verdict of not guilty.

The defendant also introduced testimony to show that there was no moon on the night of May 2, 1927, and since the lights of the automobile in which Mr. Taube and Miss Kropp were sitting were turned off, and since there were no street lights in the immediate vicinity, counsel argues that these two witnesses could not identify the defendant. However, the witness Taube said he thought that the defendant laid the flash-light down, and that sometimes the light reflected on the defendant. Miss Kropp testified that the defendant stooped over a bit to take the ring off her finger. There were street lights in the neighborhood where Rosen and Miss Blasman were robbed. Under all these circumstances we can see nothing inherently improbable in the testimony of these witnesses or any of them. And while counsel have called our attention to instances where the identification has later proved to be erroneous, it is so well settled that the appellate tribunal should not disturb the verdict of the jury unless there is no evidence to support it, or unless the testimony is so improbable or false as to be incredible, that citation of authority is unnecessary. The objection which appellant has to this evidence involves a weighing of it. The jury evidently believed the testimony of witnesses for the prosecution, and that their opportunity for observation was sufficient to enable them to properly identify the defendant. We must content ourselves with this determination.

[3] The appellant asserts that the testimony regarding the circumstances of the arrest should not have been admitted, nor should the articles found at that time, to wit, the gun, belt, holster, and flash-light have been admitted. It is true that these articles were not positively identified as being used at the time of the robberies, but we think the objection counsel has to this evidence runs to its weight rather than to its admissibility. In the case of *People v. Hale* (Cal. App.) 254 P. 639, pistols found in defendant's room to which others had access five days after the robbery, were received, not as proof that pistols were used in committing the robbery, but for "the purpose of showing that the defendants had the means of doing what the witnesses had charged them with doing." The testimony in this case is that the gun and flash-light were similar to those used in

the robberies. The rule of law, under the circumstances, is satisfied sufficiently to warrant their introduction in evidence. *People v. Ferdinand*, 194 Cal. 555, 229 P. 341.

Necessarily, these articles might not have been introduced, had the witnesses not been allowed to detail the circumstances under which they obtained possession of them. A similar contention was urged in the case of *People v. Mar Gin Suie*, 11 Cal. App. 42, 103 P. 951. There the officer arrested the defendant a few days after the homicide complained of and found a couple of pistols in his room. These guns were claimed by a woman occupant of the room. In reply to the objection the court said:

"As a part of the original case of the people, we think the testimony with regard to the finding of the pistols was proper as furnishing a circumstance bearing upon the charge, whether directly or remotely was for the jury to decide in view of all the other facts and circumstances. * * * The woman declared. * * * it is true, and in fact claimed ownership of everything in the room; *but the people not only had the right to the testimony complained of, but to prove every other circumstance occurring at the time of the arrest of the defendant having any bearing on the crime for which the defendant was arrested or upon his conduct when arrested.* [Italics ours.] His actions when the detective inquired as to the ownership of the pistols were proper to be described to the jury, and in that connection it was proper enough to receive the testimony relative to the finding of the pistols."

It must be borne in mind that there was testimony that the robberies were committed with pistol and flash-light, identified in the manner already discussed. Under this situation the statement of the court in *People v. McDowell*, 64 Cal. 467, 3 P. 124, is pertinent:

"The testimony of the witness Hicks as to the slung-shot in the possession of the defendant, and as to the statement made by defendant, was relevant and material, because there was evidence tending to show that the wounds inflicted upon the person of deceased might have been caused by such an implement."

See, also, *People v. Szafcsur*, 161 Cal. 636, 119 P. 1083. So, too, in the case of *People v. Winthrop*, 118 Cal. 85-91, 50 P. 390, 392, it is said:

"Nor was there any error in admitting evidence of the circumstances attending defendant's arrest, including his declarations at the time, or in permitting the prosecution to introduce the various articles taken from his person. This evidence showed that when arrested, shortly after the commission of the offense, defendant was apparently hiding in the city of Oakland away from the place of his residence; that he was in disguise, and passing under an assumed name, and denied his identity to the arresting officer; that among the articles found upon his person were several newspaper clippings containing accounts of the robbery and a recently purchased railroad ticket from Oakland to Mo-

jave. Such evidence is always admitted as having a tendency greater or less, according to the circumstances, to establish guilt."

[4] It can scarcely be suggested that the possession of newspaper clippings and a railroad ticket can be of greater probative value than the possession of the gun and flash-light, or that hiding away in Oakland in disguise has more weight than being in the middle of the street armed as was defendant at 11:30 at night, or that denial of identity is entitled to greater consideration than denial of the possession of the gun which the officers saw him drop. It is suggested, however, that these circumstances were prejudicial because they had a tendency to arouse suspicion that defendant had committed or was about to commit a separate offense. Were this so, it would not render testimony, otherwise admissible, inadmissible. In *People v. Ebanks*, 117 Cal. 652, 663, 49 P. 1049, 1052 (40 L. R. A. 269), it is said:

"Touching the suggestion of counsel that the evidence tended to prove the attempt of defendant to commit another offense, and thus to prejudice him in the eyes of the jury, the case of *People v. Walters*, 98 Cal. 138 [32 P. 864], is in point. In that case the court, speaking through Beatty, C. J., said: 'It is true that in trying a person charged with one offense, it is ordinarily inadmissible to offer proof of another and distinct offense, but this, only because the proof of a distinct offense has ordinarily no tendency to establish the offense charged. But whenever the case is such that proof of one crime tends to prove any fact material in the trial of another, such proof is admissible, and the fact that it may tend to prejudice the defendant in the minds of the jurors is no ground for its exclusion. These remarks are applicable to any case in which two persons are murdered or assaulted at the same time, and as part of the same transaction.' See, also, *People v. Cunningham*, 66 Cal. 668 [4 P. 1144, 6 P. 700, 846]; *People v. Smith*, 106 Cal. 74, 82 [39 P. 40]; *People v. Craig*, 111 Cal. 460, 468 [44 P. 186]; *People v. Bidleman*, 104 Cal. 613 [38 P. 502]; *People v. Lane*, 101 Cal. 517 [36 P. 16]; *People v. Walters*, supra; *People v. McGilver*, 67 Cal. 55 [7 P. 49]; *People v. Sanders*, 114 Cal. 216 [46 P. 153]; *Moore v. United States*, 150 U. S. 57 [14 S. Ct. 26, 37 L. Ed. 996]; *People v. Harris*, 136 N. Y. 423 [33 N. E. 65]; *Pierson v. People*, 79 N. Y. 424, 35 Am. Rep. 524; *Commonwealth v. Coe*, 115 Mass. 481, 501; *Commonwealth v. McCarthy*, 119 Mass. 354, 355; *State v. Patza*, 3 La. Ann. 512; *Kramer v. Commonwealth*, 87 Pa. 299, 301; *Goersen v. Commonwealth*, 99 Pa. 388, 399; Id., 106 Pa. 477, 496, 51 Am. Rep. 534; *Swan v. Commonwealth*, 104 Pa. 218, 220; *State v. Myers*, 82 Mo. 558, 52 Am. Rep. 389. These cases are quoted and cited to meet not only the foregoing point, but many other objections offered in the trial of the cause, which space will not permit us to discuss at length, among which may be mentioned objections to evidence of the death of Borden, the bullet and cot offered in evidence, the taking of the pistols and clothing at Fullerton, etc. * * *

[5] Perhaps the situation here would have been attended by greater clarity had the witness been asked to detail the circumstances of the finding of the pistol and flash-light—rather than to have called for the circumstance of the arrest, but the result is the same except possibly that there is added the testimony that defendant was arrested.

However, we fail to see how this additional element could have prejudiced the defendant, even though it be admitted that it was not material. He was found in possession of articles resembling those which had been used in the robberies committed. His actions were suspicious—his denial of the possession of the pistol when he had in fact been seen to drop it evidenced a consciousness of guilt. Subsection 3 of section 836 of the Penal Code authorized the officers to make an arrest without warrant when they had reasonable cause to believe the defendant guilty of a felony which had in fact been committed. His arrest on suspicion was further justified by his subsequent identification.

[6] There is another reason why appellant is precluded of complaint in this particular. Before the officer was questioned concerning the circumstances of the arrest he was asked this question: "Were you the arresting officer in this case?" to which no objection was interposed and which the witness answered in the affirmative. Later he was asked: "At the time you arrested the defendant did you have a conversation with him? Did you ask him any question?" Again no objection was interposed, and the answer was that the witness' partner did. Still later and after all the circumstances had been developed it first appeared that the defendant was arrested "on suspicion of robbery," whether of the offenses charged not appearing. This last question and answer covering this testimony were withdrawn by the district attorney, but still no motion was made by defendant to strike out the former testimony given that defendant was arrested. It is a fundamental rule requiring no authority to support it that appellant cannot complain of testimony which has been admitted without objection. The circumstances of finding the items were properly admitted, and no objection to testimony concerning the arrest was had. Hence no error can be predicated upon the admission of either element.

[7] Error is predicated upon remarks of the deputy district attorney during the cross-examination of the witness Taube when he said:

"Objected as improper, although I will say frankly that I do not blame a witness in view of the heat of the day and the nature of the examination for getting peevish. I think the examination has run to a most inordinate length. I am willing for the attorney to elicit anything that is of advantage to the defendant if he can,

but it sounds to me almost that the witness is on trial rather than the defendant."

[8] We find nothing which would prejudice the rights of the defendant in this statement, but if we had there is nothing to indicate that counsel attempted to have the error corrected, or that, had he made such effort, it would have been fruitless. In fact, in another instance where a question was asked by the deputy district attorney which counsel deemed to be prejudicial, the court, upon request, very promptly instructed the jury to disregard it. The last statement of the district attorney assigned as misconduct made during the course of his argument is as follows:

"As I said before, he did not give me much to answer, because he went too far afield. That is, not if I stick to the evidence. He did say that he would not willfully withhold anything that he thought you ought to know, and he would not try to save a criminal from being convicted, and I think I am justified in saying, from what I know about the case, that counsel was not justified in making that statement to you. I just want to recall, while we are talking about the law and generalities. * * *

Appellant deems this a reflection upon defendant's counsel, and perhaps the deputy district attorney might have chosen other words to express his sentiment which would have been a bit more appropriate, but so far as the effect upon the jury is concerned, the statement simply means that two gentlemen differed concerning the interpretation to be put upon the testimony. We fail to find any prejudicial error.

Judgment and order affirmed.

We concur: WORKS, P. J.; CRAIG, J.

Code, § 4252, as re-enacted in St. 1925, p. 71, providing for salary for county assessor, was untenable, since section 4252 must read in connection with section 4290, as amended by St. 1917, p. 1323, providing fee for assessor for collecting tax on unsecured personal property, unless otherwise provided, and, when read together, there was no room left for operation of this rule, since section 4252 merely fixed salary, and section 4290 declared additional compensation.

3. Taxation —310—Provision in statute held not to deprive assessor of right to fees granted by statute subsequently enacted (Pol. Code, § 1857, as amended by St. 1893, p. 264, and § 4290, as amended by St. 1917, p. 1323).

In mandamus proceedings by county against county assessor to compel return of sum retained by him as fees for collection of tax on unsecured personal property under Pol. Code, § 4290, and section 1857, which provides taxes collected for school purposes are not subject to fees for assessment, was without weight, since latest amendment to section 1857 was in 1893 (St. 1893, p. 264), and the latest amendment of section 4290 was in 1917 (St. 1917, p. 1323), and must be considered as controlling provision as subsequent expression of lawmaking power on same subject.

In Bank.

Petition for writ of mandate by the County of Ventura to be directed to Jasper Barry to compel payment of sum retained by defendant for his own use. Writ denied.

Superseding opinion of District Court of Appeal, Second District, Division 1. (259 P. 764).

James C. Hollingsworth, Dist. Atty., of Ventura, for petitioner.

Robert M. Clarke, Clarke & Bowker, and Walter E. Barry, all of Los Angeles, for respondent.

PRESTON, J. Petition for writ of mandate directing and compelling respondent, as assessor of the county of Ventura, to pay to H. R. Vandelinder, as treasurer of said county, the sum of \$8.85 now retained by said respondent for his own use, as 6 per cent. of the sum of \$147.60 collected by him as taxes on unsecured personal property within the said county belonging to Star Petroleum Company, a corporation.

The question is whether or not respondent, as assessor of Ventura county, is entitled to collect fees in accordance with the provisions of section 4290 of the Political Code, that is, retaining 6 per cent. of the total amount collected by him as such assessor as unsecured taxes levied upon personal property taxed within the said county.

Respondent's contention is that said section 4290 authorizes such retention of fees by him; that said section is the general law applicable to all cases where there is no special provision to the contrary in existence; that

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VENTURA COUNTY v. BARRY, County Assessor. (L. A. 9940.)★

Supreme Court of California. Dec. 8, 1927.

Rehearing Denied with Modification Jan. 5, 1928.

1. Taxation —310—Where general provision in statute was contravened by exception, held, on removal of exception, general provision, which was but in abeyance, governed (Pol. Code, § 4252, as amended by St. 1923, p. 1210, and § 4290, as amended by St. 1917, p. 1323).

Where assessor of Ventura county retained sum as fees for collecting tax on unsecured personal property within county, in accordance with Pol. Code, § 4290, as amended by St. 1917, p. 1323, and county contended that section 4252, as amended by St. 1923, p. 1210, repealed such provision in section 4290, by providing no commissions be retained, *held*, that language in section 4290, "unless in this title otherwise provided," was general, and applied to all cases not otherwise provided for, and that the amendment of section 4252 (St. 1923, p. 1210), did not repeal such provision, but was an exception, and section 4290 only remained in abeyance until conflicting provision of section 4252 was removed by re-enactment (St. 1925, p. 71), when it became operative again.

2. Taxation —316—"Expressio unius est exclusio alterius" held not applicable, where one salary statute was not restrictive and another granted additional fees (Pol. Code, § 4252 as re-enacted by St. 1925, p. 71, and § 4290, as amended by St. 1917, p. 1323).

In mandamus proceeding by county against assessor to compel return of sum retained as fees, contention that rule of "expressio unius est exclusio alterius" was applicable to Pol.

section 4252 of the Political Code is the special provision relating to the county of Ventura; and that, inasmuch as there is no inhibition in said section 4252 against the retention of said fees, the provision of section 4290 authorizing retention is applicable to him.

After a most careful research among the statutes and decisions, including an independent investigation upon our part, we are constrained to conclude that respondent is correct in his contention, and under the law as it is now written he has the right to retain such percentage. The question presented is purely one of statutory construction.

Section 4290, as it existed on the 22d day of June, 1923, and as it now exists, in so far as material to this controversy, was and is as follows:

"The salaries and fees provided in this title shall be in full compensation for all services of every kind and description rendered by the officers named in this title either as officers or ex-officio officers, their deputies and assistants, unless in this title otherwise provided, and all deputies employed shall be paid by their principals out of the salaries provided in this title, unless in this title otherwise provided:

"Assessor. Provided and except, that the assessor shall be entitled to receive and retain for his own use, unless in this title otherwise provided, six per cent. on personal property tax collected by him, as authorized by section three thousand eight hundred twenty, and fifteen per cent. of all amounts collected by him for poll taxes, and road poll taxes, and also five dollars per hundred names of persons returned by him as subject to military duty, as provided in section one thousand nine hundred one. * * *

On the said 22d day of June, 1923, section 4252 of the Political Code, after providing for salaries for the assessor and his deputies, was amended, and contained the following clause (Stats. 1923, p. 1210):

"All commissions or fees now or hereafter allowed by law shall be paid into the county treasury and no compensation shall be allowed the assessor for preparing the military roll of a county of this class."

However, by the statutes of 1925 (page 71) said section 4252 was again re-enacted with the above language omitted.

It is the contention of petitioner that the enactment of 1923 repealed, in so far as the county of Ventura was concerned, said section 4290, relating to retention of percentages on unsecured personal property taxes collected by the assessor, and that the subsequent omission or repeal of the above-quoted language by the act of 1925, did not serve to re-enact the repealed provisions of section 4290. In this contention petitioner calls to his aid section 328 of the Political Code, which reads as follows:

"No act or part of an act, repealed by another act of the Legislature, is revived by the repeal of the repealing act without express words reviving such repealed act or part of an act."

This section of the Code is undoubtedly effective in all cases meeting the test therein provided for. It applies to implied repeals as well as express repeals. County of Yolo v. Colgan, 132 Cal. 265, 276, 64 P. 403, 84 Am. St. Rep. 41.

The real question presented, however, is whether or not the 1923 provision of section 4252 did repeal expressly or by necessary implication any portion of said section 4290. It may here well be noted that section 4290 is a substantial duplicate of section 215 of the County Government Act of 1897 (Stats. 1897, p. 572), which latter section in turn was a substantial re-enactment of section 216 of the County Government Act of 1893 (Stats. 1893, p. 507). It may also here be noted that section 4252 of the Political Code, now applicable to Ventura county, is but a re-enactment of what was formerly section 4259 of said Code, which in turn was a substantial duplicate of section 187 of the County Government Act of 1897 (Stats. 1897, p. 543), which in turn was a substantial re-enactment of section 192 of the County Government Act of 1893 (Stats. 1893, p. 463).

In other words, these two Code sections have been side by side in the legislation of this state respecting this subject for more than 30 years. The clause substantially as above quoted as a part of the act of 1923 has existed continuously since 1913 (Stats. 1913, pp. 1177, 1178-1179), and was continued in the re-enactments of that section in 1915 (Stats. 1915, p. 224), 1917 (Stats. 1917, p. 127), and 1921 (Stats. 1921, p. 678). In other words, from 1893 to 1913, a period of 20 years, the assessor of Ventura county was entitled under the law to collect percentage fees. From 1913 to 1923, a period of 10 years, he was denied that privilege. In 1925 said clause, as above stated, was omitted from the re-enactment of said section, and we can see no escape from the conclusion that the assessor of Ventura county is again entitled to resume the right to collect this percentage and retain it for his own use.

If each enactment of section 4252 and its forerunner, section 4259, from the year 1913 to the year 1923, was a repeal of section 4290, and each re-enactment of 4290 was in turn a repeal of section 4252, then each of these sections has been at least twice repealed.

[1] We think that petitioner has misconceived the principle of statutory construction applicable to this situation. In the first place, it is plain that these two statutes are in *pari materia*. It is also plain that there is no inherent antagonism between them, for section 4290 contains the significant language "unless in this title otherwise provided." In other words, the general section, 4290, is to apply in all cases not "otherwise provided" for in some other section of the same title, and where otherwise provided for the general

law is not repealed, but remains in abeyance only.

The rule of law applicable to this situation is well stated as follows:

"The statutory rule against the revival of a statute by the repeal of a repealing act relates to absolute repeals, and not to cases where a statute is left in force and all that is done in the way of repeal is to except certain cases from its operation. In such cases the statute does not need to be revived, for it remains in force, and the exception being taken away, the statute is afterwards to be applied without the exception. * * *" 25 R. C. L. 934.

The rule has again been stated by the annotator (Ann. Cas. 1918B, p. 284) in a note in the case of Manchester Tp. Supervisors v. Wayne County Commissioners, 257 Pa. 442, 101 A. 736, where the following language is used:

"A statute abrogating the common-law rule as to the revival of an act by the repeal of the repealing act, has no application where the effect of an act is not to abrogate entirely a former act but merely to withdraw from the operation of the earlier act a portion of the cases included within its terms, leaving the earlier act still in force except as to the cases specifically provided for by the later one. Under such circumstances the repeal of the later act has the effect of again bringing the cases provided for by it within the operation of the original act."

The principle is again stated in *Ex parte Williamson*, 116 Wash. 560, 565, 200 P. 329, 331, as follows:

"It is argued, however, that this conclusion leaves the matter where it was before; that the act operated to suspend the general statutes in so far as it conflicted with them, and that these statutes are not revived by the suspension of the suspensatory act. But the rule is otherwise. The rule against the revival of a statute by the repeal of a repealing statute relates to absolute repeals only, and not to instances where the statute is left in force, and all that is done in the way of repeal is to except certain cases from its operation. In such instances the original statute does not need to be revived, for it remains in force, and, the exception being taken away, the statute is to be applied without the exception."

In the case of *Pepin Tp. v. Sage* (C. C. A.) 129 F. 657 (note, Ann. Cas. 1918B, p. 285); it appeared that a statute defining the boundaries of a township and city was nullified by the enactment of a statute placing a part of the territory within the limits of a village. It was claimed that, under the Minnesota constitutional provision prohibiting the revival of a repealed statute by the repeal of the repealing act, the statute was not revived by the repeal of the village act. Applying the exception as set out above, the court said:

"We think these provisions are not applicable to the act dissolving the village. Originally the township and city included the territory in question, and the special acts which placed it

within the village contain no reference whatever to the township or city, or to their boundary lines, or to the statutes defining them. The statutes creating the township and the city were not at any time repealed, but were left in force. The township and the city were not at any time extinguished, but remained in existence under the operation of those statutes. The effect of the special acts creating the village and defining its boundaries was to except the territory covered by it from the township and the city and from the operation of the statutes creating them. Subject to that exception, the legislative will, as at all times registered and expressed in living, operative, and valid statutes—not enactments entirely repealed, either expressly or by implication—placed this territory in the township and city. When the special acts which by implication put that exception upon these statutes were repealed, the exception was at an end. These statutes and their definition of the boundaries of the township and city were then operative as if there had been no exception. They did not need to be revived because they had not been repealed."

The principle is likewise recognized in 23 Cal. Jur. § 100, p. 718, as follows:

"A general statute, controlled in some of its provisions by a subsequent special statute, is revived by amendment of the latter, intended to give effect to the former. And in cases of conflict between a general and special act, which results in an implied repeal of certain provisions of the former, the subsequent repeal of the latter act may operate to revive the provisions of the general act."

The case of *People v. Hunt*, 41 Cal. 435, itself furnishes an illustration of the difference between the rule here announced and the cases covered by section 328 of the Political Code. This principle is also recognized in the case of *People v. Phoenix*, 6 Cal. 92, and *Smith v. Mathews*, 155 Cal. 752, 103 P. 199. That the two sections of the Code in question are not repugnant to each other as they now read, nor as they formerly read, is implied in the statement of the court found in *County of Sacramento v. Pfund*, 165 Cal. 84, 88, 130 P. 1041, 1042, as follows:

"Section 4235 merely fixes the compensation and leaves section 4290 to declare what additional compensation may be received and what is forbidden."

Section 4235 referred to is a section in all respects similar to section 4252 here under consideration. See, also, *Alameda County v. Dalton*, 148 Cal. 246, 248, 82 P. 1050.

[2] The above conclusions dispose of the contention that the rule of "expressio unius est exclusio alterius" should be made applicable to section 4252, which has for its provision the following language:

"In counties of the twenty-third class the county officers shall receive as compensation for the services required of them by law or by virtue of their offices the following salaries, fees and expenses, to wit. * * *"

As above noted, section 4252 must be read in connection with section 4290, and, when they are read together, there is no room left for the operation of this rule.

[3] Neither can any weight be given to section 1857 of the Political Code, which provides, respecting taxes collected for school purposes, that the assessor shall not have fees or compensation for assessing, collecting, or receiving the same. The latest amendment to section 1857 was in 1893. Stats. 1893, p. 264. The latest amendment and re-enactment of section 4290 was, as we have noted, in 1917 (Stats. 1917, p. 1323). As the latter re-enactment is a subsequent expression of the lawmaking power on this same subject, it must be given control over the provisions of the earlier section, and no authority need be cited to sustain this rule.

We can take no notice of the contention that the county assessor of Ventura county during this and subsequent fiscal years may, on account of the conditions pertaining in that county, collect a large amount of taxes, and thereby secure for himself unusual compensation for performing the duties of his office. It is, however, consoling to think that, for every dollar the assessor gets, the county treasury will receive approximately \$16. It has been the custom throughout the state for perhaps 40 years to allow these commissions to assessors, and such policy has no doubt been a wise one, for by so doing large amounts of taxes have been secured for the treasury, which but for this incentive might well have been lost to it.

The application for mandate is therefore denied.

We concur: SHENK, J.; RICHARDS, J.; CURTIS, J.; SEAWELL, J.; LANGDON, J.

203 Cal. 44

CITY OF LOS ANGELES v. GLASSELL et al.
(L. A. 9871.)

Supreme Court of California. Jan. 4, 1928.

1. Appeal and error ☞110—Order denying motion for new trial is nonappealable.

Order denying defendants' motion for new trial, after judgment in condemnation proceedings, is nonappealable.

2. Appeal and error ☞870(6)—Order denying motion for new trial may be considered on appeal from judgment.

Action of court in condemnation proceedings in denying defendants' motion for new trial, after judgment, may be properly considered on appeal from the judgment.

3. Eminent domain ☞167(4)—Statutory authority authorizing condemnation proceedings for public park purposes must be strictly pursued (Park and Playground Act, as amended).

Proceedings under the Park and Playground Act, as amended (St. 1909, p. 1066; St. 1913,

p. 414; St. 1921, p. 349), to assess and collect any outlay necessary to establishment of parks and playgrounds, are in invitum, and statutory authority must be strictly pursued, and every condition or other prerequisite to the exercise of jurisdiction be observed, especially every requisite of statute having semblance of benefit to landowner.

4. Eminent domain ☞180—Notice required by law authorizing condemnation of property for public park purposes is necessary prerequisite to acquiring jurisdiction (Park and Playground Act, § 9, as amended by St. 1913, p. 418, § 4).

In proceeding under the Park and Playground Act, as amended (St. 1909, p. 1066; St. 1913, p. 414; St. 1921, p. 349), to condemn property for public park purposes, notice provided for under section 9 of the act, as amended by St. 1913, p. 418, § 4, held necessary to acquirement of jurisdiction to make and enter decree fixing award to property owners.

5. Evidence ☞83(6)—Presumption that clerk gave proper notice in condemnation proceedings will not be indulged in case of direct attack on judgment (Code Civ. Proc. § 1963, subd. 15; Park and Playground Act, as amended).

Presumption will not be indulged under Code Civ. Proc. § 1963, subd. 15, that official duty has been performed by clerk pursuant to decree in condemnation proceedings under the Park and Playground Act, as amended (St. 1909, p. 1066; St. 1913, p. 414; St. 1921, p. 349), reciting that due and legal notice of time and place had been given, where attack on judgment by defendants therein is a direct, and not a collateral, attack.

6. Appeal and error ☞934(1)—Though uncontradicted presumptions favor correctness of judgment, facts may be shown on direct attack, and judgment itself reversed or modified.

All presumptions, uncontradicted by, or inconsistent with, record, are in favor of correctness of judgment, but in case of direct attack the true facts may be shown, and judgment itself on appeal may be reversed or modified.

7. Appeal and error ☞840(1)—Appellate court, on direct attack on judgment, may appeal to record for facts.

Where there is a direct attack on judgment, appellate court may appeal to record, including the bill of exceptions for the facts.

8. Judgment ☞518—Seasonable motion to vacate judgment is direct attack.

Even a motion to vacate judgment, if seasonably made, is a direct attack thereon.

9. Eminent domain ☞184—Personal notice to property owners and appearance to contest award held not waiver of necessity of notice required under law authorizing proceeding to condemn land for public parks (Park and Playground Act, § 9, as amended by St. 1913, p. 418, § 4).

Personal notice to owners of property to be taken for public park purposes under Park and Playground Act, as amended (St. 1909, p. 1066; St. 1913, p. 414; St. 1921, p. 349), together

with appearance to contest award of referees and introduction of evidence before the court, held not a waiver of necessity of notice required by section 9 of the act as amended by St. 1913, p. 418, § 4, since object of proceeding was not alone to fix value of property taken, but also to establish basis of tax demanding that other property owners of district who were to bear the burden be heard.

In Bank.

Appeal from Superior Court, Los Angeles County; F. M. Jamison, Judge.

Condemnation proceedings by the City of Los Angeles against Andrew Glassell, Una E. G. Moss, Louis A. Clarke, and M. E. Latham and others. From a judgment for plaintiff and an order denying a motion for a new trial, defendants named appeal. Appeal from order denying the motion for a new trial dismissed, and decree appealed from reversed.

Superseding opinion of District Court of Appeals, 255 P. 209.

J. E. Hannon, B. R. Berlin, and Ernest U. Schroeter, all of Los Angeles, for appellants.

Jess E. Stephens, City Atty., and Donald M. Keith, and Leslie K. Floyd, Deputy City Atty., all of Los Angeles, for respondent.

PRESTON, J. This is an action brought by the city of Los Angeles under the Park and Playground Act, as amended (Stats. 1909, p. 1066, Stats. 1913, p. 414, Stats. 1921, p. 349), to condemn 40 lots in the Torthorwald tract No. 1, in said city, for public park purposes. Several separate answers were filed by the various defendants, alleging ownership of the property, and claiming compensation for the taking thereof. Referees were appointed by the court to fix the compensation to be allowed defendants. Upon the filing of the report of the referees, defendants named above filed exceptions thereto, whereupon the matter was heard before the superior court, and the court made findings increasing the compensation nearly 50 per cent. over that allowed by the referees.

[1, 2] A motion for a new trial, supported by affidavits, was regularly made and denied. No counter affidavits were filed putting in issue the matters set forth in the affidavits of the moving parties. An interlocutory judgment of condemnation was entered accordingly, but the defendants mentioned, still being dissatisfied with the awards as to them, took this appeal from so much of the judgment as affected their respective interests. Said defendants attempted also to appeal from the order denying their motion for new trial. Such order in a case of this character is nonappealable (*Heine Piano Co. v. Bloomer*, 183 Cal. 398, 191 P. 900, and cases there cited), and need not be further considered. But the action of the court in denying motion

for new trial may be properly considered on appeal from the judgment.

Upon further consideration of this cause we find ourselves in accord with the conclusion of the learned District Court of Appeal to the effect that the interlocutory judgment entered herein must be reversed, but we prefer to base our conclusion upon slightly different reasoning.

[3] It requires no citation of authority upon the proposition that eminent domain proceedings are in invitum, and the same may be said of proceedings to assess and collect any outlay necessary to the establishment of parks and playgrounds under the act here involved:

"* * * And the statutory authority (must) be strictly pursued, and every condition or other prerequisite to the exercise of jurisdiction be observed, especially every requisite of the statute having the semblance of benefit to the landowner. * * *" 20 Corpus Juris, pp. 882, 883.

Appellants question the validity of the proceedings upon several different grounds. The most important one, and the only one that need be here considered, is the contention that, after the assessment district had been formed, the eminent domain action pursuant to ordinance of the mayor and city council instituted, jury trial waived, and after appointment of referees, hearing before them and filing of their report, the city clerk failed to comply with the provisions of section 9 of said Act of 1909 as amended in 1913 (Stats. 1913, p. 418), in that he failed to give to those persons not parties to the action, who were property owners in said district, and hence interested in the improvement, notice of the time and place of the hearing before the court upon the report of said referees. So much of the provision in question as is here involved is as follows:

"Notice of the time and place of said hearing must, at least ten days before the time so appointed, be served on all the other parties, except defendants whose default has been entered. The plaintiff, or any defendant who has answered, may file exceptions in writing to said report, specifying the grounds upon which such exceptions are based, at any time within not less than one day prior to the hearing; and any such party so filing exceptions to said report, may appear at the hearing of said report and contest the same. In addition to the notice hereinbefore provided, the clerk of the court must give notice of the filing of said report, and of the time and place appointed for the hearing of the same, to all persons owning or having an interest in any property, included within the assessment district for said improvement described in the ordinance of intention, by causing said notice last mentioned to be published for five days in a daily newspaper published and circulated in the city; or, if there be no such daily newspaper, then by two insertions in a weekly newspaper so published and circulated. Any publication of such notice shall commence at least ten days before the time appointed for the

hearing of the report. Said notice shall require all persons owning or having an interest in any property included within said assessment district for said improvement to intervene in said action, and file, in the office of the clerk of said court, his exceptions in writing to said report, if any he has, specifying the grounds upon which such exceptions are based. Said notice shall also contain a description of the said assessment district as set forth in the ordinance of intention. At any time within not less than one day prior to the hearing, any person not a party to the action, owning or having an interest in any property included within said assessment district, may intervene in the action, and file his exceptions in writing to said report, specifying the grounds upon which such exceptions are based; and any such person so intervening may appear and contest the said report, and introduce evidence in support of such exceptions." Stats. 1913, pp. 418, 419, § 4.

[4] A consideration of the foregoing provision leaves no doubt that the giving of this notice as above provided is necessary to the acquirement of jurisdiction to make and enter a decree fixing the award to the property owners whose lands are to be taken. This is true because the award made by such decree is the basis for the assessment against the property of the district of the necessary taxes to meet and liquidate the expense of the improvement. This statute in reality makes the property owners of the district parties to the eminent domain proceedings.

[5] Respondent, however, in answer to this contention, points out that the decree recites:

"And it appearing to the court that due and legal notice of the time and place fixed for the hearing of said report had been duly made and given as required by law, * * *"

—and contends that we must therefore indulge the presumption that his official duty was performed by the clerk (Code Civ. Proc., § 1963, subd. 15), which presumption will suffice in lieu of proof that the step required by the statute was really taken. But respondent overlooks the fact that this is a direct, and not a collateral, attack upon the judgment. The record discloses a motion for a new trial supported by affidavits attacking and putting in issue directly the failure of the record to show proof of jurisdiction in this respect. In the preparation of the record the absence of this proof is made the subject of a specification of the insufficiency of the evidence. No counter showing of any kind was made at any time on this issue. In fact, the bill of exceptions contains this recital:

"No proof was made or filed in said cause that said notice had ever been published by the clerk, as required by subdivision IX of the Park and Playground Act, under which such proceedings were commenced."

We must therefore assume it to be a fact that said notice was not published.

Section 30 of said Act of 1909 (Stats. 1909,

p. 1074), by implication, at least, acknowledges that jurisdiction cannot be obtained without the giving of this notice, for in it we find the following language:

"No publication or notice other than that provided in this act shall be necessary to give validity to any proceedings had hereunder."

[6] Section 31 of said act provides the manner of proving the publication of said notice, and makes applicable thereto section 2010 of the Code of Civil Procedure. It is plain that the presumption that official duty has been performed does not enter into this situation.

It is quite true that "all presumptions not contradicted by or inconsistent with the record are in favor of the correctness of the judgment" (Lyons v. Roach, 84 Cal. 27, 29, 23 P. 1026), but it is also true that "the main difference between collateral and direct attacks is, that in the former the record alone can be inspected, and is conclusively presumed to be correct; while on direct attack the true facts may be shown, and thus the judgment itself on appeal may be reversed or modified" (Lyons v. Roach, supra, page 30 [23 P. 1026]). See, also, to the same effect, Kahn v. Matthai, 115 Cal. 689, 47 P. 698.

[7, 8] Here we have a direct attack, and we may appeal to the record, including the bill of exceptions, for the facts. Woods v. Hyde, 64 Cal. App. 433, 436, 222 P. 168, 15 Cal. Jur. § 139, p. 46. Even a motion to vacate the judgment, if seasonably made, is a direct attack. In re Dahnke, 64 Cal. App. 555, 560, 222 P. 381; Norton v. Atchison, etc., Co., 97 Cal. 388, 30 P. 585, 32 P. 452, 33 Am. St. Rep. 198; Estate of Elkerenkotter, 126 Cal. 54, 58 P. 370.

The cases relied upon by respondent, such as Hahn v. Kelly, 34 Cal. 391; Young v. Red Fork Levee Dist., 124 Ark. 61, 186 S. W. 604; Hamilton County v. Chase (Iowa) 152 N. W. 580, and Dunlap v. Board of Com'rs, 85 Okl. 295, 205 P. 1100, are not in point, for, as above stated, in each of these cases the attack was collateral and not direct, and, of course, all intendments in such case are in favor of the validity of the judgment, and the recitals therein will be taken as conclusive. This rule has no saving power whatsoever for the failure to take a jurisdictional step in an action where this issue is directly presented in the case itself.

[9] Finally, respondent asserts that personal notice to appellants, their appearance to contest the award of the referees, and their introduction of evidence before the court, was a waiver of the necessity for the giving of such notice. If the rights of appellants as persons interested in the property to be taken were alone involved, this contention would be unanswerable. But, as above pointed out, the object of this proceeding was not alone to fix the value to appellants of their property taken, but also to establish legally

the basis of the tax that should be imposed upon the property of the district to defray the expense of the improvement. It is due process of law under the statute that demands opportunity for the property owners of the district, who are to bear the burden, to be heard. In this aspect of the question the appearance of the property owners whose lands are being taken, not only does not suffice, but their interests may well be adverse to the interests of the district as a whole. The case of *Harrington v. Superior Court*, 194 Cal. 185, 228 P. 15, relied upon by respondent, recognizes the distinction between jurisdiction of the subject-matter, which cannot be conferred by consent, and jurisdiction of the person, which may be so conferred after jurisdiction of the subject-matter has attached. The dual purpose of the award is overlooked by respondent.

Cases involving situations similar to that of the case at bar and with a similar conclusion to the one here announced are *County of Sutter v. McGriff*, 130 Cal. 124, 62 P. 412; *Cook v. Manasquan*, 80 N. J. Law, 206, 76 A. 310; *Taylor v. Todd*, 48 Mo. App. 550; *Crawford v. Frio County* (Tex. Civ. App.) 153 S. W. 388; *In re Buffalo*, 78 N. Y. 362; *Mitchell v. Ills. & St. L. R. & Coal Co.*, 68 Ill. 286; *Detroit, etc., v. Hamtramck Highway Comm.*, 34 Mich. 36; *In re Washington Park*, 52 N. Y. 131; *Wayne v. Caldwell*, 1 S. D. 483, 47 N. W. 547, 36 Am. St. Rep. 750.

Several other serious questions are urged, but we do not feel called upon to pause to discuss them, as they are so apparent that they are not likely to recur in further proceedings.

The appeal from the order denying motion for a new trial is dismissed, and the decree appealed from is reversed.

We concur: WASTE, C. J.; CURTIS, J.; SHENK, J.; RICHARDS, J.; SEAWELL, J.; LANGDON, J.

203 Cal. 1

SOBELMAN et al. v. MAIER et al.
(L. A. 8501.)

Supreme Court of California. Dec. 29, 1927.

1. Appeal and error ⇨1039(4)—Reference to wrong contract in complaint did not result in prejudicial injury, in view of defendants' admissions in answer and on trial.

Where complaint alleged sales contract of July 14, 1922, and set forth as part of said contract a written agreement dated June 23, 1922, and alleged, in paragraph 2, terms of contract and that defendants failed to comply with terms of agreement in failing to purchase more than 923,300 shells or ice cream cones and 770 cans, and defendants' answer admitted contract to purchase as alleged in paragraph 2 and that only 923,300 shells and 770 cans were ac-

cepted and paid for, defendants suffered no prejudicial injury by reference to July contract.

2. Appeal and error ⇨1039(2)—Where evidence showed later contract was made to strengthen defendants' position under earlier contract, no harm resulted to defendants because of plaintiffs' reliance on later contract in suit.

In action for damages for breach of contract whereby defendants agreed to buy certain number of ice cream cones and cans during specified periods covering one year, where evidence showed that provisions of July contract were for benefit of defendants and such contract was result of their efforts to strengthen their position under original June contract, no harm resulted to them on account of plaintiffs' reliance upon July contract.

3. Parties ⇨15—Party not signing but having interest in contract was proper party plaintiff to action for damages for its breach.

Party not signing original sales contract with defendant, but having interest therein and signing later contract between parties, was proper party to action for damages for breach of contract.

4. Appeal and error ⇨187(2)—Complaint that one was not proper party could not be made on appeal in absence of special demurrer.

Complaint that one was not proper party could not be made on appeal in absence of special demurrer to complaint on that ground.

5. Sales ⇨89—Defendants' acts in securing another contract authorized finding that performance of original sales contract was held in abeyance by mutual agreement awaiting execution of later contract.

That defendants were dissatisfied with provisions of original sales contract and were active in securing later contract, and that parties continued doing business with each other after date of second contract, authorized court's finding that by mutual consent plaintiffs did not furnish, and defendants did not buy, stipulated number of ice cream cones from certain date to date of execution of second contract.

6. Sales ⇨111—Sellers did not waive claim for damages for breach of contract to date of notice by serving notice on buyers of termination.

Sellers did not waive claim for damages for breach of defendants' contract to purchase specified number of ice cream cones and cans up to date of notice by serving notice that buyers had breached contract and that on that account termination was declared, but expressly stating their election to hold buyers responsible in damages.

7. Contracts ⇨271—One injured by breach of contract may treat contract as rescinded, keep contract alive, or treat repudiation as putting end to contract and sue for lost profits.

One who has been injured by breach of contract may treat contract as rescinded and recover upon quantum meruit so far as he has performed, or he may keep contract alive for

benefit of both parties, being at all times ready and able to perform, or he may treat repudiation as putting an end to contract for all purposes of performance, and sue for profits he would have realized if he had not been prevented from performing.

8. Appeal and error ⚡1033(9)—Where facts would have justified larger award, defendants could not complain of award or lack of evidence supporting it.

In action for damages for breach of contract whereby defendants agreed to buy specified number of ice cream cones and cans, where lost profit on number of ice cream cones and cans refused would have sustained much larger award than was made by court, defendants could not complain of award or of lack of evidence to support it.

9. Contracts ⚡314—**Damages** ⚡40(2)—Where breach of contract makes performance by plaintiff impossible, he may decline to proceed and recover profits lost.

Where breach of contract renders it impossible for the other party to perform, he may decline to proceed in performance and sue for damages, in which case he may recover all loss occasioned by breach, including profits he would have made if contract had been performed.

10. Appeal and error ⚡1010(1)—Sufficiency of proof of profits lost from breach of contract should have been addressed to trial court, where evidence warranted court's finding.

Defendants' criticism directed against sufficiency of proof of net profits from sale of articles lost as result of defendant buyers' breach of contract was matter which should have been addressed to trial court who passed on weight of testimony, where evidence warranted court's finding.

11. Damages ⚡6—One cannot avoid liability for breach of contract because amount of detriment is difficult to prove.

Where a defendant breaches a contract, law does not hold him faultless because of difficulties that arise in proving exact amount of detriment caused by him.

In Bank.

Appeal from Superior Court, Los Angeles County; C. P. Vicini, Judge.

Action for damages for breach of contract by William A. Sobelman and another against Ed. R. Maier and others. From a judgment for plaintiffs, defendants appeal. Affirmed.

Edward F. Wehrle and Anderson & Anderson, all of Los Angeles, for appellants.

Goodwin J. Knight, Thomas Reynolds, and Schweitzer & Hutton, all of Los Angeles, for respondents.

PRESTON, J. This is an action for damages for breach of a contract wherein plaintiffs agreed to manufacture, furnish, and sell to defendants certain specialties protect-

ed by letters patent, and defendants were to receive and accept same in certain amounts and at certain times and to pay for them as prescribed, which specialties were to be used in the making of an article of commerce known as "Cold Dogs." Plaintiffs had judgment, and defendants have appealed. They have but little to urge as to the merits of plaintiffs' claims against them. Nevertheless they have urged much of a highly technical nature in other respects and this necessitates a special reference to the pleadings, evidence, and findings.

The complaint alleges that on the 14th day of July, 1922, plaintiffs entered into a certain written contract with defendants, together with Choco-Ice Company, a Minnesota corporation, which contract is set forth in full. It is executed by plaintiff Sobelman, as first party, plaintiff Rowe as third party, and the above company as fourth party, but is unexecuted by defendants as second parties. Also set forth in full in said complaint as a part of the above-mentioned contract and referred to therein is a written agreement as above mentioned dated June 23, 1922, between plaintiff Sobelman and defendants. This agreement is duly executed and provides for the purchase by defendants of stipulated numbers of ice cream cones and cans during specified periods covering one year, with renewal privilege, at agreed prices, and for the sale thereof by plaintiff Sobelman, he being the sole licensee of Choco-Ice Company for exclusive manufacture and sale in all United States territory west of the Rocky Mountains of said so-called chocolate-coated ice cream cones or shells and cans or containers for use in filling them.

It developed that plaintiff Sobelman was not the owner of the patent for said cones and cans nor of the license for their exclusive sale in the territory mentioned, but derived all his rights in the subject-matter of the contract from a certain document dated April 29, 1922, executed to him and also to plaintiff Rowe by Choco-Ice Company, the real patentee or licensee of the patentee. Said document of April 29, 1922, is not set forth in the complaint, but was introduced in evidence on trial of the cause. After execution of the contract of June 23, 1922, defendants required plaintiff Sobelman to produce the document showing his authority in the premises. This he did, securing a copy of said writing of April 29, 1922, and immediately thereafter, in order to satisfy defendants and prevent any misunderstanding, the contract of July 14, 1922, was drafted and executed as first above set forth. The purpose of said contract was to define the rights of the respective parties under the various agreements and to assure defendants in some of the covenants in their favor in said contract of June 23, 1922. It contains also plaintiff

Rowe's ratification of the agreement of June 23, 1922, in so far as his interests are affected thereby, and likewise the Choco-Ice Company's ratification thereof. It further provides for a slightly different division of profits and for a certain method of accounting, all to the distinct advantage and benefit of defendants.

After setting forth said agreement of July 14, 1922, the complaint further alleges, in paragraph II thereof, that by its terms defendants agreed to purchase from plaintiffs 50,000 cones per day or 300,000 per week; 1,000 cans immediately upon execution of the contract, and 800 cans per month from July 1, 1922, to October 1, 1922, and agreed to pay for said cones at the rate of \$12.50 per thousand and for said cans at the rate of \$7 each; that defendants failed to comply with or conform to the terms and conditions of said agreement, in that they failed to purchase more than 923,300 shells up to September 12, 1922, and only purchased 770 cans; that plaintiffs were at all times ready, willing, and able to carry out their part of the agreement, wherefore they prayed judgment against defendants in the sum of \$14,646.75 as damages suffered from the breach of the contract.

Defendant Maier filed a separate answer, practically identical with the amended answer of defendants Sugar and Fink, which admits execution of the contract of June 23, 1922, but denies that said defendants entered into the alleged contract of July 14, 1922, or became obligated thereunder. Said amended answer also denies their failure to comply with any of the terms or conditions of said agreement of June 23, 1922, and contains six additional and separate defenses, one claiming a waiver of the right to sue for damages by reason of a written notice dated September 12, 1922, of rescission and termination of said contract of July 14, 1922, signed by plaintiffs, charging defendants and each of them with failure to make the purchases agreed upon and notifying them that plaintiffs hold them responsible in damages therefor, and the other separate defenses alleging various false and fraudulent representations made to defendants by plaintiff Sobelman as to the following matters: The amount of ice cream necessary to fill the cones and the profit to be made from sale thereof, said misrepresentation resulting in the loss to defendants of at least \$10,000; as to the ability of the licensee and patentee to manufacture and deliver the cones called for by the agreement; as to the grade of milk chocolate used in the manufacture of said cones; as to the territory for which said plaintiff Sobelman was sole licensee; as to the furnishing of tinfoil wrappers for the cones appropriately labeled "Choco-Ice" and "A Cold Dog," which wrappers were never received.

The trial court found against defendants

on all issues and in favor of plaintiffs, awarding them damages in the sum of \$5,966.75. With reference to the several agreements it found that plaintiffs and defendants entered into the agreement dated June 23, 1922, attached to and referred to in the agreement of July 14, 1922, set out in paragraph 1 of plaintiffs' complaint; that after the execution of said contract of June 23, 1922, at the instance of defendants, plaintiffs secured the execution of said agreement of July 14, 1922, and thereafter all parties to the agreement of June 23, 1922, continued to operate thereunder, and at no time did defendants or any of them ever repudiate or disclaim any responsibilities under the agreement of June 23, 1922, or July 14, 1922.

[14] Appellants insist that plaintiffs are declaring on the contract dated July 14, 1922, to which appellants are not parties; that at most the contract of June 23, 1922, is in the case as a part of said unexecuted July contract. They also insist that plaintiff Sobelman alone was a party to the contract of June 23, 1922, and the presence in the case of plaintiff Rowe conclusively shows a reliance upon the July contract and the insertion of this additional name as plaintiff is an added reason why the complaint on its face does not state a cause of action. There is no substantial merit in appellants' position in this behalf. The gravamen of the charge in the complaint and the issue that was tried was a breach of the agreement on the part of defendants to purchase and pay for the goods as manufactured and the damages sustained by plaintiffs for such breach during the period of time from the beginning of the contract until September 12, 1922. The amended answer of the defendants admits a contract to purchase as alleged in paragraph II of the complaint, and it was admitted on the trial that only 923,300 shells and 770 cans were accepted and paid for; therefore, no prejudicial injury could have been suffered on their part by a reference to the wrong contract. In fact, the original answer of defendants Sugar and Fink not only admitted the execution of the contract as alleged, but in legal contemplation admitted a breach thereof. Furthermore, the evidence shows clearly, as found by the court, that the provisions of the July contract were for the benefit of appellants and the contract was the result of the efforts of the then attorney for appellants or some of them to strengthen their position under the June contract, and for this reason also no harm resulted to them on account of reliance by plaintiffs upon the July contract. The presence of Oliver A. Rowe as plaintiff was proper, as it developed that appellants well knew that he had an interest in the June contract, and he was, therefore, a proper party to the action for damages for its breach. His connection with the matter was repeatedly brought home to appellants

as he was an active participant in the dealings with them under the contract. Besides, even if he were not a proper party, no advantage could be taken of that situation now in the absence of a special demurrer to the complaint upon that ground.

[5] In this connection appellants complain of the finding made by the court that "by mutual consent, plaintiffs did not furnish and defendants did not buy the stipulated number of shells or cones from June 23, 1922, to July 15, 1922," insisting that no evidence can be found in the record to support this finding and that but for the default of plaintiffs in this behalf, appellants would have been able to secure one purchaser for all the product purchased from plaintiffs. After the contract of June 23, 1922, was executed, appellants, acting through an attorney, in effect advised plaintiffs that it was unsafe to proceed under it and set about procuring another contract, of which efforts the contract of July 14, 1922, was the result. As long as appellants were dissatisfied with the provisions of the contract of June 23, 1922, and were active in securing the contract of July 14, 1922, this situation positively implied to plaintiffs that active production under the contract might be held in abeyance pending termination of the proceedings set on foot by appellants themselves. In other words, the circumstances and acts of the parties clearly show a tacit, if not express, agreement that deliveries under the contract would be held in abeyance awaiting execution of the July contract; moreover, the parties continued to do business with each other after July 15, 1922, and this too would authorize the finding. In view of this situation we need not discuss the sharply contested issue as to whether or not appellants lost a customer for their whole output and were thereby damaged for obviously under this finding plaintiffs would not be answerable for any loss even in the event such claim was sustained. Nor need we pause to consider whether in any event damages for such a claim could be collected.

The finding of the court that appellants breached their contract has ample support in the evidence, and such evidence need not be here reviewed. The damages claimed by plaintiffs only extend over the period beginning with the contract and ending September 12, 1922. The record would have well warranted even greater relief than was granted by the court below.

[6] There is no merit whatever in the contention that by the written notice served September 12, 1922, plaintiffs waived their claim to damages. The court finds that on September 9th a written demand reciting past breaches of the contract was served upon defendants, and in it was a notice that damages would be claimed for failure to live up to the covenants thereof. The second writ-

ing was in legal effect, although unhappily worded, a notification to appellants that they had breached the contract; that on that account a termination thereof was declared, expressly stating, however, their election to hold appellants responsible in damages for their said failure to fulfill the contract up to the date of the notice. No claim is made for subsequent damages, and hence no reason exists for the application of the rule laid down in such cases as *Lemle v. Barry*, 181 Cal. 1, *House v. Piercy*, 181 Cal. 247, 183 P. 150, and *McCready v. Bullis*, 59 Cal. App. 286, 210 P. 638.

[7] In this action plaintiffs are standing upon the contract and could at least hold appellants liable for all damages accruing prior to service of the notice. "One who has been injured by a breach of contract has an election to pursue any of three remedies. He may treat the contract as rescinded and may recover upon a quantum meruit so far as he has performed; or he may keep the contract alive, for the benefit of both parties, being at all times ready and able to perform; or, third, he may treat the repudiation as putting an end to the contract for all purposes of performance, and sue for the profits he would have realized if he had not been prevented from performing." *McConnell v. Corona City Water Co.*, 149 Cal. 60, 64, 65, 85 P. 929, 930 (8 L. R. A. [N. S.] 1171). See, also, *Robinson v. Rispin*, 33 Cal. App. 536, 539, 165 P. 979.

[8] Just how the court arrived at the award made does not appear clearly, but it does appear that the profit from the cones would have been approximately \$2.50 per thousand; that the number of cans refused was approximately 2,630; and that the profit upon them would have been about \$3.50 each. These figures would have sustained a much larger award than was made by the court; therefore, appellants are in no position to complain of the award or of the lack of evidence to support it. The rule of damages in a case like this is not in doubt.

[9] It is stated in *Fountain v. Semi-Tropic Land & Water Co.*, 99 Cal. 677, 680, 34 P. 497, 498, as follows:

"If, however, the breach be of a covenant, the nonperformance of which will render it impossible for the other party to perform, or will frustrate the whole purpose of the contract on his part, * * * he may decline to proceed in performance and sue for damages, in which case he may recover all loss occasioned by the breach—including profits he would have made if the contract had been performed. * * *

Sutherland on Damages (volume 1, p. 113, 1st Ed.) announces the same rule as follows:

"A party to a contract is entitled to recover, against the other party who violated it, damages for the profits he would have made out of it had it been performed. It is no objection to their recovery that they cannot be directly and absolutely proved. In the nature of things, the

defendants having prevented such profits, direct and absolute proof is impossible."

See, also, volume 1, p. 243, (4th Ed.) Sutherland on Damages.

Coburn v. California, etc., Co., 144 Cal. 81, 84, 77 P. 771, 772, states the general rule as follows:

"Where, however, there is no value, or where under the terms of the special contract the market value is not an appropriate or adequate criterion of damages, it has been said that the measure of damages is compensation for the actual loss suffered. (See 24 Am. & Eng. Ency. of Law, 1115, 1116, 2d Ed.) The law seeks to give the complaining party the value of his bargain—to prevent a loss which the fulfillment of the contract would have prevented—to put the injured party, so far as money can do it, in the same position as if the contract had been performed. (8 Am. & Eng. Ency. of Law, 632.)"

In *Hale v. Trout*, 35 Cal. 229, 246, where plaintiff contracted with defendant to manufacture and deliver lumber for him at a certain price and defendant breached the contract, plaintiff being without fault, it was said:

"* * * That the rule of damages upon the breach is the clear profit which the plaintiff would have made, that is to say, the difference between the contract price and what it would have cost the plaintiff to manufacture and deliver the lumber according to the terms of the contract."

In *Upstone v. Weir*, 54 Cal. 124, 126, plaintiff agreed with defendant to furnish certain iron work at a stipulated price. Plaintiff furnished less than the specified amount, due to failure of defendant to receive it. The rule of damages was there stated to be:

"The plaintiff, having sued upon the contract, is entitled to recover, for the iron work furnished, such a proportion of the whole contract price as the quantity which he furnished bears to the whole quantity contracted for; and, in addition to that, the profit which he would have made, if he had been allowed to complete his contract, together with the damages he incurred in providing means for furnishing the residue of the iron-work called for by the contract, but not delivered, because of the defendant's breach."

In *Tahoe Ice Co. v. Union Ice Co.*, 109 Cal. 242, 41 P. 1020, a contract by defendant to take the whole output of ice of plaintiff for a period of years was claimed to have been breached by defendant and the court approved the rule of damages applied in *Hale v. Trout*, supra, but held the rule inapplicable to this case because of the sale elsewhere by plaintiff of the ice produced for defendant.

In *Ablers v. Smiley*, 163 Cal. 200, 205, 124 P. 827, 829, an action for breach of a contract wherein defendant agreed to purchase from plaintiff all the ice needed for his cus-

tomers, the rule of damages was stated as follows:

"It was shown that the capacity of the ice plant was sufficient to supply all of defendants' wants and that the ice for their use could be produced at an added cost to plaintiffs of twenty-five cents per ton and, therefore, at a profit of \$3.75. The loss of this sum per ton on six hundred tons made the aggregate amount of damages two thousand two hundred and fifty dollars. Section 1512 of the Civil Code is as follows: 'If the performance of an obligation be prevented by the creditor, the debtor is entitled to all the benefits which he would have obtained if it had been performed by both parties.' The judgment is in accord with this rule. The rule of damages in such cases is the difference between the cost of manufacture and the contract price (*Hale v. Trout*, 35 Cal. 229; *Winans v. Sierra Lumber Co.*, 66 Cal. 61, 4 P. 952). Loss of profits which are the natural result of a contract and which the law implies from a breach may be recovered without allegations of special damage. (*Tahoe Ice Co. v. Union Ice Co.*, 109 Cal. 249, 41 P. 1020.)"

A similar principle is announced in the following cases: *Coburn v. California, etc., Co.*, 144 Cal. 81, 84, 77 P. 771; *Thompson v. Hamilton Motor Co.*, 170 Cal. 737, 151 P. 122, Ann. Cas. 1917A, 677; *Connell v. Higgins*, 170 Cal. 549, 150 P. 769; *Schumann v. Karner*, 184 Cal. 57, 192 P. 849; *National, etc., Mfg. Co. v. Producers' R. Co.*, 169 Cal. 745, 147 P. 963. See note 44 A. L. R., pages 215-283.

[10, 11] The criticism directed against the sufficiency of the proof of cost of production and hence the proof of net profits from sale of the articles is a matter which should have been addressed to the judge of the court below, who passed upon the weight of the testimony. For we have no hesitation in saying that there is enough evidence to warrant a finding that the profit on the cones was approximately \$2.50 per thousand. In this connection it should be noted that where a defendant breaches a contract, the law does not hold him faultless because of the difficulties that arise in proving the exact amount of detriment caused by him. "But where the prospective profits are the natural and direct consequences of the breach of the contract they may be recovered; and he who breaks the contract cannot wholly escape on account of the difficulty which his own wrong has produced of devising a perfect measure of damages." *Shoemaker v. Acker*, 116 Cal. 239, 245, 48 P. 62, 64.

We have considered the contentions of appellants with respect to their special defenses interposed herein, and we have no hesitancy in saying that there is ample evidence to support the findings that these special defenses were not sustained by the proofs. The record is replete with other objections and contentions by appellants, all of which we have considered, and none of

which in our opinion have any merit whatsoever.

Judgment affirmed.

We concur: WASTE, C. J.; CURTIS, J.; LANGDON, J.; RICHARDS, J.; SEAWELL, J.; SHENK, J.

202 Cal. 650

RICE et al. v. McCLELLAN et al.
(S. F. 12701.)

Supreme Court of California. Dec. 16, 1927.

1. Mandamus ☞16(1) — Prerogative writs will not be issued to compel doing idle acts.

Court will not issue its prerogative writs to compel the doing of idle acts.

2. Mandamus ☞113—Mandamus does not lie to compel levy of special school tax after time when it may be legally done.

Mandamus does not lie to compel levy of special school tax after passage of time when such levy may lawfully be made.

3. Mandamus ☞113—Schools and school districts ☞108(3)—High school district, on severance of part thereof, sending pupils to another district, was not entitled to levy tax; mandamus does not lie to compel levy of special school tax in high school district which did not maintain high school within its boundaries (Pol. Code, §§ 1720, 1741, 1751, 1755).

Under Pol. Code, § 1720, high school district, on severance of part thereof, sending its pupils under contract to another district, was not entitled to levy school tax, nor could such levy be enforced by mandamus, regardless of section 1751, permitting high school district to contract with another for education of pupils, since immediately, on severance of part of district containing schoolhouse, arrangements for temporary location of high school under section 1741 should have been made until district was ready to purchase site and erect suitable building under section 1755.

4. Schools and school districts ☞42(2)—Contracting for education of high school pupils in adjoining district does not satisfy statute requiring maintenance of high school in district (Pol. Code, §§ 1720, 1751).

Under Pol. Code, § 1720, high school district must maintain at least one high school in the district, and providing by contract for education of high school pupils in other district is not equivalent of such high school, notwithstanding section 1751 permitting such contracts.

5. Schools and school districts ☞108(3)—Where high school board had not prepared course of study or conducted high school in district, levy of special school tax is not authorized (Pol. Code, §§ 1750, 1756).

Where, after severance of part of high school district, remainder of district sent scholars under contract to another district's high school, and school board did not prepare course of study pursuant to Pol. Code, § 1750, levy of special tax is not authorized in such remaining

section of former district for school purposes, in view of section 1756.

In Bank.

Original proceeding by Henry E. Rice and others, members of, and constituting, the Board of Trustees of the La Ballona High School District, formerly the Venice Union High School District of Los Angeles County, for mandamus to be directed to R. F. McClellan and others, members of, and constituting, Board of Supervisors of the County of Los Angeles, to require them to include in the annual levy a special tax on property within certain territory of the county for school purposes. Writ denied.

Lyon, Fleming & Robbins, of Los Angeles, for petitioners.

Everett W. Mattoon, County Counsel, and Ernest Purdum and J. H. O'Connor, all of Los Angeles, for respondents.

WASTE, C. J. The petitioners, who allege that they are "the duly appointed, confirmed, qualified, and acting members of the board of trustees of the La Ballona high school district, formerly Union high school district," have instituted an original proceeding in mandate to compel the board of supervisors of the county of Los Angeles to include in the annual levy a special tax on property within certain territory of the county, on the theory that such territory constitutes La Ballona high school district. The board of supervisors has refused to levy the tax on the ground that the district did not, at any time between November 25, 1925, and the 30th day of June, 1927, establish or maintain, within the district, any high school whatever for the convenience of the day pupils of the district, but that during said period all of the high school pupils of the La Ballona district attended the Venice high schools of the Los Angeles city high school district, and that at no time between said dates was any high school instruction given or furnished within La Ballona high school district, other than that furnished by the Los Angeles city high school district; and on the further ground that, on the recommendation of the county superintendent of schools of Los Angeles county, La Ballona high school district has been declared to have lapsed, and the property of the district ordered sold.

There is no dispute concerning the facts. Prior to November 25, 1925, the La Ballona high school district, formerly Venice union high school district, consisted of the Venice City, La Ballona, and Playa del Rey elementary school districts, and was maintaining and conducting a fully equipped high school. On that date the city of Venice was annexed to the city of Los Angeles, and a large portion of the Venice union high school district,

including the land upon which the high school building was located, became part of the territory of the Los Angeles city high school district. The Venice union high school district, being left without a high school building, thereupon entered into an agreement with the Los Angeles city high school district, under the terms of which the Venice union high school district furnished the necessary money, personal property, and the teachers to carry on the high school in the building for the remainder of the school year 1925-26.

When the time arrived for making plans for the school year 1926-27, no high school building having been provided, and no other provision having been made for the education of its high school pupils, the Venice union high school district entered into a new contract with the Los Angeles city high school district, whereby it was agreed that the latter district should permit the attendance at Venice junior and senior high schools of all pupils resident in the Venice union high school district who were qualified to attend the seventh, eighth, ninth, tenth, eleventh, and twelfth grades of those schools, and should furnish such pupils the same advantages, equipment, supplies, and services as were furnished to other pupils doing similar work in the Los Angeles school district. As consideration for this service, the Venice union high school district agreed to pay the Los Angeles city high school district a sum, computed at the rate of \$250 per pupil, for the number of pupils represented by the total average daily attendance of pupils attending Venice junior and senior high schools from the Venice union high school district during the school year beginning July 1, 1926. The Los Angeles city high school district agreed to credit to the Venice union high school district the enrollment and average daily attendance at the Venice schools of all pupils residing in the Venice union high school district and attending said schools, such enrollment and average daily attendance to be used as a basis of part of the income of the Venice union high school district for the school year 1927-28. The Los Angeles city high school district also agreed to furnish transportation to pupils living in certain designated portions of the Venice union high school district, with the understanding that it should not collect the usual amount from the pupils so transported, but that the Venice union high school district should pay the sum of \$225 per school month for the service. Under this arrangement no high school of any kind was maintained within the limits of the Venice union high school district during the year 1926-27, but the pupils residing in the district, of high school rating, were given free instruction under the contract with the Los Angeles city high school district, which reported that thirty-three

units of average attendance were earned by them.

That portion of La Ballona high school district formerly known as Playa del Rey elementary district has been annexed to the city of Los Angeles for school purposes, and the name of the Venice union high school district has been changed to La Ballona high school district, which now consists only of the territory within the La Ballona elementary school district. Within the time and in the manner prescribed by the sections of the Political Code, and as the basis for the levy of a tax for the district for the school year 1927-28, the petitioners, as the board of trustees of the La Ballona high school district, made and filed with the county superintendent of schools of the county of Los Angeles an estimate or budget of the amount which would be required during the fiscal year 1927-28, for the purpose of meeting the current annual expenses of maintaining a high school in the district. The budget was approved by the superintendent, who, in turn, submitted to the board of supervisors the estimates, together with a statement showing the amount expended by the high school district for each item of estimate during the preceding year.

Subsequently, on September 1, 1927, the county superintendent, acting on the advice of the Attorney General that the 33 units of average daily attendance claimed by the La Ballona high school district did not belong to that district, but were "the earned property of the Los Angeles high school district, and that therefore the La Ballona district had no average daily attendance for the school year ending July 30, 1927," recommended to the respondent board of supervisors that La Ballona high school district be declared lapsed. The board of supervisors thereupon declared the district lapsed, and ordered its property sold pursuant to the provisions of section 1735 of the Political Code.

On these facts the board of supervisors has refused to levy any tax for meeting the budget, and will not do so, unless directed by the writ of this court.

[1, 2] Petitioners have not shown us how it would be possible, at this time, for the board of supervisors to levy a special tax, spread the assessment over the taxable property in the district, if one exists, and collect the tax for the fiscal year 1927-28. The time has passed when that may be done, and this court will not issue its prerogative writs to compel the doing of idle acts. But, assuming that it were yet possible to direct that such a tax be levied and collected, petitioners are not in position to demand that it be done.

[3] Section 1720 of the Political Code provides, in part, that "each high school district must establish and maintain for the convenience of the day pupils" of the district "at least one four year high school, or in lieu

thereof at least one junior high school and at least one senior high school." Petitioners contend that the contracts entered into between La Ballona and Los Angeles city high school districts constitute a substantial compliance with this provision. We cannot approve the suggestion. While section 1751 of the Code permits one high school district to contract with another high school district for the education of its pupils entitled to attend a high school, in such subjects or in such grades as may be named in such contract or agreement, we are not prepared to say that the district may thus provide for the education of *all* its high school pupils in *all* subjects by another high school district. To accept such construction sought by petitioners would be to ignore the plain provisions of the law and to sanction the existence of high school districts without any high schools. We think it clear that the Legislature has intended that every high school district shall establish and maintain a high school, as contemplated by section 1720, *supra*, within its own boundaries. The conducting of a high school, or high schools, by Los Angeles city high school district is not such maintenance of a high school within the La Ballona district. *Bay View School District v. Linscott*, 99 Cal. 25, 29, 33 P. 781, 782. It was there said that the sections of the Code "do not expressly provide that such school shall be within the district, but such is clearly the implication." The purpose governing such location, and the "unpleasant consequences" which might flow, "if a district may under the law maintain a school outside the district," are sufficiently commented on in the opinion. See, also, *Sunol School Dist. v. Chipman*, 138 Cal. 251, 71 P. 340. Since the annexation of the portion of Venice union high school to the Los Angeles city high school district in November, 1925, no high school has been maintained in La Ballona high school district boundaries.

Petitioners argue that the Legislature "did not contemplate the actual construction or erection of a high school building at any particular time" within the district contracting for the education of its high school pupils in another district. That may be admitted, but it was the duty of the predecessor of La Ballona district, immediately upon the severance of the district by annexation becoming an accomplished fact, to make arrangements for the temporary location of the high school, as it was permitted to do under the provisions of section 1741 of the Political Code, until such time as it was ready to purchase a site and erect a suitable building. *Pol. Code*, § 1755.

[4, 5] Petitioners have not complied with the law relating to the maintenance of a high school in La Ballona district, in another particular. Section 1750 of the Political Code requires each high school board to prepare

a course of study, subject to the approval of the state board of education, and designed to fit the needs of its pupils. So far as the record indicates, that was not done in this case. The contract with the Los Angeles district, which provided that the latter should furnish to the pupils of La Ballona district the same advantages, equipment, supplies, and services as were furnished to other pupils doing work in the schools, was not a compliance with the requirement of the section relating to the adoption of a course of study.

Section 1756, under which the petitioners purported to act in filing with the county superintendent of schools their estimate of the amount of money required for the present fiscal year, provides that such estimate shall be "of the amount of money required for maintaining the high school *in said district* for the current school year, including rent or construction of temporary quarters, if any." (*Italics added*). We deem it unnecessary to cite further sections of the Code relating to the subject. It is plain that La Ballona district has not maintained within its boundaries, either in permanent or temporary quarters, a high school, as required by the statute, and the action of the board of supervisors must be sustained.

The petition for a writ of mandate is denied.

We concur: RICHARDS, J.; SHENK, J.; CURTIS, J.; PRESTON, J.; LANGDON, J.; SEAWELL, J.

203 Cal. 126

KRANER v. SNOW MOUNTAIN WATER & POWER CO. (S. F. 11841.)★

Supreme Court of California. Jan. 11, 1928.

Rehearing Denied Feb. 9, 1928.

1. Appeal and error ⇐664(1)—Matters in record most consonant with trial court's action must be accepted by appellate court, where affidavits are conflicting.

Where affidavits, presented on hearing of motion to dismiss, are conflicting, appellate court must accept matters appearing in record which are most consonant with action taken by trial court.

2. Appeal and error ⇐949—Dismissal of action to foreclose mechanic's lien for want of prosecution will not be reversed in absence of affirmative showing of abuse of discretion (*Code Civ. Proc.* § 1190).

Appellate court will not reverse dismissal of action to foreclose mechanic's lien for failure to prosecute within time allowed by *Code Civ. Proc.* § 1190, unless there is an affirmative showing of an abuse of trial court's discretion.

In Bank.

Appeal from Superior Court, Lake County; M. S. Sayre, Judge.

Action by W. A. Kraner against the Snow Mountain Water & Power Company to fore-

close mechanic's lien. From judgment of dismissal for want of prosecution, plaintiff appeals. Affirmed.

Edgar C. Chapman, of San Francisco, for appellant.

Max Thelen, of San Francisco, Benjamin C. Jones, of Lakeport, and Thelen & Marrin, of San Francisco (Pillsbury, Madison & Suto, of San Francisco, of counsel), for respondent.

LANGDON, J. [1, 2] This is an appeal from a judgment entered on an order dismissing, for delay in prosecution, an action to foreclose a mechanic's lien. The action was filed by the original contractor, and the order dismissing it was made under the authority and discretion vested in the trial court by statute. The only question presented by the appeal is whether or not the judge of the superior court abused the discretion vested in him by the following language from section 1190, Code of Civil Procedure:

"And in case such proceedings be not prosecuted to trial within two years after the commencement thereof, the court may in its discretion dismiss the same for want of prosecution."

It is admitted that there was a failure to prosecute the action for the period mentioned by the statute. The affidavits presented on the hearing of the motion to dismiss are conflicting as to certain matters which would enter into the exercise of discretion in the determination of the motion, and we must accept the matters appearing in the record which are most consonant with the action taken by the trial court. It is unnecessary to review these matters herein; they involve a disputed agreement for extension of time and a discussion of prior litigation between the parties hereto and others.

The parties have argued rather extensively in their briefs the force and effect of the issues, findings, and judgment in this prior proceeding. While a conclusion upon that question is not determinative of the order we are reviewing, the respondent presents its views thereon for the purpose of showing that the appellant has had his day in court upon the merits of the controversy between the parties and that this consideration properly entered into the action taken by the trial court upon the motion to dismiss the present action. The appellant, on the other hand, argues that the judgment in the former action does not make the issues presented here res judicata. We are not called upon to determine this collateral question. The plaintiff having failed to prosecute his action within the time allowed by the statute, the trial court was invested with the discretion to dismiss the action, and nothing less than an affirmative showing of appellant of an abuse of such discretion would justify this court

in substituting its judgment for that of the trial judge upon this motion.

The judgment is affirmed.

We concur: WASTE, C. J.; PRESTON, J.; SHENK, J.; RICHARDS, J.; SEAWELL, J.; CURTIS, J.

203 Cal. 100

MOODY v. SHUFFLETON, County Auditor.
(Sac. 4088.)★

Supreme Court of California. Jan. 10, 1928.

Rehearing Denied with Modification Feb. 9, 1928.

Counties 322(2)—County supervisor holding chattel mortgage on newspaper to secure purchase price held "interested" in contract for county printing (Pol. Code, §§ 920, 4322).

Where county supervisor sold newspaper and received chattel mortgage thereon to secure himself for full purchase price, he was interested in claims against county for printing, directly or indirectly, within intent of Pol. Code, §§ 920, 4322, forbidding interest in any contract made by officers in their official capacity or by any body or board of which they are members.

[Ed. Note.—For other definitions, see Words and Phrases, Interested.]

In Bank.

Appeal from Superior Court, Shasta County; J. B. Landis, Judge.

Proceeding in mandamus by H. G. Moody, transacting business under the name and style of "The Searchlight," to compel H. H. Shuffleton, Jr., County Auditor of the County of Shasta, to draw his warrant in amount of certain claims previously approved by the Board of Supervisors. Judgment for plaintiff, and defendant appeals. Reversed.

Superseding Opinion of District Court of Appeal, 257 P. 564.

Jesse W. Carter, Dist. Atty., of Redding, for appellant.

William R. McKay, Dist. Atty., of Hanford, amicus curiae.

Chenoweth & Leininger, of Redding, for respondent.

LANGDON, J. This is a proceeding in mandamus to compel the defendant, as auditor of the county of Shasta, to draw his warrant in favor of plaintiff in the amount of certain claims previously approved by the board of supervisors of that county.

The facts leading up to the proceeding and necessary to its understanding are: H. L. Moody, the father of the plaintiff, had been, prior to July 17, 1925, the owner and publisher of a newspaper known as "The Searchlight," published in Redding, Shasta County, Cal. In connection with the publication of this newspaper, he conducted a printing and jobbing business and owned and operated a general printing plant.

On September 19, 1923, he became supervisor of Shasta county. From the time he became supervisor until July, 1925, he did printing, advertising, and job work for and sold supplies to Shasta county, and claims for the same were presented to the board of supervisors and approved. He collected from Shasta county, while he was supervisor, for printing, advertising, job work, and supplies, the sum of \$5,755.96. In July, 1925, several claims presented by him for printing, job work, and supplies were, upon advice of the district attorney, rejected by the supervisors, as illegal claims, and thereafter an action was brought against him by the district attorney of Shasta county to recover money which he had collected from the county for printing, advertising, job work, and supplies while he was supervisor. This action has since been tried and judgment rendered by the superior court of Shasta county against H. L. Moody and an appeal has been taken by him to this court, which appeal is at present undetermined.

About two weeks after the claims were rejected as aforesaid, in July, 1925, H. L. Moody recorded a bill of sale purporting to convey said newspaper and printing plant to H. G. Moody, his son, and contemporaneously recorded a chattel mortgage on said newspaper and printing plant, purporting to have been executed by said H. G. Moody to H. L. Moody and his wife, Emma H. Moody. Thereafter, H. G. Moody, doing business under the name and style of "The Searchlight," proceeded to do printing, advertising, and job work for and furnish supplies to Shasta county, and presented claims to the board of supervisors thereof for the payment of the same, and said H. L. Moody, sitting on the board of supervisors, approved said claims, and the same were transmitted to the auditor with the request that he draw his warrant on the treasurer of Shasta county for the payment of the same. The auditor was advised by the district attorney of Shasta county that said claims and demands were illegal, because H. L. Moody, a supervisor of Shasta county, who participated in the approval and allowance of said claims, was interested therein by reason of holding a chattel mortgage on "The Searchlight," a newspaper and printing plant furnishing said printing, job work, and supplies. The auditor, thereupon, refused to draw his warrant in favor of the petitioner, and this proceeding was instituted in the superior court of Shasta county to obtain a writ of mandate commanding the auditor to draw his warrant in favor of the petitioner on the treasurer of Shasta county for the payment of said claim and demand. The writ was granted.

At the trial, it was proven that the consideration paid by H. G. Moody to H. L. Moody for "The Searchlight" was \$20,000

and the entire purchase price was represented by promissory notes which were secured by a chattel mortgage on "The Searchlight." It was admitted that the value of the machinery and equipment and all the physical properties constituting "The Searchlight" newspaper and printing plant was between \$12,000 and \$14,000, and that the remainder of the property making up the total value of \$20,000 consisted of "good will." It also appears that after "The Searchlight" was transferred to H. G. Moody on July 17, 1925, Mrs. Emma H. Moody, wife of H. L. Moody, was employed as a bookkeeper in the office and received no compensation for her services.

The only question presented by the appeal is whether or not the claims made against the county were void because the contracts upon which they were based were in violation of sections 920 and 4322, Political Code, reading, respectively, as follows:

"Members of the Legislature, state, county, city, and township officers, must not be interested in any contract made by them in their official capacity, or by any body or board of which they are members. * * *

"Supervisors must not be interested in purchases or contracts. No member of the board must be interested, directly or indirectly, in any property purchased for the use of the county, * * * nor in any contract made by the board, or other person, on behalf of the county, for the erection of public buildings. * * *

The foregoing statutory pronouncements are in consonance with the well-settled policy of the common law, and numerous decisions are to be found vigorously enforcing the rule.

It is earnestly contended on behalf of the respondent that the facts of the present case do not bring it within the operation of section 920, Political Code, because it does not appear that the board of supervisors made the contract for the county with the plaintiff. Conceding that to be true, we turn to the consideration of the other section of the Political Code, above quoted. It is conceded that H. L. Moody, as supervisor of Shasta county, in passing upon the claims involved here, acted as a quasi judicial officer, and the only point in dispute is whether or not H. L. Moody was "interested, directly or indirectly," within the intent of section 4322, Political Code, in the supplies, printing, etc., purchased for the use of the county from "The Searchlight" because of his chattel mortgage upon all property of that business to secure to himself the full purchase price thereof.

The position of the county auditor is stated in his answer as follows:

"That the value of the security of said chattel mortgage is therefore increased by the business received by said newspaper and printing business from the county of Shasta and said H. L. Moody is benefited thereby; that the larger the volume of business received by said newspaper and printing business from said county and the greater the price paid for the printing, advertis-

ing, and supplies so furnished, the greater the value of said newspaper and printing business as security on said chattel mortgage; that it is to the interest of H. L. Moody to thus increase the value of said security."

The foregoing argument of appellant would be convincing even if this were a case of first impression in this state, but it appears that there is authority for his position, presenting precisely the same legal situation as we find in the instant case, in the case of *Quatman v. Sup. Court*, 64 Cal. App. 203, 221 P. 666. This was a proceeding in prohibition to prevent Hon. Claude F. Purkitt, as judge of the superior court of Glenn county, from further proceeding in the trial of an action entitled *Barceloux v. Sacramento Valley Realty Co.* The court stated:

"At the time of the beginning of the action by *Barceloux* against the *Sacramento Valley Realty Company*, the respondent *Purkitt* was the owner and holder of a promissory note, dated June 6, 1920, for the sum of \$301.60, made, executed, and delivered to him by the *Sacramento Valley Realty Company* payable sixty days after date, and also was the owner and holder of an account against said *Sacramento Valley Realty Company* in the sum of \$27.35."

After the action had been commenced but before trial, Judge *Purkitt* indorsed said note to a third party "without recourse." The petitioner, who was interested in the litigation, contended that Judge *Purkitt* was disqualified because of his interest. The court held him disqualified because he was a creditor of one of the parties and in deciding against the further contention that the disqualification had been removed by the indorsement of the note "without recourse," the court said:

"The authorities are practically unanimous to the effect that it does not follow that one who exempts himself from liability as an indorser by using the expression 'without recourse' or its equivalent stands free from all obligation in respect to the indorsement. His undertaking, notwithstanding the qualified indorsement, may be a substantial one, for it seems clear that he divests himself of none of the liabilities of the vendor of the paper."

Assuredly this limited liability of an indorser without recourse is less of an interest in the business of the litigant than is the interest of a chattel mortgagee upon the entire property and good will of a business to secure its full purchase price.

The case of *Minor*, 121 Cal. 372, 53 P. 815, holds that a judicial officer holding stock in a bank which is a creditor of an irrigation district is disqualified to act in a matter relating to the irrigation district.

The general policy of our statutory provision

upon this subject has been repeatedly upheld by the courts of this state. *Meyer v. City of San Diego*, 121 Cal. 102, 53 P. 434, 41 L. R. A. 762, 66 Am. St. Rep. 22; *Berka v. Woodward*, 125 Cal. 119, 57 P. 777, 45 L. R. A. 420, 73 Am. St. Rep. 31; *Stockton Plumbing Co. v. Wheeler*, 68 Cal. App. 592, 229 P. 1020. The court in *Berka v. Woodward*, supra, uses language which seems specially apt in connection with the instant case:

"Our statutes are general in prohibiting any officer from being interested in such contracts, and, if ever there was an occasion for its strict enforcement, it certainly exists in a case such as this where the contractor is a member of the common council whose duty it is to make such contracts on behalf of the city. He cannot be permitted to place himself in any situation where his personal interest will conflict with the faithful performance of his duty as trustee, and it matters not how fair upon the face of it the contract may be, the law will not suffer him to occupy a position so equivocal and so fraught with temptation."

Other states, in construing statutes similar to the ones we are considering, have extended the rule further than the instant case requires. The case of *Foster v. City of Cape May*, 60 N. J. Law, 78, 36 A. 1089, held that a member of a city council, who held as collateral security a share of stock of an electric light company, was disqualified to vote to authorize a contract with such company to light the city, although the value of the stock was slight. In that case, it was said:

"If interest be allowed to disqualify in any case it must in all, as it is impossible, by any scale, to measure the different effects which it may have on different minds."

The vital force of the foregoing conclusion is made apparent when we consider the possibility suggested by appellant were we to uphold the contention of the respondent: Suppose the business conducted by respondent was dependent solely or largely upon orders received from the county for its earning power. H. L. Moody, a member of the board of supervisors, would then be enabled to pass upon contracts which would be vital to the value of his security for \$20,000. The possibilities of the contention of respondent stamp it as against public policy. As said by the court in the *Quatman Case*, supra:

"It is not a question of whether the learned trial judge would or would not act impartially. A legal question only is presented."

The judgment appealed from is reversed.

We concur: WASTE, C. J.; CURTIS, J.; PRESTON, J.; RICHARDS, J.; SHENK, J.; SEAWELL, J.

83 Cal. App. 253

JONES v. SUPERIOR COURT OF CALIFORNIA IN AND FOR LOS ANGELES COUNTY et al. (Civ. 5928.)

District Court of Appeal, Second District, Division 1, California. Jan. 6, 1928.

1. Prohibition ⚡27—In proceeding to prevent proceedings under order of contempt, court must assume that facts are as set forth in affidavit in re contempt.

In proceeding for prohibition to prevent proceedings under an order of contempt on ground that affidavit in re contempt was insufficient to show contempt of trial court, court must assume that facts are as set forth in affidavit in re contempt rather than as set forth in record.

2. Contempt ⚡26—Where plaintiff produced checks in court as ordered, court held without jurisdiction to punish for contempt for refusal to permit private inspection in absence of court.

Court held without jurisdiction to punish for contempt, where certain checks were produced in court by plaintiff as ordered but plaintiff refused to allow private inspection in absence of court, notwithstanding court's instruction to parties to retire to chambers for purpose of inspecting such checks.

3. Contempt ⚡21—Court cannot punish for contempt occurring out of judge's presence unless definite order is violated.

In order to give court jurisdiction to punish for contempt where it is alleged to have occurred out of presence of judge, affidavit in re contempt must show violation of or refusal to obey definite order.

Application by Mark F. Jones for a writ of prohibition prayed to be directed to the Superior Court of Los Angeles County, Hugh J. Crawford, Judge, to prevent proceedings under an order of contempt. Writ granted.

Oliver O. Clark and W. L. Engelhardt, both of Los Angeles, for petitioner.

Everett W. Mattoon, County Counsel, and S. V. O. Prichard, Deputy County Counsel, both of Los Angeles, for respondents.

YORK, J. The petition for writ of prohibition recites in hæc verba the affidavit in re contempt in the lower court which it is contended by petitioner is insufficient to show any contempt of any order of the trial court in the proceedings wherein it was filed, or at all, and particularly that said affidavit does not show any order of the said Hon. Hugh J. Crawford requiring the petitioner to submit the documents referred to in said affidavit to the inspection of any person. It is also contended by petitioner, but not passed on herein, that the documents referred to in said affidavit as having been refused to the attorney for the defendant were not such documents as were entitled to be inspected by any one, or subject to an order for inspection

by the court without their being particularly identified, or at least more particularly identified than the identification referred to in said affidavit. The affidavit is entitled in the action, Los Angeles Housing Corporation v. J. A. Crowley, and so far as necessary to be considered herein reads as follows:

"J. A. Crowley, of lawful age, being first duly sworn, on his oath states: That he is the defendant in the above-entitled cause; that on the 4th day of November, 1927, he executed and filed in the above-entitled cause which was then on trial in department 16 of the above-named court, a certain affidavit, being in the words and figures as follows, to wit:

"(Title of Action.)

"J. A. Crowley, of lawful age, being first duly sworn, on his oath states, that he is the defendant in the above-entitled cause, trial of which is now being had in department 16 of the above-entitled court; that Hugh Wilton, president and managing agent of plaintiff, is in possession of the following documents, to wit:

"1. Checks numbered 2,000 to 3,500, inclusive, of the Los Angeles Housing Corporation, drawn on the People's National Bank of Los Angeles, Cal., and the check book stubs corresponding thereto, from which said checks were taken. * * *

"That the production of the said books and documents is necessary to a complete defense of the above-entitled action by this defendant, and for the discovery of the true facts involved in the trial thereof.

"That the checks and stubs mentioned in the paragraph numbered 1 hereinabove are material for the purpose of enabling the witness Edwin B. Cassady, by an inspection thereof, to state whether or not the said Hugh Wilton stated to him, the said Cassady, that the checks introduced herein and numbered 1 to 8 inclusive, were drawn and delivered as and for payment of dividends to this affiant, and not as loans. * * *

"Wherefore, affiant prays the court for an order compelling the production of the above-named books and records by the said Hugh Wilton."

"That thereafter and on the 4th day of November, 1927, Hon. Hugh J. Crawford, judge of department 16 of the above-entitled court, granted and filed his certain order in the above cause, which said order is in the words and figures, as follows, to wit:

"Upon the affidavit of J. A. Crowley heretofore filed herein, and the testimony of Hugh Wilton heretofore given herein, and for good cause shown, it is hereby ordered that the said Hugh Wilton produce in court on Monday, November 7, 1927, at 10 o'clock a. m., at the trial hereof, the following books and documents, to wit:

"1. Checks numbered 2,000 to 3,500, inclusive, of the Los Angeles Housing Corporation, drawn on the People's National Bank of Los Angeles, Cal., and the check book stubs corresponding thereto, from which said checks were taken. * * *

"That copy of said order was served upon the said Hugh Wilton in Los Angeles, Cal., on November 4, 1927.

"That on Monday, November 7, 1927, at 10 o'clock a. m., in said department 16 of the above-entitled court, at the trial of the above-entitled cause, the said Hugh Wilton, in obedience to said order, produced in open court, among others, the following documents, to wit:

"Checks numbered 2,000 to 3,500, inclusive, of the Los Angeles Housing Corporation, drawn on the People's National Bank of Los Angeles, Cal., and the check book stubs corresponding thereto, from which said checks were taken.

"That thereupon the Hon. Hugh J. Crawford, then and there presiding in the said department 16 of the above-entitled court, on the trial of the above cause, in open court instructed the parties to the above-entitled cause with their attorneys, to retire to the chambers of said Hon. Hugh J. Crawford for the purpose of inspecting the said checks hereinbefore mentioned.

"That thereupon this defendant J. A. Crowley, together with his attorney of record, W. O. Wanzer, and Mark F. Jones, attorney of record for the plaintiff herein, together with Miss E. Taylor, secretary of the plaintiff herein, the said Mark F. Jones and Miss E. Taylor being then and there in possession of said checks, retired to the said chambers of the said judge, for the purpose of making such inspection; that after so retiring to said chambers, W. O. Wanzer, attorney for the defendant, demanded of the said Miss E. Taylor and of the said Mark F. Jones, attorney for the plaintiff, permission to inspect the said checks numbered 2,000 to 3,500, inclusive, but the said Mark F. Jones, then and there willfully and intentionally refused to permit this affiant, defendant, or his attorney of record, W. O. Wanzer, to inspect all of said checks, and willfully and intentionally refused to permit the said Miss E. Taylor to allow this affiant, defendant herein, or the said W. O. Wanzer, attorney for defendant to inspect all of said checks; that the said Mark F. Jones then and there stated to this affiant, defendant herein, and to the said W. O. Wanzer, that he would exhibit for inspection only such checks as this affiant or the said W. O. Wanzer could and would specifically designate and identify, and that unless such checks as this affiant, or his said attorney, desired to inspect could be specifically identified and described, he, the said Mark F. Jones, would and he did then and there refuse to permit inspection of such checks to be made.

"That the said Mark F. Jones now is, and at all times since the filing of the above-entitled cause in the above-named court has been, the attorney of record for plaintiff, Los Angeles Housing Corporation, a corporation, and now is and at all such times has been a duly licensed and practicing attorney at law in the state of California, with offices in the city of Los Angeles, Cal."

We are treating as true, of course, the statement in the affidavit which states "That thereupon the Hon. Hugh J. Crawford, then and there presiding in the said department 16 of the above-entitled court, on the trial of the above cause, in open court instructed the parties to the above-entitled cause with their attorneys, to retire to the chambers of said Hon. Hugh J. Crawford for the purpose of inspecting the said checks

hereinbefore mentioned." By "said checks" is evidently meant certain of the documents contained in the original order as set forth in said affidavit. The record herein does not disclose such to be the fact, but does show that the real order made by the trial court was: "All right. We will take it up at half past 10. Proceed with the other case." This following a statement by Mr. Wanzer, the attorney for defendant, "I would like to request at this time that Mr. Cassady be allowed a few minutes time to examine the books that they have brought in."

[1, 2] Conceding, as we must, that the facts are as set forth in the affidavit and not as set forth in the record, we find that the books, documents, and checks set forth were actually brought into open court in accordance with the order of November 4th set forth in the affidavit.

By reason of the fact that the inspection of said checks was not requested to be had in open court, but merely a private inspection was requested by Mr. Wanzer, as attorney for defendant in the action then pending before the court, or that he was requesting a private inspection by a witness thereof, and by reason of the fact that the petitioners herein are not shown to have ever refused to obey the order of the court to produce, and by reason of the fact that the said order of the court set forth in the order of said court to produce specified that the books, papers, and checks to be brought into court were to be used in the trial of the cause and did not in any way refer to an inspection or order to be made in private by the attorney Wanzer, or by any other person, and that there was no order excepting only the oral order, a general statement of which appears in the affidavit, which oral order has been hereinbefore set forth, and which so-called order is not either a direct or a specific order of the court, as we construe it, to allow a private inspection, in the absence of the court of all or any particular part of the private books and papers of the plaintiff corporation, we will have to hold, on the face of the record disclosed by the affidavit, that there is no showing in such affidavit of any violation of an order of the court on the part of the petitioner herein.

[3] In order to give the court jurisdiction to punish for contempt, where the same is alleged to have occurred out of the presence of the judge, the affidavit in re contempt must show in a case of this kind a violation of, or a refusal to obey, a definite order. This we do not find in the affidavit.

We are not passing upon the question as to whether all the books and papers in general, of a corporation, can be required to be exhibited in open court as was ordered by the court; we are merely and only holding that this affidavit the material parts of which are hereinbefore set forth in *hæc verba* does not

disclose a violation of any order made by the court, and we can find no allegation of any refusal to obey an order of court anywhere in said affidavit.

The court is therefore ordered to desist from proceeding further on the affidavit in re contempt hereinbefore set forth. Let the peremptory writ issue accordingly.

For the reasons hereinbefore stated, the demurrer interposed by respondents is overruled.

We concur: CONREY, P. J.; HOUSER, J.

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RENEAU v. HIRSCH. (Civ. 3376.)

District Court of Appeal, Third District, California. Dec. 24, 1927.

Hearing Denied by Supreme Court Feb. 20, 1928.

1. Appeal and error ⇨1004(1), 1005(1)—Damages ⇨96—New trial ⇨74—Damages for personal injury is for discretion of jury and trial judge, and decision will not be set aside unless plainly excessive.

Amount of damages in personal injury action is for sound discretion of jury and judge of trial court, whose decision, on appeal, will not be set aside unless verdict is so plainly and outrageously excessive as to suggest, at first blush, passion or prejudice on part of jury.

2. Damages ⇨132(6)—\$18,000, together with \$2,719 medical and hospital bill for broken and lacerated leg sustained by 17 year old delivery boy, held not excessive.

\$18,000 awarded to 17 year old boy employed as grocer's delivery boy for physical injuries, together with \$2,719 for medical attention, hospital bills, and loss of time for injuries consisting of broken and badly lacerated leg, held not excessive.

3. Appeal and error ⇨932(1)—Appellate court, where verdict in personal injury action is attacked as excessive, must resolve evidence in favor of respondent.

Where verdict in personal injury action is attacked as being excessive, appellate court must treat every conflict in the evidence as resolved in favor of respondent and must give to him the benefit of every inference that can reasonably be drawn in support of his claim.

4. Trial ⇨108½—Plaintiff's counsel, in action for injuries in automobile collision, properly questioned jurors as to connection with indemnity insurance company.

In action for injury in automobile collision, plaintiff was properly permitted to question jurors as to connection in any way, as agents or otherwise, or as stockholders, with indemnity insurance company.

5. Trial ⇨127—Evidence that defendant, sued for damages, is insured is inadmissible.

Evidence that defendant in action for damages is insured against loss by reason thereof is not admissible.

6. Trial ⇨133(2)—Permitting plaintiff's counsel, in action for injuries, to cross-examine defendant's medical experts as to examinations for casualty companies and compensation received held proper.

In action for injuries resulting in automobile collision, permitting plaintiff's counsel to ask defendant's medical experts on cross-examination as to examinations for casualty companies and as to compensation received therefor held proper, in view of instruction thereon.

Appeal from Superior Court, Los Angeles County; Victor R. McLucas, Judge.

Action by Arnold H. Reneau, a minor, by James A. Reneau, his guardian ad litem, against Florence Wile Hirsch, executrix of the estate of Eugene D. Hirsch, deceased. Judgment for plaintiff, and defendant appeals. Affirmed.

Haas & Dunnigan and Shaw & McDaniel, all of Los Angeles, for appellant.

Bertrand J. Wellman, of Los Angeles, for respondent.

PRESTON, Justice pro tem. This is an appeal by defendant, Eugene D. Hirsch, from a judgment entered against him upon a verdict of a jury in the sum of \$20,719, in an action for damages for personal injuries.

The verdict was divided as follows:

"\$18,000 for physical injuries; \$2,719 for medical attention, hospital bills, and loss of time."

The essential facts are not in dispute and may be thus briefly stated: The plaintiff and respondent, Arnold H. Reneau, at the time he received the injuries complained of, was a minor of the age of 17 years, employed as a delivery boy by a grocery store in the city of Ocean Park, and receiving a salary of \$18 per week. On July 7, 1923, respondent was removing groceries from his automobile truck, which he had parked near the curb on the east side of Main street, in the city of Ocean Park, when defendant's automobile driven by his chauffeur at a high rate of speed, collided with said delivery truck and crushed respondent's left leg between the truck and a telephone pole located near the curb. Respondent's left leg was almost entirely severed from his body above the knee, there being only an anterior flap holding the two parts of the leg together. Numerous pieces of wood, stone, manure, and dirt were ground into respondent's leg. The injury can best be described by quoting a portion of the testimony of Dr. C. P. Thomas, one of the attending surgeons:

"As I remember when I was called to the hospital I found him [referring to respondent] on the operating table with a very bad lacerated wound of the leg. The back part of the leg, just a little ways above the knee, and the bone broken off at that place, and the ends a long ways

apart. Nearly all of the soft parts on the flexor side, that is, the under side of the leg, were severed. I found a great deal of timber in the wound, slivers of wood, more or less decayed, and, of course, he was bleeding and in great pain; suffering a great deal of shock. He had, evidently, lost a great deal of blood before he got to the hospital. My impression is that the flexor muscles were nearly all severed. Those that are definitely flexor muscles. There are some muscles that have other functions than that of flexing and helping to flex, but the main flexor muscles were severed. The bone was exposed for six inches, and the lower fragment bent back on itself, or bent back on the joint so that they were overriding. The two ends were four or five inches apart. After cleaning the wound out thoroughly, I drilled a hole through the end of each bone, or the ends of the same bone, and put a silver wire through it and drew them together and twisted the wire up snugly so as to hold the ends together. I then sewed the soft parts, each muscle to its fellow as near as I could. * * * The hemorrhage was quite profuse. He was greatly shocked and white when he came to the hospital. * * * I saw him October 20th and discharged him from the hospital, and there were no discharging wounds and his muscles had united, but they were weak yet, and the knee had limited motion only, and his general condition was fair. The limb is now somewhat smaller than the other, at the place of severance of the muscles; there is some enlargement of the knee joint, and there is a slight limitation of motion. I think it would be safe to say there is a limitation of somewhere between 10 and 25 per cent. The limb is not as strong nor as flexible as the other limb by probably 20 per cent."

The doctor further testified as follows:

"Q. I will ask you to state, doctor, whether in your opinion, this boy is suffering from any permanent injury from this limb? A. Yes, he has some permanent disability. * * *

"Q. In what way does this permanent injury affect him? How does it incapacitate him? A. Well, he hasn't full—he hasn't the ability—he hasn't the power of flexing the leg. The loss of muscular substance somewhat weakens the ability to flex the leg. * * *

"Q. Have you made comparative measurements of the two limbs to determine the extent of atrophy? A. Not with a tape measure, but only with my eye.

"Q. Except in the case where the scar tissue occurs, the balance of the leg should, eventually, with normal exercise, return to the same size as its mate? A. Yes, sir. * * *

"Q. Now, what particular motion—limitation of motion—what motion is limited in his leg? A. He is unable to flex his leg more than at right angles. * * *

"Q. The exercise and use will have a tendency to increase his power to flex, and it will so have a tendency to increase the size and strength of the muscles, is that true? A. Yes; and yet I think I should qualify that, in fairness to the boy and to your side as well. The muscle, as it appears now—the muscle ends are not actually together, that I sewed, but instead, a fibrous membrane of scar tissue has united the two ends of the muscle in such a way that they function; but they do not function as a perfect, smooth-running muscle would, and never will. * * *

*It is a very unusual injury. I don't think I ever saw all of the flexor muscles severed before in a lower extremity. I never saw the flexor muscles about the knee cut off before unless the leg was amputated. * * **

The plaintiff was in the hospital for 15 weeks, and after leaving the hospital he walked with the aid of crutches and a cane for a time, and it was not until October, 1924, that he was able to return to work.

Dr. A. H. Jones, also an attending physician, testified in part as follows:

"There is an enormous amount of scar tissue where the compound fracture was, and it involves all the flexor muscles and all the way down to the bone. The flexor muscles all have scar tissue in them and are joined together by scar tissue. The scar tissue will never be replaced by muscle tissue; conversely, scar tissue always will contract; it will contract appreciably for 10 or 12 years; and the converse is going to be true; the scar tissue is going to pinch up more than the muscle tissue as time goes on. That tends to reduce the efficiency of the muscles. It limits the possible increase in the amount of muscle tissue. There is a permanent weakness."

In speaking of the respondent's ability to walk, Dr. Jones further testified:

"Of course, he is going to feel it; it is going to be weaker, and it is going to tire easier, and it is not going to have the endurance; and in case of going down hill, why, that action of preventing a person from falling forward is going to make it, he will have to be much more deliberate about his actions, have to be careful."

In speaking of the wire in respondent's leg, Dr. Jones said:

"The first thing that happens is that there is an area of osteoporosis around the wire; and the wire begins to get loose; and there is a constant conscious feeling of something wrong at the seat of the foreign body, and nature begins to get ready to cast it off; it softens the bone around it. * * * I think there is a reasonable probability, wherever you put a foreign body in the tissues, that nature will finally pass it out. * * * It is pretty hard to say what the probable effect will be [referring to the wire in respondent's leg]; that is a very good result. Wires do not usually stay in that good; they almost always—nature resists them and casts them out. I would say, trying to make a conscientious reply, that the chances for a man to live 35 years with that wire in there were about fifty-fifty that it would at some time become a foreign body."

The respondent also testified as follows:

"Well, if I am walking, my left leg always has to come down; it comes down solid; just straight, instead of like an ordinary person walking, their knees kind of spring. The tendons are stiff. * * * Going up and down stairs I always have to put my right foot up first, because if I bend my left one the muscles and things are not strong enough to pull me up at all on the left leg—I have to watch in walking or I will fall."

There were other physicians who attended the respondent, and their opinions and conclusions were, in the main, the same as those above quoted.

The record reveals that James A. Reneau, the father of respondent and his guardian ad litem in the case at bar, commenced an independent action against defendant and appellant to recover money expended by him for medical services, hospital charges, and loss of wages, etc., for respondent, and it was stipulated that his action might be dismissed and that these charges might be considered by the jury in this case, provided the jury determined appellant to be liable.

Only two grounds are urged for a reversal of the judgment. The first and principal contention made is that the verdict is excessive; second, misconduct of the attorney for respondent.

A motion for a new trial was made upon several grounds, among them being "excessive damages, appearing to have been given under the influence of passion or prejudice." Subdivision 5, § 657, Code Civ. Proc. The motion for a new trial was denied.

[1] The rule is well established that the amount of damages in this kind of an action is committed, first, to the sound discretion of the jury, and next to the discretion of the judge of the trial court, who, in ruling upon the motion for a new trial, may consider the evidence anew, determine anew the facts, and set aside the verdict if it is not just. Upon appeal, the decision of the trial court and the jury on the subject cannot be set aside unless the verdict is so plainly "and outrageously excessive as to suggest, at first blush, passion or prejudice or corruption on the part of the jury." *Aldrich v. Palmer*, 24 Cal. 516; *Wheaton v. North Beach, etc., R. R. Co.*, 36 Cal. 591; *Swain v. Fourteenth St. R. R. Co.*, 93 Cal. 185, 28 P. 829; *Morgan v. Southern Pacific Co.*, 95 Cal. 501, 30 P. 601; *Lee v. Southern Pacific Co.*, 101 Cal. 118, 35 P. 572; *Howland v. Oakland C. St. Ry. Co.*, 110 Cal. 523, 42 P. 983; *Harrison v. Sutter St. Ry. Co.*, 116 Cal. 156, 47 P. 1019; *Reeve v. Colusa G. & E. Co.*, 152 Cal. 99, 92 P. 89; *Hale v. San Bernardino, etc., Co.*, 156 Cal. 713, 106 P. 83; *Zibbell v. Southern Pacific Co.*, 160 Cal. 237, 116 P. 513; *Campbell v. Bradbury*, 179 Cal. 364, 176 P. 685; *Bisinger v. Sacramento Lodge No. 6*, 187 Cal. 578, 203 P. 768; *Kelley v. Hodge Transportation System*, 197 Cal. 598, 242 P. 76; *Smith v. San Joaquin, etc., Power Corp.*, 59 Cal. App. 647, 211 P. 843; *Anderson v. San Francisco-Oakland Rys.*, 61 Cal. App. 21, 214 P. 289; *Holmes v. California Crushed Fruit Co.*, 69 Cal. App. 779, 232 P. 178; *Bosse v. Marye* (Cal. App.) 250 P. 693.

[2] We have carefully examined the entire record, including the evidence, and there is nothing in the record to show or suggest that the verdict was not the result of the fair and honest judgment of the jury. The award

of damages made by the jury, and sustained by the trial court, is large, but when the extent and character of the injuries received by respondent and the intense pain and suffering that he endured for so long are all considered, we think the award is not at all disproportionate to the compensation reasonably warranted by the facts.

[3] Appellant, in contending that the award of damages is excessive, lays great stress upon the fact that three physicians who examined the respondent just before the trial, which was approximately a year and six months after the injury, testified that there was little or no permanent injury to respondent's leg. This testimony did nothing more than raise a conflict in the evidence, which conflict was undoubtedly resolved in favor of the respondent, and the rule is well settled that in considering an attack upon a verdict as being excessive we must treat every conflict in the evidence as resolved in favor of the respondent, and must give to him the benefit of every inference that can reasonably be drawn in support of his claim. *Kimie v. San Jose-Los Gatos Ry. Co.*, 156 Cal. 273, 104 P. 312; *Riffel v. Letts*, 31 Cal. App. 428, 160 P. 845.

[4] It is next contended by appellant that counsel for respondent was guilty of prejudicial misconduct. There is no merit in this contention. During the examination of the jurors on their voir dire the following proceedings were had:

"Mr. Wellman (Attorney for Plaintiff and Respondent): I would like to know if any of the jurors are connected as a stockholder or otherwise with the Royal Indemnity & Insurance Company?"

"Mr. Dunnigan (One of the Attorneys for Defendant and Appellant): I object to that question and assign it as error."

"The Court: Objections sustained."

"Mr. Wellman: I have an authority that I wish to hand to your honor."

"The Court: Very well, show this to counsel, please."

"Mr. Dunnigan: I have read the case, if your honor please, I still desire to urge the objection and take the court's ruling."

"The Court: Let me see the case. Mr. Reporter, will you read the last question again, please? (Question read by reporter.) Objection will be overruled. The jury may answer the question."

"Mr. Wellman: Are any of you connected in any way, as agents or otherwise, or as a stockholder, with the Royal Indemnity Insurance Company?"

"Jurors: No."

This question was entirely proper. *Arnold v. California Portland Cement Co.*, 41 Cal. App. 425, 183 P. 171.

During the cross-examination of Dr. Bohme, a physician called as a witness by defendant, the following questions were propounded by plaintiff's counsel:

"Q. Do you examine people who are injured for different casualty companies? A. I do.

"Q. To what extent do you do that kind of work? A. Almost exclusively.

"Q. Your time is devoted almost entirely to examining people who are hurt, for casualty companies and insurance companies, is it? A. And corporations.

"Q. What compensation did you receive for examining this boy?

"Mr. Dunnigan: Objected to as immaterial.

"Mr. Wellman: To show the interest of the witness.

"The Court: Overruled. A. Twenty-five dollars.

"Mr. Wellman: What compensation do you expect to receive for appearing here and testifying?

"Mr. Dunnigan: Objected to as incompetent, irrelevant, and immaterial.

"Mr. Wellman: To show the interest of the witness.

"Mr. Dunnigan: He will get his money without regard to the results.

"The Court: Objection sustained."

[5] Appellant contends that these questions were asked for the purpose of prejudicing the jury against casualty insurance corporations in general and to convey to the jury the impression that appellant was insured against any damages by reason of the collision. The rule is, of course, well settled that evidence that a defendant in an action for damages is insured against loss by reason thereof is not admissible, and it would undoubtedly be improper for counsel for plaintiff to endeavor to get such a fact before the jury by questions designed solely for that purpose. *Pierce v. United Gas Co.*, 161 Cal. 188, 118 P. 700; *Roche v. Llewellyn Iron Works*, 140 Cal. 563, 74 P. 147; *Dameron v. Ansbro*, 39 Cal. App. 289, 178 P. 874; *Arnold v. California Portland Cement Co.*, 41 Cal. App. 427, 183 P. 171; *De Liere v. Goldberg, Bowen & Co.*, 30 Cal. App. 612, 159 P. 197.

[6] We are unable to say, however, that the attorney for plaintiff transgressed the above rule in any of his questions, or that any of the questions were not within the bounds of legitimate cross-examination. Moreover, the questions complained of were nearly all answered without objection from defendant.

The attorney for plaintiff did not in any way attempt to prove that defendant was indemnified against loss by reason of the injury to plaintiff. Furthermore, the court expressly instructed the jury as follows:

"Ladies and gentlemen of the jury, before proceeding to give you the instructions in full, the court desires in a preliminary way to instruct you as to two different matters regarding insurance. * * * The fact that you do or do not believe that the defendant is insured by a liability insurance company has nothing whatever to do with the issues of this case. It would be error on the part of this court if it permitted it to be proved that the defendant carries liability in-

surance; and your verdict in this case, as between the plaintiff and defendant, shall be the same whether you do or do not believe that the defendant carries liability insurance."

We conclude that no prejudicial error was committed by plaintiff's counsel in propounding the questions complained of to appellant's medical experts on cross-examination, and there is nothing in the record from which it could be inferred or insinuated that plaintiff's counsel did not ask said questions in the utmost good faith.

No other points are urged for a reversal of the judgment in this case. It cannot be doubted that plaintiff received a most unusual and severe injury, and that he suffered great pain and anguish, and that he is, to a considerable degree, at least, permanently injured. While defendant denied negligence in his answer, no attempt is made on this appeal to deny that the chauffeur of defendant was negligent.

We find no error in the record. The judgment is affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

LEWIS v. GRUNBERG et al. (Civ. 3306.)

District Court of Appeal, Third District, California. Dec. 30, 1927.

Hearing Granted by Supreme Court Feb. 27, 1928.

1. Appeal and error $\S$ 519—Stipulation and order relative to submission of case to referee, not embodied in bill of exceptions or transcript, cannot be considered (Code Civ. Proc. $\S$ 650, 953a).

Where neither stipulation nor order that case be submitted to referee to try all issues and report finding and judgment thereon were embodied in bill of exceptions as provided by Code Civ. Proc. $\S$ 650, nor in transcript as provided by section 953a, reviewing court cannot consider either stipulation or order.

2. Appeal and error $\S$ 967(1)—Reference is presumed special unless it may be inferred from recitals in findings of referee and court that it was general (Code Civ. Proc. $\S$ 638-645).

Unless it may be properly inferred from recitals in findings of referee and those of court that reference to referee was general in character, it must be presumed that it was special reference for benefit of court under Code Civ. Proc. $\S$ 638-645.

3. Reference $\S$ 99(2)—Reference held general, in view of its recitals and fact that court had no evidence before it.

Reference held general, where referee recited as part of findings that he was appointed to find upon both questions of law and fact, and it was clear from court's findings that there was no trial held by court and no evidence taken by it and that court did not have before it evidence submitted to referee.

4. Reference ~~to~~ 99(2)—Where reference was general, judgment must be entered in accordance with referee's findings; aggrieved party's remedy for referee's error being motion for new trial (Code Civ. Proc. § 644).

Where reference was general in nature, judgment should be entered on findings of referee filed in cause, in accordance with such findings, pursuant to Code Civ. Proc. § 644, and, for any error committed by referee, remedy of aggrieved party was by motion for new trial or other appropriate proceeding.

Appeal from Superior Court, Butte County; H. D. Gregory, Judge.

Action by J. A. Lewis against A. W. Grunberg and another, copartners doing business under the firm name and style of Grunberg & Anderson, to recover money due under a contract for the purchase of merchandise. Judgment for plaintiff, and defendants appeal. Reversed with directions.

J. Oscar Goldstein, of Chico, for appellants.

Bond & Deirup, of Chico, for respondent.

BURROUGHS, Justice pro tem. January 10, 1922, plaintiff and defendants entered into a written contract whereby the plaintiff agreed to sell and defendants agreed to buy a stock of merchandise. February 1, 1922, the parties entered into a supplemental contract concerning the same subject-matter. A dispute having arisen between the parties as to the proper construction to be given the contracts as to the price to be paid for the merchandise, and being unable to reach an adjustment of the controversy, this action was commenced by the plaintiff to recover the sum of \$5,265.40, together with interest thereon at the rate of 7 per cent. per annum from the 15th day of February, 1922, being the amount claimed by the plaintiff as due under the terms of said contract.

Defendants admit by their answer that there is due the plaintiff the sum of \$3,814.23, and no more.

By its judgment, the court awarded the plaintiff the sum of \$4,857.74, together with interest thereon at the rate of 7 per cent. per annum from April 1, 1922, and from the judgment so entered the defendants appeal.

The appeal is upon the judgment roll alone. As a part of the judgment roll there appears a report and findings of fact by a referee, which, among other matters, recites:

"Pursuant to order of reference duly made and filed in the above-entitled action, wherein the undersigned, L. G. Faulkner, Esq., was duly appointed referee with direction to find upon matters of both law and fact, and, after hearings duly held under and by authority of said reference at the city of Chico, county of Butte, state of California, before said referee and all matters and things having been presented in due form and according to law by Bond &

Deirup, Esqs., attorneys for plaintiff, and by J. Oscar Goldstein, Esq., attorney for defendants, and all witnesses having been called were duly sworn and testified. Now therefore, the evidence submitted to your referee having been duly considered by him, the said referee begs leave to submit his report as follows: Findings of law and facts upon trial of the issues involved."

While the said findings and conclusions of law therefrom are inartistically drawn, still they respond to the issues raised by the pleadings and the referee recommends a judgment in favor of the plaintiff and against the defendants in the sum of \$3,439.76, with interest thereon at the rate of 7 per cent. per annum from the 15th day of February, 1922, together with their costs of suit.

June 30, 1922, the court filed its findings and conclusions of law in this cause, in which it finds that the defendants are indebted to plaintiff in the sum of \$4,857.74, with interest thereon at the rate of 7 per cent. per annum from April 1, 1922, and for his costs of suit.

Judgment was accordingly entered by the clerk on July 6, 1922, in favor of the plaintiff for said last-mentioned amount. In its findings the court recites:

"The above-entitled action came on regularly for hearing before the above-entitled court sitting without a jury, a jury having been waived by the respective parties hereto. Plaintiff was represented by Messrs. Bond & Deirup, his attorneys, and defendants by J. Oscar Goldstein, Esq., their attorney. The cause was heard upon the amended complaint, as amended, and the answer thereto, as amended, and upon the report of L. G. Faulkner, Esq., the referee heretofore appointed herein, the exceptions filed by the plaintiff, and the motion of the defendants to confirm the report, which motion was based and made upon the said report and upon all the files, records, pleadings, proceedings, exhibits, and all other matters pertaining to this cause, and the matter having been argued and submitted to the court for consideration and decision, and the court being fully advised in the premises, now finds."

The appellants complain that, the order of reference having been that the referee find upon questions of both law and fact, and the referee having done so, the court was without authority to set aside the findings of said referee and substitute its own therefor. In other words, it is their contention that the findings and conclusions of the referee have the same force and effect as though made by the court and judgment should have been entered in accordance therewith.

Respondent contends that there is nothing legally before the court from which it may determine the character of the order of reference, and that it must be presumed, in the absence of an affirmative showing of error, that the court acted within its authority, and

that the said order of reference was special and not general in its nature.

There appears in the clerk's transcript a stipulation signed by all the attorneys that the cause be ordered to a referee "to try all of the issues in the above-entitled action, whether of fact or of law, and to report a finding and judgment thereon."

In pursuance of said stipulation there appears in said transcript an order signed by the judge of the court appointing L. G. Faulkner, Esq., a referee "to try all of the issues in this action, whether of fact or of law, and to report a finding and judgment thereon."

[1, 2] As neither the stipulation nor the order is embodied in a bill of exceptions, as provided by section 650, Code of Civil Procedure, nor in a transcript, as provided by section 953a of said Code, this court cannot consider either said stipulation or order (*Totten v. Barlow*, 165 Cal. 378, 132 P. 749; *Richmond v. Julian Con. Min. Co.*, 176 Cal. 600, 169 P. 356), and, unless it may be properly inferred by the court from the recitals in the findings of the referee and those of the court that the reference was general in its character, it must be presumed that it was a special reference for the benefit of the court (sections 638 to 645, inclusive, Code Civ. Proc.; *Tyson v. Wells*, 2 Cal. 122; *Faulkner v. Hendy*, 103 Cal. 15, 36 P. 1021).

[3] The referee recites as a part of his findings that he was appointed to find upon both questions of law and fact. The court in its findings recites the proceedings had before it, the various documents presented and considered, and it is clear therefrom that there was no trial held by the court and no evidence taken by it, and also that the court did not have before it the evidence submitted to the referee. The court finds as a fact that the wholesale price of certain merchandise that had been damaged by fire, and concerning which there was a dispute between the parties, was the sum of \$2,126.74, being the amount which the referee fixes by his findings as the wholesale price of said merchandise, but the referee finds that the actual value of said merchandise was the sum of \$708.98, the latter amount being found by the court to be erroneous. With this exception the court adopted the findings of the referee and ordered a judgment for an amount in excess of that found due by the referee.

[4] We are satisfied from the foregoing recitals contained in the findings of the referee, and also from the recitals in the findings of the court, that the order of reference was general in its nature, and, under the provisions of section 644 of the Code of Civil Procedure, "the finding of the referee or commissioner upon the whole issue must stand as the finding of the court, and upon filing of the finding with the clerk of the court, judgment may be entered thereon in the same

manner as if the action had been tried by the court." This holding is supported by the following authorities: *In re Riccardi* (Cal. App.) 251 P. 650, *Weavering v. Schneider*, 52 Cal. App. 182, 198 P. 418, and *Clark v. Millsap*, 197 Cal. 765, 242 P. 918. In these cases the distinction is pointed out between findings by a referee where the reference is general or special, and holding the findings conclusive where the reference is general, as in the case at bar.

Upon the filing of the findings of the referee in this cause, judgment should have been entered thereon in accordance with the findings, and, for any error committed by the referee, the remedy of the aggrieved party was by motion for a new trial, or other appropriate proceeding. *Faulkner v. Hendy*, supra.

Having reached the foregoing conclusion, it becomes unnecessary to consider any other question presented by counsel for either party. The judgment is reversed, with directions to the trial court to enter judgment in favor of the plaintiff in the sum of \$3,429.76, with interest thereon at the rate of 7 per cent. per annum from the 15th day of February, 1922. The appellants will have and recover their costs on appeal.

We concur: FINCH, P. J.; PLUMMER, J.

88 Cal. App. 221

Ex parte JEFFCOATES. (Cr. 1456.)

District Court of Appeal, First District, Division 1, California. Jan. 4, 1928.

Infants $\Leftrightarrow$ 20—Evidence held to sustain conviction for commission of crime against infant (Pen. Code, § 288).

In prosecution under Pen. Code, § 288, relative to commission of lewd or lascivious acts with children, evidence of child, where corroborated by other evidence including defendant's admission, held sufficient to sustain conviction.

Application by Ollie Jeffcoates for a writ of habeas corpus prayed to be directed to the Sheriff of the City and County of San Francisco to secure petitioner's release from custody on a charge of violation of Pen. Code, § 288. Application denied.

Harry S. Whitthorne, of San Francisco, for petitioner.

TYLER, P. J. It appears from the petition that applicant was held to answer before the superior court for an alleged violation of section 288 of the Penal Code relating to crimes against children. It is claimed that the evidence is wholly insufficient to sustain said holding or the information subsequently filed. As in all cases based upon the sec-

tion referred to, the evidence is of a sordid character. No useful purpose would be subserved by a recital of the same. It is sufficient to say that, while the evidence of the child is not wholly satisfactory, there is other evidence, including the admission of the defendant that he committed the acts, which establishes sufficient or probable cause to sustain the charge.

The application is denied.

We concur: KNIGHT, J.; CASHIN, J.

88 Cal. App. 67

DAVIS v. TANNER et al. (Civ. 3396.)★

District Court of Appeal, Third District, California. Dec. 28, 1927.

Hearing Denied by Supreme Court Feb. 23, 1928.

1. Municipal corporations ⚡706(5)—Evidence held to support finding of negligence of taxicab driver injuring pedestrian.

Evidence, in action for death of pedestrian struck by taxicab, that driver of taxi, in place where traffic was badly congested, suddenly swerved in front of moving street car at excessive rate of speed and without sounding horn, supports implied finding of jury that driver was negligent.

2. Appeal and error ⚡1002—Verdict based on conflicting testimony will not be disturbed on appeal, where there is substantial evidence to support judgment.

An appellate court will not disturb verdict of jury based upon conflicting testimony, where there is substantial evidence to support judgment.

3. Municipal corporations ⚡706(7)—Contributory negligence of pedestrian injured by taxicab held for jury.

Evidence held not to show that pedestrian struck and killed by taxicab was contributorily negligent as matter of law.

4. Witnesses ⚡395—Sworn testimony of witness at coroner's inquest corroborating testimony at trial held competent, in view of introduction of subsequent statement to impeach witness on theory that testimony at trial had been fabricated.

Where former statement of witness was offered to impeach her on theory that she had colored her testimony at trial through inducement of one of counsel, testimony given at coroner's inquest two days after accident and before making of statement sought to be introduced, and which corresponded with and corroborated her testimony at trial, held competent.

5. Trial ⚡83(1)—Admission of evidence otherwise competent is not error because ground authorizing its reception is erroneously stated.

If evidence is otherwise competent under the pleadings and state of the record, it is not error to admit it merely because the ground authorizing its reception is erroneously stated.

6. Appeal and error ⚡232(2)—One failing to assign proper ground for admission of evidence cannot complain of its rejection.

One may not complain of the rejecting of evidence when upon request he fails to assign proper ground for its admission.

7. Witnesses ⚡361(1), 395—Evidence of prior statements are incompetent to rehabilitate testimony at trial merely because of effort to impeach witness' reputation or evidence of former inconsistent statements.

Evidence of prior statements consistent with testimony at former hearing are incompetent to rehabilitate witness' testimony at trial merely because effort has been made to impeach her general reputation or because of evidence of former statements inconsistent with present testimony.

8. Witnesses ⚡377, 395—Previous statement corresponding to testimony at trial is competent to rehabilitate witness' evidence, where he is charged with coloring or fabricating his testimony.

Where witness is charged with coloring his testimony from ulterior motives or that his testimony is fabrication of recent date, his previous statements, corresponding to testimony at trial, are competent, particularly if made prior to impeaching statement, to rehabilitate his evidence and refute inference of recent fabrication or improper influence.

9. Appeal and error ⚡994(2)—Extent that falsity of part of witness' testimony affects his credibility is exclusively within province of jury (Code Civ. Proc. § 2061, subd. 3).

Notwithstanding provision of Code Civ. Proc. § 2061, subd. 3, that witness false in one part of testimony is to be distrusted in others, it is exclusively within province of trial judge or jury to determine to what extent falsity of part of testimony or of former conflicting statements affect credibility of other statements.

10. Negligence ⚡122(1)—Defendant has burden of proving contributory negligence by preponderance of evidence (Code Civ. Proc. § 1963, subd. 4).

Under Code Civ. Proc. § 1963, subd. 4, defendant has burden of proving by preponderance of evidence plaintiff's contributory negligence, since law presumes that plaintiff took ordinary care of his own concerns.

11. Negligence ⚡122(1)—Presumption that person takes ordinary care of his own concerns is evidence to be weighed by jury, but may be rebutted (Code Civ. Proc. § 1957, and § 1963, subd. 4).

Presumption under Code Civ. Proc. § 1963, subd. 4, that person takes ordinary care of his own concerns, is itself evidence, in view of section 1957, and is entitled to be weighed by jury, together with all other evidence in case, in determining issues involved, and, in absence of evidence to contrary, such presumption will prevail, but, like any other species of evidence, such presumption may be rebutted.

⚡For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

★Hearing denied by Supreme Court.

12. Appeal and error ⚡882(12)—Defendant cannot complain of instruction containing language identical to that contained in instruction given at defendant's request (Code Civ. Proc. § 1963, subd. 4).

Defendant cannot complain of instruction as to presumption of ordinary care in plaintiff's favor under Code Civ. Proc. § 1963, subd. 4, where identical language was incorporated in instruction given at defendant's request.

13. Trial ⚡295(6)—Instruction in language of Motor Vehicle Act as to care of driver of vehicle held not misleading or prejudicial when read as whole (Motor Vehicle Act, § 113[a]).

Instruction in substantial language of section 113(a), Motor Vehicle Act (St. 1923, p. 553), as to care required of driver of vehicle on public street, was not misleading or prejudicial, where, when read as whole, in connection with other instructions, it fully advised jury of traffic law applicable to similar situations.

14. Trial ⚡296(8)—Use of words "satisfactory evidence" was not misleading. In view of repeated instructions that preponderance of evidence alone was sufficient to justify verdict.

Instruction containing phrase that, unless presumption of exercise of due care by plaintiff is overcome by "satisfactory evidence," jury should find for plaintiff, was not misleading, in view of repeated instructions that preponderance of evidence alone was sufficient upon which to justify verdict.

15. Trial ⚡295(1)—Instructions must be considered as a whole.

Instructions to jury must be considered as a whole.

16. Death ⚡85—Measure of damages for death of husband is properly based on pecuniary loss suffered.

In action by widow for death of husband, measure of damages is properly based upon pecuniary loss suffered on account of death of husband.

17. Death ⚡88—Instruction authorizing jury to consider disposition of deceased husband in estimating damages for death held proper.

Instruction, in action for death of plaintiff's husband, that, in estimating pecuniary loss suffered because of such death, jury might consider disposition of deceased, was proper, since it is proper to consider pecuniary loss a widow sustains in being deprived of society, comfort, and protection of her deceased husband.

Appeal from Superior Court, Los Angeles County; John M. York, Judge.

Action by Vinnie Wood Davis, as administratrix of the estate of Harvey D. Davis, deceased, against C. C. Tanner, doing business under the fictitious name and style of the Brown & White Cab Company, and another. From a judgment for plaintiff and an order denying a new trial, defendants appeal. Affirmed.

George W. Seith and Louis P. Pink, both of Los Angeles, for appellants.

Culver & Nourse, of Los Angeles, for respondent.

THOMPSON, Justice pro tem. This is an appeal from a judgment and order denying a motion for new trial following a verdict for \$11,000 damages for the death of respondent's husband, who was killed by appellants' automobile while attempting to cross Spring street in Los Angeles.

The appellants contend that (1) the judgment is not supported by the evidence; (2) that the trial court erred in admitting evidence of a witness of respondent given at the coroner's inquest, which was received for the purpose of rehabilitating her testimony at the trial, after an attempt had been made by the appellants to impeach her by introducing a former written statement made by her regarding the incident, which effort to impeach the witness was apparently offered on the theory that her testimony at the trial was a fabrication on her part of recent date, or that it was given through unwarranted influence exercised on the part of respondent's attorneys; and (3) that the court erred in giving certain instructions at the request of respondent.

The respondent is the surviving widow and the duly qualified administratrix of the estate of Harvey D. Davis, deceased. Appellant Tanner is a corporation operating a taxicab business in the city of Los Angeles, under the name of Brown & White Cab Company, and the appellant Crawford was engaged as a chauffeur of the cab which was involved in the accident. The deceased was a man 42 years of age, and possessed of good health and faculties. About 3 o'clock in the afternoon of February 4, 1924, he attempted to cross Spring street in Los Angeles amid congested traffic, midway between Fourth and Fifth streets as they cross Spring at right angles. A double line of street car tracks extends along Spring street at this point. A compact line of automobiles were parked along the westerly curb throughout the block. A second line of machines were standing toward his right, opposite the safety zone, at the southerly end of the block, awaiting the traffic signal to proceed across the intersection of Fifth street. Toward his left, about 75 feet distant, a street car and the taxicab involved in this action were approaching abreast, at an ordinary rate of speed, estimated at about 8 or 10 miles per hour. Under such circumstances the deceased stepped from the westerly curbing of Spring street at a point about the middle of the block, and, passing between two of the automobiles which were parked there, he looked toward his left whence danger from traffic might be expected on his side of the street, and then saw the street car and ap-

pellant's taxicab at a distance of about 75 feet, approaching at a rate of speed which would warrant a reasonably prudent person in assuming he would have ample time to safely cross the street ahead of the vehicles. He then hastened forward and reached a point about the middle of the south-bound track, where he was struck by appellants' taxicab, which was speeding up to get ahead of the street car so as to avoid the line of stationary machines toward the southerly end of the block, which were awaiting the traffic signal to continue their course southerly. The taxicab swerved in ahead of the street car, causing the motorman to clang his bell violently as a warning. The taxicab struck the deceased and carried him a distance of 60 or 75 feet before the driver was able to stop the machine. The application of the brakes, in an effort to stop, left distinct skid marks on the pavement behind the taxicab some 60 feet in length. After the machine was brought to a stop, the deceased lay injured and bleeding in the north-bound track just ahead of the front left wheel of the taxicab. He was immediately taken to the hospital, and died within a few hours thereafter. The chauffeur testified that at the time of the accident he was traveling only about 18 or 20 miles per hour; that he swerved in ahead of the street car and suddenly saw the deceased only a few feet ahead of the machine; that he immediately applied the brakes, but was unable to avoid hitting the man. Expert testimony indicates without conflict that a similar automobile, under like circumstances, traveling 20 miles per hour, could be stopped with the use of the foot brake alone within a distance of 40 feet, and that a car going at the rate of 25 miles per hour could be stopped under similar conditions within 68 feet. Judging from the length of the skid marks it necessarily follows that at the time of the accident the taxicab must have been traveling at an unlawful and excessive rate of speed, and that the driver, without sounding a warning horn, rapidly and carelessly turned his machine in ahead of the street car, in spite of the congested condition of the traffic.

[1, 2] The record in this case therefore furnishes substantial evidence to support the implied findings of the jury to the effect that appellants were guilty of a lack of ordinary care, which was the proximate cause of the injuries resulting in the death of respondent's intestate. In view of the existence of the badly congested condition of traffic at this time and place, it was clearly negligent for the driver of the taxicab to thus suddenly swerve around and in front of the moving street car at an excessive rate of speed and without sounding a warning horn.

A taxicab driver is to be commended for prompt attention to the calls of his custom-

ers, but this diligence will not justify him in driving along a street which is congested with traffic at such an excessive rate of speed as to endanger the safety or lives of pedestrians who may be exercising their lawful privilege of using the street with such ordinary care for their own safety as would be required of a reasonably prudent person, consistent with the state of traffic under the surrounding conditions.

It is a well-established rule that an appellate court will not disturb the verdict of a jury based upon conflict of testimony where there is substantial evidence to support the judgment. 2 Cal. Jur. 921, § 543.

[3] Nor can the court hold that the record, as a matter of law, discloses evidence which will warrant the court in finding that the deceased was guilty of contributory negligence. At the time of the accident, the traffic had been stopped on Spring street awaiting the sounding of the traffic signal. The approaching street car and taxicab were clearly visible to the deceased. They were some 75 feet distant when he passed between the machines parked at the curbing and he looked to his left, whence danger was to be anticipated, before he attempted to cross the street. This seems to furnish substantial evidence which will refute a charge of contributory negligence, particularly since the burden was on the appellants to show such lack of ordinary care on the part of the deceased. We are therefore of the opinion that the judgment and the verdict are amply supported by the evidence.

Prejudicial error is claimed by appellants in the admission of testimony on the part of Hilda M. Hogg, which was given at the coroner's inquest, to rehabilitate her evidence at the trial after an effort was made to impeach her. The accident resulting in the death of the intestate occurred February 4, 1924; the coroner's inquest was held two days later, on February 6, 1924; the written statement of the witness offered for impeachment to show recent fabrication was taken March 14, 1924; and the trial of the case occurred February 5, 1925. In brief, the testimony of the witness Hogg was as follows:

"I was on the west side of Spring street, * * * about the center of the south-bound track, between Fourth and Fifth streets. * * * I saw both the taxicab and Mr. Davis (before the accident occurred). * * * The taxicab and street car were about a third of a block (away) coming south from Fourth street, * * * running parallel, and about the same rate of speed. I saw Davis come out from between the parked line of machines on the west side * * * and incline his head to the north. * * * They (the street car and taxicab) were away (from him) about as far as from here to the outer door (a distance of about 60 or 75 feet). The taxicab was right along the front side of the street car. * * * After looking toward the north he (Davis) looked straight ahead * * * and began

to cross. * * * The taxi speeded up in order to get in front of the street car, * * * and wasn't quite straightened out * * * when it struck him. (He was) about a step from the south-bound track, and it threw him up against the radiator and the fender of the taxi, * * * and sort of shot him forward off the radiator, * * * and then struck him again. * * * When the taxi finally came to a stop, * * * the left hand wheel was in the center of the north-bound track, * * * resting against his neck."

Upon cross-examination of the witness Hogg, her statement previously taken in writing March 14, 1924, by a representative of the appellants, who went to her room for that purpose and procured her to sign the same, was introduced in evidence for the avowed purpose of impeaching her. It is evident from the following colloquy between Mr. Pink, attorney for appellants, and Mr. Nourse, representing the respondent, that appellants believed and sought to give the jury the impression that the testimony given at the trial had been changed and recently fabricated as the result of the persuasion of Mr. Loveland, an associate in the law office of respondent's attorneys, in an interview which he held with the witness subsequent to the making of the written statement which was offered for impeachment purposes. Inquiry by Mr. Pink:

"Q. Could you have Mrs. Hogg back here? I would like to ask her about her talking—who talked to her out there at her home that night?"

Mr. Nourse, replying:

"A. Mr. Loveland, in my office, went out and talked to her. * * * Q. You don't know how long he was there?"

Mr. Loveland speaking:

"A. I think we talked over the case about half an hour. Q. How long were you there? A. I was there for a whole evening. Q. Two or three hours? A. Oh no; I would say an hour and a half. Q. Who else was there? A. A man by the name of Miller, and her (Mrs. Hogg's) sister were there. Q. Was Mr. Hogg there? A. Yes."

Furthermore, in cross-examination of Mrs. Hogg, respecting this written statement, Mr. Pink, by the use of sarcasm, clearly implies that he believed the testimony given at the trial was the result of recent fabrication on the part of the witness:

"Q. It (the statement) was correct? A. As far as I could (then) recollect. Q. You mean your recollection has improved, now that a year has gone by? A. I should like to state the condition I was in at that time. * * * Q. Your recollection has improved now that almost a year has gone by? A. Yes; it has. Q. And a year from now, you will remember even better? * * * It (the statement) was made just a little over a month after the accident? A. Yes, sir.

"Mr. Pink: I see."

The inference was conveyed that because of domestic trouble the witness had not slept for several nights just prior to the time this statement was made. The details of this written statement conform very closely to the testimony given at the trial, with the exception that the witness is there quoted as saying:

"I saw the taxicab start to swerve * * * in front of the street car. * * * A business man stepped from between two automobiles parked at the west curb of Spring street * * * I saw him take just four quick steps, and step directly in front of the taxi, which was going about 10 or 12 miles an hour. * * * The taxi driver stopped just as soon as he could, 20 or 30 feet after he struck the man. * * * The taxi driver was doing all he could to avoid running over the man."

It appears this statement was taken while the witness was subject to unusual mental strain and wearied from loss of sleep for three or four nights previous; it was reduced to writing by the representatives of appellants, and her signature was evidently reluctantly given, after much urging on the part of the scrivener.

[4-6] It is apparent from the record that appellants offered the former statement of the witness Hogg to impeach her, on the theory that she had fabricated or colored her testimony given at the trial through the urgent inducement of respondent's attorneys, with whom a recent conference was developed by appellants, with the manifest inference that this interview was the cause of whatever conflict exists between her testimony at the trial and her former statement made to appellants.

Under such circumstances her testimony given under oath at the coroner's inquest two days after the occurrence of the accident and before she could have been subject to the inferred influence of respondent's attorneys was competent, since it corresponded with and corroborated in every material detail her challenged testimony given at the trial. Nor was its admission prejudicial error, because counsel failed to assign the proper ground for its acceptance. If evidence is otherwise competent under the pleadings and the state of the record, it is not error to admit it merely because the ground authorizing its reception is erroneously stated. Upon the contrary, one may not complain of the rejecting of evidence when, upon request, he fails to assign a proper ground for its admission. In the first instance, the evidence is competent and therefore not prejudicial, while in the latter case the court has not been informed of the legal ground authorizing its admission, and the refusal to admit it under such circumstances may be said to be the fault of the party offering it in improperly assigning the ground which would justify its reception.

[7, 8] It is now a well-settled rule in California and in most of the states of this nation that evidence of prior statements consistent with, or corresponding testimony given at a former hearing, are incompetent to rehabilitate the testimony of a witness given at the trial, merely because an effort has been made to impeach her general reputation, or because evidence has been adduced of former statements inconsistent with her present testimony. 27 Cal. Jur. 178, § 153; 28 R. C. L. 654, § 238; Jones on Evidence, 3d ed., 1371, sec. 869; 1 Greenleaf on Evidence, sec. 469; 7 Enc. of Evidence, 231; 40 Cyc. 2787; Mason v. Vestal, 88 Cal. 396, 26 P. 213, 22 Am. St. Rep. 310; Barkly v. Copeland, 74 Cal. 1, 15 P. 307, 5 Am. St. Rep. 413; People v. Doyell, 48 Cal. 85; People v. Shaw, 36 Cal. App. 441, 172 P. 401. But there is an equally uniform exception to this rule recognized by all the authorities to the effect that, where the witness is charged with changing or coloring his testimony from ulterior motives or that his evidence is a fabrication of recent date, his previous statements corresponding to the testimony given at the trial are competent, particularly if they are made prior to the impeaching statement for the purpose of rehabilitating his evidence and refuting the inference of recent fabrication, or that the testimony was given as a result of improper influence or because of undue interest. 27 Cal. Jur. 179, § 153; 28 R. C. L. 655, § 239; 40 Cyc. 2787; Wharton's Crim. Ev. (10th Ed.) § 492; 2 Wigmore on Evidence, 2d ed., 642, sec. 1126-1129; 6 Jones Comm. on Ev., 4864, §§ 2456-2458; 7 Enc. of Ev., 235; Cal. Electric Light Co. v. Cal. Safe Dep. Co., 145 Cal. 124, 78 P. 372; Barkly v. Copeland, 74 Cal. 1, 15 P. 307, 5 Am. St. Rep. 413; People v. Doyell, supra; People v. Billings, 34 Cal. App. 549, 168 P. 396; Walsh v. Wyman, 244 Mass. 407, 138 N. E. 389; State v. Spisak, 94 Wash. 566, 162 P. 998; People v. Purman, 216 Mich. 430, 185 N. W. 725; In re McClellan's Estate, 21 S. D. 209, 111 N. W. 540; Zell v. Com., 94 Pa. 273; Gilbert v. Sage, 57 N. Y. 639; Baber v. Broadway, etc., Co., 9 Misc. Rep. 20, 29 N. Y. S. 40; Griffin v. Boston, 188 Mass. 475, 74 N. E. 687; Waller v. People, 209 Ill. 284, 70 N. E. 681; McLain v. British F. M. I. Co., 16 Misc. Rep. 336, 38 N. Y. S. 77.

Numerous cases are cited by appellants to uphold this contention that the instant case does not fall within the exception of the rule above stated. There is neither substantial dispute as to the rule of law nor as to the exception thereto. The difficulty, however, arises in an effort to apply the law to the facts and circumstances of a particular case. It would be an arduous and useless task to attempt to reconcile and discriminate these various cases. In 2 Wigmore on Evidence, at page 642, is found an interesting discus-

sion of this subject, wherein the author attempts to reconcile the conflicting arguments upon this subject found in many of the leading cases. In support of the admission of former corresponding statements to rehabilitate the evidence of a witness sought to be impeached, this text says:

"On behalf of the admission of the supporting evidence, the earlier and conventional argument is that if a contradictory statement counts against a witness, a consistent one should count for him."

Upon the contrary, the modern prevailing view is that ordinarily such statements are inadmissible. They are not evidence in themselves (27 Cal. Jur. 169, § 143), and, where the conflict is conceded, it is said:

"Since the self-contradiction is conceded, it remains as a damaging fact, and is in no sense explained away by the (former) consistent statement. It is just as discrediting if it was once uttered, as though the other story had been told a score of times."

[9] This latter view is the one relied upon by appellants in the instant case, and was forcefully expressed by Mr. Justice Bigelow in the case of Com. v. Jenkins, 10 Gray (Mass.) 488. But the able author of Wigmore on Evidence says with respect to this argument: "Forceful as it seems at first sight, it is itself, in one respect based on a fallacy." For, after all, regardless of apparent conflicting statements made by a witness, either on the stand or out of court, it still becomes the duty of a jury to determine the facts and ascertain, if possible, which story speaks the truth. While the statute (Code Civ. Proc. § 2061, subd. 3) provides "that a witness false in one part of his testimony is to be distrusted in others," this is a mere rule to guide the court and the jury in determining the credibility of the witness and the weight of his testimony. Nevertheless, "it is exclusively within the province of a trial judge (or jury) to determine to what extent the falsity of a part of the testimony * * * (or of former conflicting statements) affects the credibility of other statements. 10 Cal. Jur. 1148, § 365. And likewise it has been held that "the jury may give credence to a witness who is false in a material part of his testimony, or to one whose testimony contains contradictions and inconsistencies." 27 Cal. Jur. 183, § 156. In the case of Stewart v. People, 23 Mich. 76, 9 Am. Rep. 78, Mr. Justice Cooley, one of the most eminent jurists this country has produced, refutes the argument of Mr. Justice Bigelow in the Jenkins Case, supra, and concludes by saying:

"We think the circuit judge ought to be allowed a reasonable discretion in such cases, and * * * though such evidence should not generally be received, yet * * * his discretion

in receiving it ought not to be set aside except in a clear case of abuse."

Particularly is this true where an impeaching statement has been taken under circumstances such as appears in the instant case, which leaves a grave doubt as to the accuracy or binding effect of such a statement, and under circumstances which makes a former statement of the witness made immediately after the accident, when there was no intimation of bias, prejudice or favoritism, peculiarly forceful and valuable to aid the jury in ascertaining the truth. In 2 Wigmore on Evidence, p. 647, it is said:

"A consistent statement at a time prior to the existence of a fact said to indicate bias, interest, or corruption will effectively explain away the force of the impeaching evidence, because it is thus made to appear that the statement in the form now uttered was independent of the discrediting influence. The former statements are therefore admissible."

It is not necessary that the party seeking to impeach the witness shall expressly state that his evidence is offered to prove a fabrication of recent date, nor to charge that the recent evidence was given under improper inducements in order to authorize the admission of corresponding statements made upon a prior occasion. It is sufficient if the evident purpose of the impeaching party, as disclosed by the record, indicates this to have been his purpose. In the case of Griffin v. Boston, supra, after stating the general rule, which excludes former corresponding statements, the court says:

"But there is one exception to that rule, and that is when it appears from the cross-examination, or otherwise that it may be the purpose of the cross-examining counsel to show that the testimony was a recent invention or impressed upon a witness by some undue influence. In such a case it is permissible for the purpose of restoring the credit of the witness to show that the testimony he makes upon the stand is like the statement which he made shortly after the accident. * * * The plaintiff's counsel contended * * * that the purpose of the cross-examination was simply to test the recollection of the witness; but we are of opinion that, while some of the questions and answers were for this purpose, the purpose also existed to impeach the witness * * * and to show that his testimony was a recent fabrication, created under the influence of the attorney for the defendant, in his office, shortly before the trial."

Likewise, in Baber v. Broadway, etc., supra, it is said:

"In order to come within the above exceptions to the rule, it is not necessary, as contended by the appellant's counsel, there be a direct charge of fabrication."

To the same effect, it is similarly held in Re McClellan's Estate, and in Zell v. Com., supra.

[10-12] Appellants contend that the court

erred in giving the following instruction, to wit:

"The burden is upon the defendant to prove the negligence of Harvey D. Davis by a preponderance of the evidence, and, in considering the evidence upon this point, you will keep in mind that the law presumes that Harvey D. Davis, at the time in question here, took ordinary care of his own concerns."

This was a correct statement of the law. Section 1963, Code of Civil Procedure, subd. 4, provides it is a presumption "that a person takes ordinary care of his own concerns." This disputable presumption declares no more than is asserted in the familiar maxim that "self-preservation is the first law of life." This presumption is itself declared to be evidence (Code Civ. Proc. § 1957; Stafford v. Martinoni, 192 Cal. 724, 221 P. 919; Everett v. Standard Acc. Ins. Co., 45 Cal. App. 332, 339, 187 P. 996; Mar Shee v. Maryland Assur. Corp., 190 Cal. 7, 210 P. 269), and is entitled to be weighed by the jury, together with all the other evidence in the case in determining the issue involved. In the absence of evidence to the contrary, this presumption will prevail. Chalmers v. Hawkins, (Cal. App.) 248 P. 727; Hatzakorjian v. Rucker-Fuller Desk Co., 197 Cal. 82, 97, 239 P. 709, 41 A. L. R. 1027; Crabbe v. Mammoth C. G. M. Co., 168 Cal. 500, 506, 143 P. 714; Everett v. Standard Acc. Ins. Co., supra. Like any other species of evidence, this presumption may be rebutted. Where one relies upon a defense of contributory negligence, the party charged with such negligence is entitled to the benefit of the legal presumption that he exercised ordinary care, and the defense must overcome this presumption in order to obtain a favorable judgment in this regard. Moreover, in the instant case, the identical language of this presumption was incorporated in an instruction given to the jury at the request of the appellants. It necessarily follows that one may not complain of an instruction declaring the very principle of law which is given to the jury at his own request. Hyatt on Trials, vol. 2, § 1429.

[13-17] Appellants also complain of the giving of an instruction which quoted substantially the language of section 113 (a) of the California Motor Vehicle Act (St. 1923, p. 553), to the effect that the driver of a vehicle upon a public street or highway must operate it in a careful and prudent manner, and at a rate of speed consistent with the existing state of traffic. This instruction read as a whole in connection with the other instructions, which fully and fairly advised the jury of the traffic law applicable to similar situations, was not misleading or prejudicial. So also the jury was clearly instructed that their verdict must rest upon a preponderance of the evidence. The use

of the phrase in one of the instructions to the effect that, "unless the presumption (of the exercise of due care) is overcome by *satisfactory evidence*, you will find for the plaintiff," could not have been misleading, for the jury was repeatedly informed that a preponderance of the evidence alone was sufficient upon which to justify a verdict. Nor is the instruction prejudicial, wherein appellants contend all of the elements of liability were not included, because it failed to exempt them from liability unless under the circumstances they should have reasonably anticipated the accident. The jury was fully instructed upon the reciprocal duties and obligations of the respective parties, and the instructions must be considered as a whole. Fairly construed, the several instructions offered by respondent affecting the measure of damages were specifically limited to a recovery of the pecuniary loss suffered on account of the death of respondent's intestate. This is a correct basis upon which to estimate damages in the instant case. 8 Cal. Jur. 1003, § 51. One instruction is criticized because it contained the statement that in estimating the pecuniary loss the jury might consider "the disposition of the said Harvey D. Davis as to whether it was kindly and affectionate or otherwise." This was not erroneous, since it was confined to elements only which may be considered in estimating pecuniary loss, and since it is proper to consider the pecuniary loss a widow sustains in being deprived of the society, comfort, and protection of her deceased husband. 8 Cal. Jur. 1007, § 53. Taken as a whole we are of the opinion that the jury was fully and fairly instructed as to the law of the case, and that no prejudicial error exists therein.

For the foregoing reasons, the judgment is affirmed.

We concur: FINCH, P. J.; HART, J.

88 Cal. App. 186

In re NEWMAN.★

WATSON v. NEWMAN.

(Civ. 6023.)

District Court of Appeal, First District, Division 1, California. Dec. 31, 1927.

Hearing Denied by Supreme Court Feb. 27, 1928.

1. Adoption ⇨3—Statutes relating to adoption, being in derogation of common law, must be strictly construed (Civ. Code, § 224).

Civ. Code, § 224, and other statutes relating to adoption, being in derogation of common law, rule of strict construction applies, especially when purpose or effect thereof is to deprive natural parent of possession of his child.

2. Adoption ⇨3—If statute relating to adoption is open to interpretation, it should be construed in support of rights of natural parent (Civ. Code, § 224).

Courts, being solicitous in preserving integrity of family, and zealous to protect rights of parents, will construe every intendment of Civ. Code, § 224, and other statutes relating to adoption in favor of claim of natural parent, all doubts being resolved in his favor, and, if statute is open to interpretation, it should be construed in support of rights of natural parent.

3. Adoption ⇨7—Word "divorced" in statute as to consent to adoption of parents means dissolution of marriage (Civ. Code, §§ 90, 224).

Under Civ. Code, § 224, providing that consent of father to adoption is essential, unless he has been adjudged guilty of extreme cruelty, and for that cause divorced, word "divorced," strictly construed, means dissolution of marriage, and marriage is dissolved only as provided by section 90.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Divorce.]

4. Adoption ⇨7—Interlocutory divorce decree did not dissolve marriage relation within statute relating to adoption (Civ. Code, §§ 90, 224).

Under Civ. Code, § 90, entry of interlocutory decree in divorce action did not dissolve marriage relation within meaning of section 224 relating to adoption, since office of interlocutory decree is merely that of declaring that party in whose favor court decides is entitled to divorce, and relation of husband and wife remains until marriage is dissolved by final judgment.

5. Adoption ⇨7, 14—Where mother died after securing interlocutory divorce decree on ground of extreme cruelty, but before final judgment, court had no jurisdiction to make valid order of adoption of child without father's consent, and could vacate order (Civ. Code, §§ 90, 224).

Under Civ. Code, §§ 90, 224, where mother died after she had secured interlocutory decree in action for divorce on ground of extreme cruelty, but before final judgment, parties were still husband and wife, and court was without jurisdiction to make valid order of adoption of child without father's consent, and was therefore justified afterwards in vacating order.

Appeal from Superior Court, Santa Clara County; J. R. Welch, Judge.

Motion by Ralph Newman against Lila Watson to set aside an order of adoption of Margaret Newman. From an order vacating the order of adoption, Lila Watson appeals. Affirmed.

Owen D. Richardson, of San Jose, for appellant.

Fred L. Thomas and Archer Bowden, both of San Jose, for respondent.

★Hearing denied by Supreme Court.

KNIGHT, J. On March 24, 1925, Lila Watson adopted the infant child of Ralph and Mary Newman without obtaining the consent of its father, and on May 15, 1925, at the instance of the father, the order of adoption was set aside. This appeal has been taken from the order vacating, and the question presented for determination is whether under the circumstances hereinafter set forth the consent of the father was essential to the adoption.

The parents of the child were married in March, 1921, and lived together as husband and wife until February, 1924, at which time they separated. Margaret Newman, the child here involved, was the issue of the marriage, having been born about seven months prior to the separation of her parents. In March, 1924, Mrs. Newman, who was then residing in San Jose with her sister, Lila Watson, filed a complaint for divorce, alleging extreme cruelty. Her husband filed a cross-complaint for divorce upon similar grounds. The record before us does not show that findings in the divorce action were ever made or waived; however, on September 4, 1924, an interlocutory judgment of divorce was granted and entered in favor of Mrs. Newman, and she was awarded the custody of the child, Newman being directed to pay \$35 a month for its maintenance, and being granted the right to visit the child at reasonable times. It appears that, following the granting of the interlocutory decree, Mrs. Newman continued to make her home with her sister, the child living with them; and on March 25, 1925, Mrs. Newman died.

A few days preceding her death Newman visited her, and, according to his affidavit, Lila Watson at that time requested him "to leave" the child in her custody, which he refused to do. The next day, March 21st, Mrs. Newman executed a written consent to the adoption, and on March 24th the order of adoption was obtained, it being alleged in the petition that the father of said minor child, said Ralph Newman, was adjudged guilty of cruelty and for said cause was divorced from said Mary Newman * * * by the interlocutory judgment of said court. * * *

It was on the day following the adoption proceeding that Mrs. Newman died. Newman at this time was residing in Oakland, and within a month thereafter learned of the adoption proceeding through friends, and immediately filed a motion, supported by affidavit, to set aside the order of adoption. In his affidavit he stated, among other things, that his place of residence in Oakland, where he had lived for some time, was well known to Lila Watson, but that she had given him no notice whatever of the intended adoption proceeding. On May 15, 1925, his motion was granted.

Section 224 of the Civil Code reads as follows:

"A legitimate child cannot be adopted without the consent of its parents, if living, nor an illegitimate child without the consent of its mother if living, except that consent is not necessary in the following cases, to wit: * * *

2. From a father or mother adjudged guilty of adultery or cruelty and for either cause divorced. * * *

(Italics ours.)

The contention of appellant is that unless appealed from or set aside, an interlocutory decree of divorce is final as to all matters properly adjudicated therein; and that therefore the interlocutory decree here, having adjudged the father to be guilty of cruelty, and that his wife was entitled to a divorce from him on that ground, and not having been appealed from or set aside, the father was "divorced" upon the ground mentioned within the meaning of said section 224 of the Civil Code.

[1, 2] We are unable to sustain this contention. It may be stated generally that, since the statutes relating to adoption are in derogation of the common law, the rule of strict construction applies, especially when the purpose or effect thereof is to deprive a natural parent of the possession of his child; and the courts, being solicitous in preserving the integrity of the family, and zealous to protect the rights of the parents, will construe every intendment thereof in favor of the claim of the natural parent, all doubts being resolved in his favor; and, if the statute is open to interpretation, it should be construed in support of the rights of the natural parent. 1 Cal. Jur. 421; In re Cordy, 169 Cal. 150, 146 P. 532, 534; Matter of Cozza, 163 Cal. 514, 126 P. 161, Ann. Cas. 1914A, 214; In re McGrew, 183 Cal. 177, 190 P. 804.

[3] As shown, under the provisions of section 224 of the Civil Code the consent of the father to the adoption was essential, unless he had been adjudged guilty of extreme cruelty, and for that cause "divorced." Construing the word "divorced" strictly, it can mean but one thing, a dissolution of the marriage; and a marriage is dissolved only by death of one of the parties, or "by the judgment of a court of competent jurisdiction decreeing a divorce of the parties." Civil Code, § 90. (Italics ours.)

[4] It has been repeatedly held that the entry of an interlocutory decree does not dissolve the marriage relation, and the parties thereto remain in the relation of husband and wife until the marriage is dissolved by the final judgment. See cases cited in note to 9 Cal. Jur. pp. 757, 758. The office of the interlocutory decree is merely that of declaring that the party in whose favor the court decides is entitled to a divorce. Olson v. Superior Court, 175 Cal. 250, 165 P. 706, 1 A. L. R. 1589; Brown v. Brown, 170 Cal. 1, 147 P. 1168; Estate of Dargie, 162 Cal. 51, 121 P. 320. It is but a step in the divorce proceeding. Brown v. Brown, supra.

[5] In the present case death dissolved the marriage before the parties were divorced. At the time of Mrs. Newman's death, therefore, the parties were still husband and wife, and, while that relationship existed, the consent of the father to the adoption of his child was essential, and, not having been obtained, the court was without jurisdiction to make a valid order of adoption (*Estate of Sharon*, 179 Cal. 447, 177 P. 283), and was therefore justified afterwards in vacating the order (*Miller v. Higgins*, 14 Cal. App. 156, 111 P. 403; *Estate of Pillsbury*, 175 Cal. 454, 166 P. 11, 3 A. L. R. 1396; *Bell v. Krauss*, 169 Cal. 387, 146 P. 874).

For the reasons above stated, the order appealed from is affirmed.

We concur: TYLER, P. J.; CASHIN, J.

88 Cal. App. 191

GALLETTA v. LEHMAN et al. (Civ. 6026.)

District Court of Appeal, First District, Division 1, California. Dec. 31, 1927.

Judgment §589(1)—In suit to enjoin execution on justice court's judgment, validity of judgment, having been determined in mandamus proceedings, was *res judicata*.

Where, in mandamus proceeding to compel justice's court to recall and quash execution issued under its judgment, it was held that judgment was not void, validity of such judgment was *res judicata* in subsequent suit to restrain service of other executions under same judgment on ground that it was void.

Appeal from Superior Court, City and County of San Francisco; Louis H. Ward, Judge.

Action by A. Galletta against Felix Lehman and another to enjoin execution pursuant to justice court's judgment and for damages. Judgment for defendant, and plaintiff appeals. Affirmed.

H. Slikerman, of San Francisco, for appellant.

M. H. Hernan, of San Francisco, for respondents.

KNIGHT, J. Defendants' demurrer to plaintiff's second amended complaint was sustained without leave to amend. Judgment in defendants' favor was entered accordingly, and plaintiff appeals.

The action purports to be one for an injunction and for damages. The complaint contains four counts which are loosely drawn, but it may be gleaned therefrom that by the first cause of action plaintiff seeks to enjoin the defendants from serving, or causing to be served, any executions issued, or to be issued, against plaintiff pursuant to a justice's court judgment theretofore obtained by the defendant Lehman against plaintiff; and the remaining causes of action are for the recovery of damages which plaintiff claims to have suffered as a result of being temporarily deprived of the use of a truck levied upon under certain executions previously issued pursuant to said justice's court judgment; also for exemplary damages based upon the ground that in making said levies "defendants were guilty of oppression and malice."

From an examination of the entire complaint, it becomes obvious that each of the causes of action attempted to be stated is grounded upon the assumption that said justice's court judgment is void, and therefore each constitutes a collateral attack thereon; furthermore, the question of the validity of said justice's court judgment was directly assailed by plaintiff in a proceeding in mandamus instituted by him in this court to compel the justice's court to recall and quash one of the executions issued thereunder (*Galletta v. Justice's Court*, 73 Cal. App. 95, 238 P. 133), and it was held that the judgment was not void, and for that reason this court refused to grant the writ directing that the execution be recalled. The foregoing decision was rendered prior to the hearing of the demurrer herein, and it is apparent therefrom that the causes of action attempted to be pleaded by plaintiff in this action were groundless. The trial court was therefore justified in sustaining the demurrer without leave to amend.

The judgment is affirmed.

We concur: TYLER, P. J.; CASHIN, J.

☞ For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

88 Cal. App. 245

(262 P.)

PEOPLE v. GONZALES. (Cr. 1538.)★

District Court of Appeal, Second District,
Division 1, California. Jan. 5, 1928.

Hearing Denied by Supreme Court March 5,
1928.

1. Criminal law ☞1111(1)—Accused, convicted of subsequent violation of Wright Act, could not show on appeal that prior convictions were under ordinance, where not disclosed on record (St. 1921, p. 79).

In prosecution under Wright Act (St. 1921, p. 79) for unlawful possession of intoxicating liquor, where accused pleaded guilty to charge, as well as theretofore having been found guilty of three several offenses of same character, was convicted, and on appeal urged that prior convictions were for violation of local city ordinance, and, consequently, conviction might not be pleaded in prosecution for violation of statute, but record on appeal failed to disclose such facts, *held*, since it must be assumed that record as it stood was correct, that point advanced by accused could not be sustained.

2. Criminal law ☞1144(1/2)—Nothing appearing in record as to what was done, presumption is that what ought to have been done was rightly done.

Where nothing appears in record as to what was done, it will be presumed in favor of judgment that what ought to have been done was not only done, but rightly done; and that, when record affirmatively shows what transpired, it will not be presumed that something different was done.

3. Criminal law ☞1144(5)—Though existence of jurisdictional fact is not affirmed on record, such fact will be presumed.

Though existence of jurisdictional fact is not affirmed on record, such fact will be presumed.

4. Criminal law ☞1202(1)—Accused need not be convicted as second offender under Wright Act before being charged as third or fourth offender (St. 1921, p. 79).

Where defendant pleaded guilty to violation of Wright Act (St. 1921, p. 79) and to having theretofore been found guilty of three several offenses of same character and contended that she should have been convicted as second offender before information charging her as a third or fourth offender could be filed, *held* that, in the absence of express direction, court would not hold that intent of statute was though defendant had been found guilty of two separate violations, she could not be charged with them, unless on trial of second offense defendant was also charged with first conviction.

Appeal from Superior Court, San Bernardino County; Charles L. Allison, Judge.

Trixie Gonzales (also known as Rosa Washington) was convicted of unlawful possession of intoxicating liquors, and she appeals. Affirmed.

A. S. Maloney and Lester G. King, both of San Bernardino, for appellant.

U. S. Webb, Atty. Gen., John L. Flynn, Deputy Atty. Gen., and Warner I. Praul, of Los Angeles, for the People.

HOUSER, J. Defendant pleaded guilty to a charge of unlawful possession of intoxicating liquor as well as to theretofore having been found guilty of three several offenses of the same character. Thereupon she was sentenced to serve one year in the county jail and to pay a fine of \$500, with the payment of \$250 of such fine being "suspended." She appeals from the judgment.

The first point made by appellant is that:

"The judgment of the court is excessive, and therefore void, for the reason that a conviction under a city ordinance cannot be pleaded in aggravation of punishment in a state court in a prosecution under the Wright Act."

[1-3] In connection therewith, appellant directs attention to what she claims occurred at the time sentence was imposed, to wit, that her counsel requested the judge of the trial court to take judicial notice of the fact that each of the several prior convictions of defendant was for a violation of a local city ordinance, and, consequently, that a conviction therefor might not be pleaded for violation of a state statute. The record on appeal, however, fails to disclose the facts to which appellant refers. Nor does the language appearing in the information against defendant support her contention. Each of the several allegations as to two of the charges in the information was to the effect that at a specified time, in the police court of the city of San Bernardino, the defendant was convicted of the commission of the named offense; and as to the third of such charges, in the justice court of San Bernardino township, she likewise had been so convicted. The record is silent with reference to the designation of any particular statute or ordinance under the provisions of which either or any of such convictions of defendant was had. As in substance is stated in *Crouch v. H. L. Miller & Co.*, 169 Cal. 341, 344, 146 P. 880, where nothing appears in the record as to what was done, it will be presumed in favor of the judgment that what ought to have been done was not only done, but rightly done; and that when the record affirmatively shows what transpired, it will not be presumed that something different was done. In 15 Cal. Jur. p. 68, where the authorities are cited, the rule is announced that, even though the existence of a jurisdictional fact be not affirmed on the record, such fact will be presumed. It thus becomes clear that this court is powerless to supply the deficiency, if any, existing in the record herein, and thus make it coincide with appellant's statement of the facts either as to what occurred at the time judgment was pronounced

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203 Cal. 12

LONDON GUARANTEE & ACCIDENT CO., Limited, v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al. (S. F. 12754.)

Supreme Court of California. Dec. 30, 1927.

1. Master and servant ☞404, 405(1)—Hearsay evidence is admissible in proceeding before Industrial Accident Commission and may be sufficient to establish fact at issue.

Hearsay evidence is admissible in workman's compensation proceeding before Industrial Accident Commission and may be sufficient to establish any fact at issue.

2. Master and servant ☞417(7)—Industrial Accident Commission's finding of dependency, supported by evidence, is conclusive.

Industrial Accident Commission's finding that father was dependent on deceased son because deceased son had contributed \$25 per month to use of his father, which sum father actually used for his maintenance and support, being supported by evidence, was conclusive, since findings of commission on question of dependency will not be disturbed when supported by evidence in record.

3. Master and servant ☞388—That father's brother owed him money held not to relieve father's dependency on deceased son.

That father's brother owed him money, interest from which would have supported him in accustomed manner, did not relieve father's dependency on deceased son, killed in course of employment, where father's mental condition was such that he did not know of debt, and it was discovered accidentally by another son after first son's death, and money was later collected.

4. Master and servant ☞388—"Dependency" exists where contributions are looked to for support in maintenance of dependent's accustomed mode of living.

"Dependency" of claimant on deceased employee does not mean absolute dependency for necessities of life, but it is sufficient that contributions of employee are looked to for sup-

port in maintenance of dependent's accustomed mode of living.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Dependency.]

5. Master and servant ☞388—That claimant owns some property does not prevent him from being dependent on earnings of deceased workman.

Mere fact that claimant has some property of his own does not necessarily prevent him from being dependent on earnings of deceased workman.

6. Master and servant ☞388—Question of dependency on deceased workman must be determined by facts appearing at time of injury.

Question of dependency of father on deceased son must be determined in accordance with facts as they appeared at time of injury to son, and subsequent obtaining of money by father could not affect award.

Curtis, J., dissenting.

In Bank.

Proceeding under the Workmen's Compensation Act by John Murray, an incompetent person, by his guardian ad litem and trustee, for the death of Ralph Murray, his son, claimant, opposed by the London Guarantee & Accident Company, Limited, insurer. The Industrial Accident Commission awarded compensation, and the insurer brings certiorari. Affirmed.

Superseding opinion of District Court of Appeal, 260 P. 354.

Haas & Dunnigan, H. E. Forster, and H. C. Johnston, all of Los Angeles, for petitioner.

G. C. Faulkner, of San Francisco, for respondents.

PRESTON, J. By this proceeding petitioner seeks to have annulled an order, made by respondent Industrial Accident Commission, awarding compensation in the sum of \$900 to one John Murray, as a partial dependent, on account of death of his son, Ralph, through injury received in the ordinary course of employment. Upon petition for writ of review the District Court of Appeal for the Second District annulled the award, and the cause is now before us for hearing. Petitioner appears as the insurer of the employer of said deceased, Ralph Murray.

The sole question to be determined is whether the evidence adduced before respondent commission sufficiently supports its findings and establishes, first, that the father was at least partially dependent upon his said son for support, and, second, that part of the earnings of said son were actually turned over to the father and used by him for his said support and maintenance.

It will suffice to state, without setting forth the evidence at length, that it substantially

imports the following facts: The aged father, a man of 76 years at the time of death of the son, was injured during 1920 or 1921 in an automobile accident. As a result he became totally incapacitated for work and suffered a mental breakdown, his mental state growing worse with passing years. He had theretofore been alienated from his wife and family and had for some 20 years led a solitary life, existing as a miser in rough shacks along the bank of the Mississippi river, and occupying himself with picking up old rags, bottles, etc. He suffered the continued mental delusion that he was absolutely penniless and without means of livelihood or support. Continuously throughout the years of the father's incapacity said deceased son had sent him each month the sum of \$25. Although there were six other children, apparently none of them had ever contributed to the support of their father, and it is questionable whether their circumstances were such as would have enabled them to do so. Shortly after the death of Ralph, another son, Walter, secured the commitment of the father to an insane asylum.

Such action gave rise to a peculiar situation upon the hearing of this case before the commission in that it made it difficult, if not almost impossible, to secure the testimony desired for a proper determination of the matter. The testimony of the father could not be had, or, if secured, it would have been valueless on account of his mental condition and especial delusion as to money matters. Furthermore, owing to his queer lonely life but few of the true facts or circumstances were known to outside persons. Hence by far the greater portion of the proof, and especially that relating to contributions made by deceased to the father, consisted of hearsay evidence.

[1] Hearsay evidence, however, is admissible in a proceeding before the commission and may be sufficient to establish any fact at issue. See *State Comp. Ins. Fund v. Ind. Acc. Com.*, 195 Cal. 174, 180, 231 P. 996, 999, and cases therein cited. As is there said:

"The cases construing the act since the adoption of the amendment of 1917 [St. 1917, p. 831] leave no room for doubt as to the probative sufficiency of hearsay evidence if in the judgment of the commission such evidence carries with it convincing force. It is, in this class of cases, legal evidence and may be sufficient in itself to sustain an award."

[2] Although here the evidence may appear to be somewhat indefinite in certain respects and lacking in requisite strength, yet in view of the circumstances of the case as above related, it was, if believed by respondent commission, legally sufficient to support their conclusion in the premises, to wit, that the son contributed \$25 per month to the use of his father, which sum was actually used by said

father for his maintenance and support. To put it another way, the question as to dependency is one of fact upon which the findings of the commission, having sufficient support in the evidence, are conclusive. "It is to be borne constantly in mind that questions as to who are dependents and the extent of dependency are to be determined primarily by the commission, and, in accordance with general rules governing the review of findings, its conclusions in this regard will not be disturbed when supported by evidence in the record." 27 Cal. Jur. 289, § 25.

The record further shows that at the time the father received news of the death of his son, Ralph, he was visiting another son, Walter, at Fort Dodge, Iowa. During the visit, said Walter discovered some figures in a notebook belonging to the father, who, upon being questioned, admitted that at some previous date he had loaned to his own brother (Walter's uncle), \$5,000 or more, in return for which the brother made out certain promissory notes. However, instead of delivering them to the lender as evidence of the debt, he kept both notes and money. He never paid interest on the money, nor did he make known the existence of the transaction during passing years. Said Walter thereupon went to the brother and succeeded in securing his father's property, reduced to cash in amount of \$5,500. He was thereafter appointed guardian for his father, and as such guardian retained said sum for the purpose of meeting expenses at the insane asylum.

[3] In the face of the fact that at the time of the injury the father was utterly without knowledge of his right to said money, it is contended that because it really belonged to him he was not dependent upon his son, Ralph, as interest from said estate would have supported him in his accustomed manner of living, or he could have been using the principal, in which event his dependency would only have started upon exhaustion of said fund. The mere statement of such a contention reveals its fallacy. In the first place, the father did not actually have possession of the estate, nor was it of any monetary value to him. So far as he was concerned, at most it consisted of the unproved claim, if he should happen to remember its existence, of an insane man against his brother, and the verbal promise of said brother to pay, which promise might or might not be fulfilled. The brother never recognized the debt or evidenced the slightest intention of paying it. As it had passed from the memory of the father, he was in no position to look to it for support. But for the chance discovery of the figures in the notebook, the true facts might never have come to light. Certainly such a situation cannot be held to have relieved dependency upon the son.

[4, 5] The true test of dependency is stated as follows in *L. R. A. 1916A*, p. 248:

"Dependency * * * does not mean absolute dependency for the necessities of life; it is sufficient that contributions of the workman are looked to for support in the maintenance of the dependent's accustomed mode of living.

"The mere fact that the claimant has some property of his own does not necessarily prevent him from being dependent upon the earnings of the deceased workman" (citing Carter's Case [1915] 221 Mass. 105, 108 N. E. 911).

See, also, 25 R. C. L. 771, § 66, where the rule is similarly stated, and 27 Cal. Jur. 289, § 25.

[6] The subsequent obtainment of the estate cannot affect the award made, as questions of dependency are determined in accordance with the facts as they may appear at the time of injury to the employee. 27 Cal. Jur. 291, § 26, and many cases there cited.

Award affirmed.

We concur: WASTE, C. J.; RICHARDS, J.; SHENK, J.; SEAWELL, J.; LANGDON, J.

CURTIS, J. I dissent. The undisputed evidence shows that John Murray, the respondent and the father of the deceased, was, at the time of the death of his son, possessed of property of the value of approximately \$5,500. This property consisted of money loaned out by the brother of the father, and was represented in the form of notes receivable, and there is not a scintilla of evidence to show that these notes were not worth their face value. In fact, as recited in the majority opinion, they were in a short time after the death of the son "reduced to cash in an amount of \$5,500." The finding, therefore, of the commission, that the father was partially dependent upon his son during the lifetime of the latter, finds no support whatever in the evidence.

203 Cal. 180

CONDON v. ANSALDI. (S. F. 12125.)★

Supreme Court of California. Jan. 20, 1928.

Hearing Denied in Bank Feb. 16, 1928.

I. Appeal and error ⇨933(6)—Minute order governs in specification of grounds for granting new trial, and is conclusively presumed to set forth action taken by court.

Where, in record, statement by court tends to support contention that new trial was granted solely on ground of supposed error of court in giving instructions, and minute order granting motion for new trial contained no such specification, but was simply general order granting motion, *held*, under these circumstances, minute order must govern, and it must be conclusively presumed to set forth action taken by court on motion.

2. Appeal and error ⇨933(4)—Order granting new trial, not specifying ground as on insufficiency of evidence, will be presumed not based on that ground (Code Civ. Proc. § 657).

Where order granting new trial which was appealed from did not specify that it was granted on ground of insufficiency of evidence to sustain verdict under Code Civ. Proc. § 657, it will be presumed, on appeal, that it was not based upon that ground.

3. Appeal and error ⇨1064(1)—Instruction that negligence of driver of automobile striking pedestrian was to be determined without regard to injury sustained held prejudicial.

Where, in action for injuries alleged by plaintiff to have been sustained when she was knocked down and run over by automobile owned and driven by defendant, court instructed that jury was to determine question of negligence without any regard to injury plaintiff may have sustained, and there was conflict of evidence respecting negligence of defendant, *held*, giving of instruction was prejudicial to rights of plaintiff.

4. Municipal corporations ⇨705(11)—Pedestrian may hold driver of automobile, although driver's negligence was not sole cause of injury, if it was proximate cause.

Where, in action against driver of automobile for injuries which plaintiff sustained when struck by automobile, court instructed jury that, unless defendant was solely responsible for occurrence of accident complained of, the verdict must be for defendant, *held*, that new trial was properly granted, since law does not require that negligence of defendant must be sole cause of injury, and all that is required is negligence shall be proximate cause of injury.

Department 1.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by Mary Condon against Giovanni Ansaldi for damage for personal injuries. Judgment for defendant, and from order granting plaintiff's motion for new trial, defendant appeals. Affirmed.

Cooley & Gallagher, of San Francisco, for appellant.

Reisner & Deming, of San Francisco, for respondent.

CURTIS, J. [1-3] Action to recover damages for injuries which plaintiff alleged she sustained in being knocked down and run over by an automobile owned and driven by defendant. A trial was had before a jury which rendered a verdict in favor of the defendant. Plaintiff moved for a new trial, which was granted by the court, and the defendant has appealed from this order. It is contended by appellant that the motion for a new trial was granted by the trial court solely on the ground of the supposed error of the court in giving instructions numbered 28 and 29. While there is in the record a state-

ment by the court which would tend to support this contention of appellant, the minute order granting the motion for a new trial contains no such specification, but is simply a general order granting the motion. Under these conditions the minute order must govern, and it must be conclusively presumed to set forth the action taken by the court upon the motion. *Morgan v. Robinson Co.*, 157 Cal. 348, 107 P. 695; *Weisser v. Southern Pacific Ry. Co.*, 148 Cal. 426, 83 P. 439, 7 Ann. Cas. 636; *Kent v. Williams*, 146 Cal. 3, 79 P. 527; *Ben Lomond Wine Co. v. Sladky*, 141 Cal. 619, 75 P. 332; *Power v. Fairbanks*, 146 Cal. 611, 80 P. 1075; *Biaggi v. Ramont*, 189 Cal. 675, 209 P. 892. As the order appealed from does not specify that it was granted upon the ground of the insufficiency of the evidence to sustain the verdict, it will be presumed that it was not based upon that ground. Section 657, Code Civ. Proc. The only ground urged by respondent, therefore, which can be considered by this court in determining the validity of said order, is the alleged error of the trial court in giving certain instructions numbered 20, 21, 28, and 29, which were given the jury at the request of the appellant. We can see no real objection to instructions numbered 20 and 21. In instruction numbered 28, however, the jury were instructed that:

"You are to determine the question of negligence without regard to any injury the plaintiff may have sustained."

Just what meaning was intended to be conveyed by this instruction is not clear. That it would have the effect of confusing the minds of the jurors we think is quite evident. However, it may have had a more serious and injurious effect upon the jurors than simply confusing them, owing to the evidence in this particular case. The nature of the injuries sustained by the plaintiff in the collision with defendant's automobile might have had an important bearing upon the jury's determination of the defendant's negligence, had they been permitted to consider said injuries. Plaintiff sustained a broken leg and other severe wounds as the result of her coming in contact with the automobile. She testified that she was knocked down and run over and her leg broken by the force of defendant's automobile as it was driven at a rapid rate of speed by defendant.

[4] On the other hand, the defendant testified that he saw plaintiff "coming, and at

the same time she stopped, and she hung herself on the radiator, and the machine was stopped right there, and the time I started to get off the machine the lady was hanging there with her hands on the radiator cap, and she fell right back." While she might have received a broken leg in falling from the machine in the manner described by defendant, yet such a serious injury would have been an unusual result from such slight fall. On the other hand, it is quite a common experience for a victim of an accident who, while walking upon a paved street, has been knocked down and run over by an automobile, to receive a broken limb or even a much more serious injury. Had the jury been permitted to take into consideration the serious nature of plaintiff's injuries, it might have concluded that the plaintiff's, rather than the defendant's, version of the accident was the true and correct account of what happened at the time of the collision. In view of the sharp conflict in the evidence respecting the negligence of defendant, the giving of this instruction in our opinion was prejudicial to the rights of the plaintiff, and justified the judge of the trial court in granting the motion for a new trial. In this same instruction, as well as in instruction numbered 29, the court told the jury that, "unless the defendant is solely responsible for the occurrence of the accident complained of, your verdict must be for the defendant." In *Griffith v. Oak Ridge Oil Co.*, 190 Cal. 389, 392, 212 P. 913, 914, this court, through Chief Justice Myers, said:

"The law does not require that negligence of the defendant must be the sole cause of the injury complained of in order to entitle the plaintiff to damages therefor. All that is required in either respect is that the negligence in question shall be a proximate cause of the injury.
* * *

We cannot say but that the plaintiff was prejudiced by the giving of this instruction, as well as that part of instruction No. 28 first quoted above. It evidently was the opinion of the trial judge that by the giving of these two instructions the rights of the plaintiff had been seriously prejudiced, and for that reason he granted plaintiff's motion for a new trial. In doing so we think he acted properly.

The order appealed from is affirmed.

We concur: PRESTON, J.; LANGDON, J.

203 Cal. 61

KELSEY v. MILLER. (L. A. 8539.)

Supreme Court of California. Jan. 5, 1928.

1. Husband and wife $\hookrightarrow$ 14(3)—That wife aided husband's divorce from former wife did not per se work forfeiture of her right to procure joint tenancy deed of property purchased with her funds.

That wife, before marriage, counseled, aided, assisted, and abetted husband's divorce from former wife did not per se work a forfeiture of her right to dispose of her property on same terms as others, as by procuring execution of joint tenancy deed to property paid for with her funds.

2. Deeds $\hookrightarrow$ 196(3)—Evidence in suit to annul joint tenancy deed held to rebut presumption of husband's undue influence over wife (Civ. Code, §§ 158, 2235).

In administrator's action against decedent's husband to annul joint tenancy deed, evidence held to rebut presumption of undue influence by husband, under Civ. Code, §§ 158, 2235.

3. Husband and wife $\hookrightarrow$ 266—Marriage $\hookrightarrow$ 11—Invalidity of one divorce decree would not inevitably nullify husband's subsequent marriages and acquisition of property rights from later wife.

Invalidity of one divorce decree for want of jurisdiction to render it would not inevitably nullify husband's subsequent marriages and transactions whereby he obtained property rights from subsequent wife.

4. Divorce $\hookrightarrow$ 65—Wife's pro confesso, filed in husband's divorce suit, constituted appearance, giving court jurisdiction of defendant.

Pro confesso, executed by wife and caused to be filed as record in husband's divorce suit, reciting that she waived notice, copy, pleading, and term, and agreed to immediate trial, constituted appearance, giving court jurisdiction of defendant.

5. Divorce $\hookrightarrow$ 329—Evidence held not to show fraud or collusion invalidating husband's foreign decree of divorce from former wife.

Evidence held not to show fraud or collusion, invalidating foreign divorce decree granted husband in suit brought by him against former wife without substituted service after she filed bill for divorce against him in another state.

6. Divorce $\hookrightarrow$ 326—Parties remarrying are estopped to deny validity of foreign divorce.

Parties to foreign divorce decree are estopped by remarriage to other persons to deny validity of decree, even if void on collateral attack as showing want of jurisdiction on its face.

7. Divorce $\hookrightarrow$ 327—Husband requesting wife to accompany him to another state, qualifying himself to practice medicine therein, remaining there some time, and not returning to former state, held bona fide resident when granted divorce therein.

Husband requesting wife in good faith to accompany him from Massachusetts to Tennessee, qualifying himself to practice medicine in

latter state, remaining there several months after sanitarium of which he was medical director closed, and not returning to Massachusetts, but going to and remaining in California, held a bona fide resident of Tennessee at time of divorce decree granted him therein.

8. Divorce $\hookrightarrow$ 326—Tennessee divorce judgment will not be held invalid on collateral attack for failure to allege plaintiff's residence in state and defendant's desertion or absence for statutory time (Shannon's Code Tenn. § 4203, and § 4201, subds. 4, 8).

Judgment of divorce, granted in Tennessee will not be held invalid on collateral attack because statutory requirements of two year's residence by plaintiff in that state and desertion or absence of defendant for two years (Shannon's Code Tenn. § 4201, subds. 4, 8, and section 4203) were not alleged in complaint nor incorporated in judgment.

9. Evidence $\hookrightarrow$ 80(1)—Laws of another state are presumed same as those of state on similar subjects.

Supreme Court must presume, in absence of contrary showing, that laws of another state are the same as those of California affecting similar subjects.

10. Judgment $\hookrightarrow$ 503—Judgment of court having general jurisdiction of subject-matter cannot be successfully attacked collaterally because of imperfect or defective complaint.

Judgment of court having general jurisdiction of subject-matter cannot be successfully attacked in collateral proceeding because of imperfect or defective complaint in action in which rendered; judgment in accord with prayer of such complaint being nothing more than error.

11. Divorce $\hookrightarrow$ 168—Failure to allege plaintiff's residence for statutory time does not affect court's jurisdiction as respects collateral attack (Civ. Code, § 128).

As respects collateral attack, failure to allege that plaintiff in divorce suit resided in state and county in which brought for time prescribed by Civ. Code, § 128, does not affect court's jurisdiction to hear and determine action, if it obtained jurisdiction of defendant.

12. Divorce $\hookrightarrow$ 327—Divorce obtained on substituted service outside state of matrimonial domicile by simulating residence therein may be held void in any other state.

Where one spouse goes to another state than that of matrimonial domicile, and there obtains divorce under residence simulated for such purpose and not in good faith, judgment is not binding on courts of other states, and may be held void therein on proof of fraudulent residence and substituted service only.

13. Marriage $\hookrightarrow$ 40(1), 50(1)—Proof of prior marriage and parties' continued life is insufficient to make case against second ceremonial marriage but proof that first marriage was not set aside is required.

Merely proof of prior marriage and continued life of both spouses is not sufficient to make a case against second ceremonial marriage, but there must be further showing that first marriage had not been set aside by judicial decree.

14. Marriage ⚭40(1)—Legality of marriage regularly solemnized is presumed.

There is a very strong presumption in favor of the legality of a marriage regularly solemnized.

15. Marriage ⚭40(11)—In view of burden of proof, parties to regular marriage in state were husband and wife, absent evidence that husband was not divorced from former wife.

In absence of testimony in former wife's deposition as to whether she had obtained divorce decree or affirmative showing that husband had not obtained valid decree against her, he and one whose marriage to him was regularly solemnized in California after foreign divorce decree assailed as void were husband and wife under laws of such state whatever their marriage status before, in view of burden of proof on one attacking second marriage.

16. Divorce ⚭168, 172—Final divorce decree is binding on all as to determination of marital status, and immune from collateral attack on other than statutory grounds (Code Civ. Proc. § 1916).

Final divorce decree, being a judgment in rem establishing and dissolving matrimonial status is binding on all the world as to determination of such status and immune from collateral attack on grounds not specified by Code Civ. Proc. § 1916.

17. Divorce ⚭1—Marriage ⚭2—Marriage and divorce are questions of public policy largely within state's sound discretion.

Marriage and divorce are questions of public policy committed largely to sound discretion of the several states.

18. Marriage ⚭40(1)—Judgment upholding marriage status of persons seriously affected must be sustained, if reasonably possible.

Policy of law requires that trial court's judgment upholding marriage status of persons seriously affected thereby be sustained, if reasonably possible.

19. Witnesses ⚭204(1) — Letter instructing attorney to get writer's share of property for his children by former marriage if anything happened to him and wife held inadmissible as privileged.

In action to annul joint tenancy deed to plaintiff's decedent and her husband, letter from husband to his attorney, stating that he wanted latter to get husband's share for his children by former marriages, "for whom I am doing many of these things," if anything happened to him and wife on automobile trip, held properly excluded from evidence as privileged and of little, if any, relevancy.

In Bank.

Appeal from Superior Court, Los Angeles County; John M. York, Judge.

Action by Frank M. Kelsey, special administrator of the estate of Mary Moore Miller, deceased, against Jared H. Miller. Judgment for defendant, and plaintiff appeals. Affirmed.

Anderson & Anderson, Victor T. Watkins, and John L. Richardson, all of Los Angeles, for appellant.

Kimball Fletcher, A. P. Thomson, MacDonald & Thompson, and Hunsaker, Britt & Cosgrove, all of Los Angeles, for respondent.

SEAWELL, J. This appeal, L. A. No. 8539, which will presently receive our attention, is the first in numerical order of three separate appeals pending in this court from judgments affecting the estate of Mary Moore Miller, deceased. The second appeal, L. A. No. 8894, 263 P. 213, is entitled "Frank M. Kelsey, as Special Administrator of the Estate of Mary Moore Miller, Deceased, Plaintiff and Appellant, v. Jared H. Miller, Defendant and Respondent, Security Trust & Savings Bank, a Corporation, Citizens' National Bank, a Corporation, and Citizens' Trust & Savings Bank, a Corporation, Defendants," and was taken by the special administrator from a judgment awarding plaintiff costs only in an action brought to compel Jared H. Miller to account to said estate for all moneys belonging to said Mary Moore Miller which might have come into his hands or that were received by him from her during a seven-year period of assumed marital relations, which was terminated by her death, and during which period of time said Jared H. Miller and Mary Moore Miller held themselves out to be and lived together as husband and wife. Said third appeal, L. A. No. 9013, 263 P. 214, entitled "George W. Moore, Contestant and Respondent, v. Jared H. Miller, as Executor of the Estate of Mary Moore, Deceased, Lillian Hays, Formerly Lillian Miller, and Russell C. Miller, Respondents and Appellants," was taken from a decree revoking the probate of the last will and testament of said Mary Moore Miller, deceased. All of said actions, including the instant case, were doubtless brought on behalf of the collateral kindred of said decedent and arise out of the same state of facts and involve many similar issues of law and fact.

The complaint herein L. A. No. 8539, which was twice amended, will be referred to as the "complaint," rather than as the "second amended complaint." The action was brought to obtain a decree of annulment of a certain deed, dated November 10, 1915, wherein the grantees, Mary Moore Miller, since deceased, and her husband, Jared H. Miller, defendant and respondent, were named as joint tenants, with the right of survivorship, in and to lot 35, Kensington Place, situate in the city of Los Angeles, and valued at \$16,500. The money furnished to pay the purchase price of said real property was taken from funds acquired by the wife before marriage. Incidental to the main purpose of the action, plaintiff prays, as the special administrator of said estate, to be let into the possession

of said real property, which, since the demise of Mary Moore Miller on February 17, 1921, has been and now is in the possession of said Jared H. Miller by virtue of said deed, and that he and the other defendants named in the action who claim an interest adverse to said estate be forever barred and enjoined from asserting any claim of interest in or to said real property, and for general relief.

It is claimed by appellant that two major controlling propositions have been established by the evidence, which, if given the probative force which they are entitled to receive, would inevitably compel a reversal of the judgment. These propositions may be thus summarized: First, that the decree granted to Jared H. Miller on September 15, 1909, by the circuit court of Shelby county, state of Tennessee, in the action of Jared H. Miller v. Edith C. Miller, his former wife, purporting to dissolve the matrimonial bonds theretofore existing between him and said former wife, was invalid by reason of certain alleged fraudulent methods employed by Jared H. Miller in obtaining said decree, including collusive conduct on the part of both parties to said action, and, said marriage not having been lawfully dissolved, the subsequent marriages of Dr. Jared H. Miller with Mary Moore were void from the beginning. Second, that if matrimonial relations which were maintained by her and Dr. Jared H. Miller were maintained in the belief that she was his lawful wife, when as a matter of law she was not such lawful wife, the deed of joint tenancy being a gift and made in the belief and under the influence of the existence of the marital state, would bring the transaction within the confidential relation clauses of sections 158 and 2235, Civil Code, which provide that transactions between husband and wife "by which he obtains any advantage from his beneficiary, are presumed to be entered into by the latter without sufficient consideration, and under undue influence," and the presumption of undue influence would of itself be sufficient to vitiate the conveyance. Other allegations of fraud and undue influence practiced on the part of said Jared H. Miller are alleged to consist in false reports and representations made by him to said Mary Moore to the effect that he was a person possessed of great wealth and was engaged in handling large affairs and that he possessed unusual capacity, sagacity, and ability as a developer, promoter, and manager of large business and financial enterprises, when as a matter of fact he was insolvent and was lacking in the qualities which he boasted of possessing. These latter representations are offered as affording other and additional inducements which moved Mary Moore to consent to enter into the marriage relation with him and did thereafter influence her to place her estate largely within his control.

The appellant claims that the matrimonial status of respondent Miller and Mary Moore Miller depends upon the validity or lack of validity of said divorce decree granted to said Jared H. Miller from Edith Chesley Miller (whose maiden name was Edith Chesley) by the circuit court of the county of Shelby, state of Tennessee, on September 15, 1909. Dr. Jared H. Miller was a graduate physician and surgeon. His marriage with Edith Chesley was solemnized by his father, the Rev. Frederick M. Miller, at North Brookfield, state of Massachusetts, in 1901. Shortly after said marriage they moved to Palmer, Mass., where they resided for a period of almost three years. There a son, Chesley Russell Miller, was born. Between the years 1903 and 1905, for a period of something like two years, they lived apart. During said period he spent a year in Europe, the wife having returned to her mother's home. In 1905 he resumed the practice of his profession at Boston, and his wife rejoined him. They lived together intermittently and unhappily until April, 1909, when the wife again left him. A part of their early married life was spent in Massachusetts and a portion was spent in a Connecticut city, where Dr. Miller was connected with a sanitarium. Edith Chesley Miller, since the granting of the Shelby county decree, remarried and has since been living with her husband in Springfield, Mass. By her deposition, which constitutes a part of the record herein, she deposed to the fact that in the month of May, 1909, a period when she and Dr. Jared H. Miller were living separate and apart, he visited her and requested her to rejoin him and accompany him to Raleigh, Tenn., where he was to assume the position of medical director of a sanitarium, but that she refused to do so. This request, it appears from the deposition of Edith Chesley Miller, was made in good faith. A few days thereafter, to wit, June 1, 1909, she filed an action in the courts of Massachusetts praying for a decree annulling the bonds of matrimony then existing between them and alleging acts of cruelty on his part and charging him with being an habitual user of intoxicating liquors and drugs. By her deposition, taken in the instant case, she recanted as to the liquor and drug charges made in her complaint and deposed that said charges had been overstated by her attorney and that her former husband was not addicted to the use of drugs and that the intoxication therein alleged as habitual was occasional only. The complaint seems to have been served on Dr. Jared H. Miller on the day it was filed, and he departed from Boston for Tennessee on the following day. No further pleadings were filed or proceedings of any nature taken by said plaintiff, Edith Chesley Miller. Shortly after Dr. Jared H. Miller arrived at the Tennessee sanitarium to assume his duties Edith Ches-

ley Miller arrived in Tennessee, prompted by the belief that her husband had taken their son, Chesley Russell Miller, with him. In this she was mistaken. The boy, who, it seems, was placed by judicial order in the custody of Dr. Miller, was at Summerville, Mass., a short distance out of Boston. Upon one of her visits at the Tennessee sanitarium the proprietor thereof, in the presence of Dr. Jared H. Miller, urged her to rejoin her husband at the sanitarium and resume matrimonial relations with him. This she positively stated she would not do. Within a few days thereafter she returned to Massachusetts, where she afterwards remarried and has since resided with her husband. Dr. Miller qualified as a practicing physician of Tennessee in conformity with the laws of that state, and, according to his testimony, which is corroborated by subsequent events, had no intention of again returning to Massachusetts. He remained at the Tennessee sanitarium until it was closed as an unsuccessful venture. He then went to Memphis, where he resided for several months, and finally departed for California to visit his daughter by his first marriage, who was then living at the home of his father, the Rev. F. M. Miller, at Lankershim. Subsequently he entered the practice of his profession at San Francisco and finally located in Los Angeles. The marriage with Edith Chesley was respondent's second marriage, his first wife having died a short time after the birth of the daughter above mentioned.

The complaint sets out a number of acts and matters which, it is claimed, bore directly upon the execution of said deed and which were fraudulently employed and resorted to by respondent to induce, and which did induce, said Mary Moore Miller to execute said deed. The Shelby county decree is alleged to have been procured by respondent, who was plaintiff in said divorce proceeding, upon the false and fraudulent representation made by him to said court that he had acquired a legal residence in the state of Tennessee, when as a matter of fact he was not a bona fide resident of said state, and, further, that both parties to the proceeding were guilty of collusion in causing and procuring said decree to be made. It is next alleged that on March 29, 1911, at the city of Berkeley, county of Alameda, state of California, said Jared H. Miller pretended to contract a marriage with Irene Ayers by engaging in a ceremony which in form conformed to the marriage ceremonial, but which nevertheless was void by reason of the undissolved marriage bond then existing between respondent and said Edith Chesley Miller; that respondent and said Irene Ayers Miller lived together as husband and wife until July 13, 1914; that thereafter and on or about November 17, 1914, by the institution of a false and fraudulent action in the chancery court of the county of Shelby, state of Tennessee, respondent was granted a

decree of divorce from said Irene Ayers Miller; that at the time said action was commenced and said decree was granted said court was without jurisdiction of either person or the subject-matter of the action, for the reason that said respondent was not then nor had he ever been a bona fide resident of said state; that said Irene Ayers Miller had no notice, actual or constructive, of the pendency of said action or of the entry of said decree until September 14, 1922; that on November 20, 1914, at the city of Jackson, county of Madison, state of Tennessee, said Jared H. Miller and Mary Moore went through the form of a marriage ceremony; that thereafter, to wit, October 13, 1915, at the city of Memphis, state of Tennessee, the same parties, having complied with all the ceremonial forms and statutory requirements essential for the legal solemnization of marriages, went through the form of and engaged in a pretended marriage ceremony for the second time, which was also void by reason of said Miller not having been legally divorced from said Edith Chesley Miller.

It is further alleged in this connection that the intermarriage of said Jared H. Miller and Irene Ayers, if said marriage was in law valid, continued to be a subsisting marriage contract, inasmuch as the decree granted by the circuit court of Shelby county on November 17, 1914, purporting to divorce them, was fraudulently procured. As an additional objection and obstacle to said pretended marriage of October 13, 1915, by said Jared H. Miller and Mary Moore, it is alleged that at the time it was purported to have been solemnized there was pending in the superior court of the state of California, county of Alameda, an action wherein and whereby said Irene E. (Ayers) Miller as plaintiff was praying for the dissolution of the matrimonial bonds then existing between her and said Jared H. Miller; that he appeared in and defended said action, but did not mention or refer to the purported decree of divorce rendered in his favor by the chancery court of Shelby county, state of Tennessee, whereby his said pretended marriage with Irene Ayers Miller was decreed dissolved on November 17, 1914; that an interlocutory decree of divorce was rendered on September 28, 1915, by said superior court of Alameda county, adjudging the plaintiff, Irene Ayers Miller, entitled to a divorce from said Jared H. Miller, but the final decree was not entered therein until October 5, 1916. The complaint contains no allegation of any other marriage having been performed, in which said Jared H. Miller and Mary Moore were the contracting parties. The answer, however, alleges the celebration of a subsequent marriage ceremony performed at the city of Fresno, California, on May 11, 1918, and the court finds this allegation to be true and that this marriage was legal in all respects.

It is not claimed that any of the marriage ceremonies performed since the decree entered by the circuit court of Shelby county on September 15, 1909, were void as lacking in legal symbols or form, but it is claimed that all subsequent marriages pretended or attempted to have been entered into by said Jared H. Miller since his marriage with Edith Chesley are absolutely void for the reason that no valid decree of divorce was ever made or entered by any court dissolving said marriage.

The complaint alleges and the court found that at the time of the trial of the instant case said Edith Chesley Miller was a resident of the state of Massachusetts and was known as Edith C. Berriman, and that Irene E. Ayers was a resident of the state of California. It is alleged by plaintiff that at the time of the Memphis marriage, October 13, 1915, Mary Moore was wholly ignorant of the fact that said Jared H. Miller was a married man, and that she was induced by the fraudulent representations made by him to believe and did believe that he was a single man, and there was no legal obstacle debarring him from contracting marriage with her, and that she continued in such belief to the time of her death. Fraudulent representations are alleged to have been made by him to her that he was possessed of large properties and wealth, which representations being accepted by her as statements of truth influenced her conduct in dealing with him to her detriment. His insolvency is also alleged.

It is alleged that after the performance of said marriage ceremony at the city of Jackson on November 20, 1914, said Miller and Mary Moore entered upon matrimonial relations and continued to live together as husband and wife to the day of her death, to wit, February 17, 1921; that as her pretended husband, but well knowing that he was not her lawful husband, said Miller gained and secured her love, affection, and confidence, and by indulging in meretricious representations beguiled her into the belief that he was her lawful husband, and that he was well qualified to manage and care for her properties and invest her funds, and thereby induced her to place into his hands for said purposes sums of money aggregating in excess of \$200,000; that as a part of his design he represented that he was about to purchase the real property described in the complaint and present it to her as a home for both; that said Mary Moore expressed a desire to participate in said purchase and to pay one-half the purchase price of said home, and, while he pretended to protest against her paying any part of said purchase price, with seeming reluctance and unwillingness he finally yielded to her desire in the matter and consented that she pay one-half of said purchase price; believing that he intended to and would pay the remaining one-half of

said purchase price, Mary Moore consented to and agreed with respondent, Dr. Miller, that the deed, which is dated November 10, 1915, and recorded May 11, 1916, should be taken in the names of both as joint tenants with the right of survivorship; that said respondent did not pay the said one-half or any part of said purchase price; but without her knowledge or consent he paid the whole of said purchase price out of the separate moneys and property of said Mary Moore.

The certificate of marriage attesting the solemnization of the marriage of said Jared H. Miller and Mary Moore on October 13, 1915, as authorized by the marriage license theretofore issued, is pleaded at large. A number of sections of the statutes of the state of Tennessee bearing upon the question of the legality of the decrees of divorce granted by the Tennessee courts to respondent from Edith Chesley Miller and Irene Ayers Miller, respectively, and affecting his right to remarry thereafter, are incorporated in the complaint and answer, some of which will hereafter be considered.

The answer makes full and complete denials of each and every allegation of the complaint from which any adverse inference or conclusion may be drawn as to the legality of the divorce decree granted to respondent by the Tennessee court in the case of Jared H. Miller v. Edith Chesley Miller, and of all other allegations that tend to impair the validity of the marriages of Jared H. Miller and Mary Moore. The proceedings instituted in the superior court of the county of Alameda, whereby Irene Ayers Miller was granted a decree of divorce from respondent, are admitted to be true. Respondent alleges that he domiciled in the state of Tennessee on June 5, 1909, with the intention of making and did make said state his place of legal residence, and resided therein until about November 21, 1914. The history of the two marriages entered into by respondent and Mary Moore in Tennessee and the third at Fresno, Cal., is recited, and in this connection it is alleged that, relying upon the legality of said marriage ceremonies, respondent and said Mary Moore Miller lived together as husband and wife, beginning with the celebration of the first marriage, to wit, November 20, 1914, to the time of her death. The answer specifically denies that said Mary Moore was not informed as to respondent's matrimonial status as affected by the several divorce proceedings mentioned in the complaint, and alleges in this connection that she was absolutely informed as to each and every marriage and divorce proceeding mentioned in the complaint, and that she knew and was as fully advised as to the legal effect thereof as was the respondent. He denies that he reported falsely on his wealth or his earning capacity, and alleges that he

stated to Mary Moore all the facts concerning his financial standing; denies that he was insolvent or was not possessed of any real or personal property prior to and at the times said marriage ceremonies were performed with said Mary Moore; admits that respondent secured, obtained, and had the love, affection, and confidence of said Mary Moore during the entire period of their relationship, but denies that it was obtained by the practice of deception or artifice; admits that from time to time during the continuance of their marital relations Mary Moore Miller gave to him either as a gift outright or made him a joint tenant with herself in various property and sums of money; denies that at the time the real property in suit was purchased he agreed or promised to pay or was expected to pay one-half or any part of the purchase price thereof; alleges that Mary Moore Miller well knew that respondent was at said times without means to purchase said property, and pursuant to her desire and wish she paid the whole of said purchase price from her separate estate, except the sum of \$500, which sum was paid by respondent from his separate estate; that said real property was purchased either with the separate funds of Mary Moore Miller given by her to respondent for that purpose or with funds held in joint tenancy by said Mary Moore Miller and respondent, except said sum of \$500 furnished by respondent, that said Mary Moore Miller was in possession of all the facts relating to the purchase of said real property, and that the terms of said deed contain the free and voluntary act, wish and desire of said Mary Moore Miller that he and she should hold and enjoy said real property as joint tenants with right of survivorship, the title to which became vested in him upon the death of said Mary Moore Miller.

The court found that the estate of Mary Moore Miller was not at any time the owner or entitled to the possession of said real property described in said deed; that said claims asserted by said estate as to ownership and right of possession were unsupported by the evidence; that upon the death of Mary Moore Miller said Jared H. Miller became and has since continued to be the owner of said property in fee simple absolute and entitled to the possession thereof. It further found that prior to September 4, 1909, Jared H. Miller and Edith Chesley Miller were husband and wife, and that the decree of divorce granted September 15, 1909, to said Jared H. Miller by the circuit court of Tennessee in the action brought by him against said Edith Chesley Miller, was valid and dissolved the marriage tie theretofore existing between said Jared H. Miller and Edith Chesley Miller. The subsequent marriage of respondent with Irene Ayers, solemnized in the city of Berkeley, Alameda

county, on March 29, 1911, was found to be legal and the decree of divorce obtained against her by respondent in the chancery court of Tennessee on November 17, 1914, was found to be void and of no effect upon the sole ground that said respondent was not at the time of the commencement of the action or at the time of the rendition of the said decree a bona fide resident of or legally domiciled in the state of Tennessee. The court also found that at the time of each of the marriages attempted to be solemnized pursuant to marriage licenses issued by legally constituted authority to said Jared H. Miller and Mary E. Moore, to wit, November 20, 1914, and October 13, 1915, respectively, there was a valid, subsisting marriage existing between respondent and Irene Ayers Miller, which continued in force and effect until October 5, 1916, on which day a final decree of divorce was duly filed and entered in the superior court of the county of Alameda, fully and finally divorcing said respondent and Irene Ayers Miller; that the marriage ceremony solemnized at the city of Fresno, state of California, May 11, 1918, was in all respects valid and without legal objection, and from that day hence Dr. Jared H. Miller and Mary Moore became and remained husband and wife; further, that Mary Moore was not at the date of the Memphis marriage, October 13, 1915, ignorant of the fact that said Jared H. Miller was a married man, nor did he falsely or fraudulently represent to her with intent to deceive her that he was legally capable of entering into marriage with her, nor did he report to her falsely or represent to her that he was a man of substantial means or possessed of large properties in the state of California or elsewhere; that prior to said marriage of November 20, 1914, said Jared H. Miller stated to Mary Moore all the facts concerning his money, property, practice, and current income, and thereafter said Mary Moore knew the respondent's financial condition and that he had no substantial means, money or property; that immediately after the marriage ceremony performed at Memphis, October 13, 1915, to the time of the death of Mary Moore Miller she and respondent lived continuously together as husband and wife, and during said time Mary Moore Miller believed she was respondent's lawful wife and that such belief was not the result of any fraud practiced on the part of respondent, and that no fraud or false representations were as a matter of fact practiced by said respondent as a means of exerting undue influence over her, but that each enjoyed the love, affection, and confidence of the other. The alleged false representations that respondent promised to pay one-half the purchase price of the real estate involved in this action is found to be untrue. It is further found that the full price of said real estate was paid by Mary Moore

Miller with full knowledge that respondent was without funds, and that the title was to be taken in their names as joint tenants with right of survivorship.

The statutes of Tennessee defining the various causes that shall constitute grounds of divorce, among other things, provide:

"Wilful or malicious desertion or absence of either party without a reasonable cause for two whole years." Shannon's Code, § 4201, subd. 4.

"Refusal, on part of a wife, to remove with her husband to this state, without a reasonable cause, and wilfully absenting herself from him for two years." Section 4201, subd. 8.

"A divorce may be granted for any of the aforesaid causes, though acts complained of were committed out of the state, or the petitioner resided out of the state at the time, no matter where the other party resides, if the petitioner has resided in this state two years next preceding the filing of the petition." Section 4203.

The statutes contain a provision that when a marriage is absolutely annulled the parties shall severally be at liberty to marry again, except for existing causes not present in the instant case.

The court impliedly found, and upon the record it is inconceivable how it could have otherwise found, that Mary Moore Miller was at all times in full possession of all the facts and circumstances affecting the marital status of Jared H. Miller, and that she was an active, willing, and persistent ally, at all times co-operating with him, and that she largely directed the execution of devious plans whereby said Irene Ayers Miller was to be put aside by him in order to make room for herself in the marital life and affections of respondent. By no means was she mere clay in the potter's hands, but it incontrovertibly appears that she was aggressively active in her determination to make Jared H. Miller her husband, and displayed no small degree of initiative talent in the furtherance of her purpose, and moved toward her designs with fixed determination. Her many letters and unbroken course of conduct, beginning shortly after she first met the respondent at the city of Los Angeles as his patient and continuing through the period of the pending divorce proceedings which ended with the entry of the final decree of divorce obtained by Irene Ayers Miller in the California court, furnish conclusive proof of her willing and active participation in very much that is chargeable to the respondent in the matter of the dissolution of the Irene Ayers Miller marriage. Mary Moore Miller was not an ordinary person. She was an unmarried woman 62 or 63 years of age at the time she met Dr. Miller in the spring of 1914 at his office at Los Angeles. Dr. Miller was then aged 43 years. Mary Moore Miller was then a woman reasonably well preserved, possessing good features, well-mannered, and

retaining a lively interest in current matters. Her home was at Marquette, Mich., and it had been her habit to spend the winters at Los Angeles with companions whom she frequently brought with her from her Michigan home. She was mentally alert, cultured, and well informed as to public men and measures. Her young maidenhood and middle life were spent in close association with an unmarried brother, Frank Moore, who was a man of wide business and financial affairs and a successful speculator. They made their home together for some 35 years, and when he deceased she became his sole heir. He left a large and valuable estate. There were other living brothers and sisters and children of deceased brothers and sisters, most of whom are interested in the three actions herein, which have for their object the acquisition of the estate of Mary Moore Miller.

George William Moore, a lawyer of considerable repute, who practiced his profession at Detroit, while not a nominal contestant, is, nevertheless, interested in this litigation and is supporting the cause of the collateral kindred. For many years after the death of her brother Frank, who devised his entire estate to decedent to the exclusion of Attorney George William Moore and the other brothers and sisters, George William was the adviser of his sister in many of her large business transactions; but it is very clear from the evidence and the numerous letters written by the decedent to George William that she had very positive notions of her own on matters of business and finance, and unless a suggestion made by another met with her wishes or judgment she did not hesitate to reject the same. No doubt she had advised with her deceased brother, whose fortune consisted largely in his investments in iron stocks, and by long and close contact with him had obtained an intimate knowledge of his business affairs. Following the death of her brother Frank, decedent lost much of her interest in the home at Marquette and planned and took many trips by train and automobile to such places as she felt would afford her comfort and pleasure. In January, 1914, she met Dr. Miller at his office in Los Angeles and became his patient in what is known as plastic surgery. His wife, Irene Ayers Miller, was his office assistant. Miss Mary Moore had brought with her two lady companions from Michigan and also her automobile and chauffeur.

It was during the period of treatment above referred to that Dr. Miller and Mary Moore began their intrigue which ultimately resulted in the divorcement of Dr. Miller and Irene Ayers Miller. It was agreed that inasmuch as Mary Moore had planned to take her companions with her on a trip to Yellowstone Park during the summer, Dr.

Miller should meet her at the station where tourists change from the main line to the branch line leading into Yellowstone Park. In order to disarm her companions it was planned that the meeting should appear to be wholly accidental. During their short stay at the park Dr. Miller and Mary Moore met and made plans to dissolve the marriage contract that stood in the way of their intermarriage. Their stay at the park being concluded, she returned to Marquette, Mich., and he returned to Los Angeles. Immediately thereafter a correspondence was established. The letters written by Mary Moore to Dr. Miller before the Irene Miller separation are such effective and complete refutations of appellant's claim that Mary Moore was cajoled unwittingly into her several marriages with Dr. Miller, and that she would not have joined in any of the attempted marriages with him had she entertained a suspicion that he was not eligible to contract marriage, that it will be necessary to quote from but a few of the many that might be collated from her very full correspondence. Immediately upon reaching her Marquette home from the Park she wrote to him as follows:

"Indeed we will consult about *everything* and I feel that we shall be very happy. If we can keep it from everybody knowing that you were not free when I saw you at the park we will do so. Dr., we are not children and if there was a sad mistake in your life there is no harm for us to confide in each other even before you are free—we are doing nothing wrong, but it is just as well to keep it from the outside world if we can. I don't know how long a time it takes to get your freedom. If it can be arranged out of the state it will be better. I believe the Lord is on our side for he never intended that home should be any other than a place ruled by *perfect love and confidence*. * * * I wonder if the lady in San Francisco [reference is to Irene Ayers Miller] will object to a separation? One does not know how she will feel. We will both be so relieved and happy when there is no obstacle in the way. * * * Have burned your others [letters]. Hated to do so but knew it was safer to do so, will burn this one. * * *

The following portions of two letters written by her on August 23, 1914, and November 3, 1914, express her interest in Dr. Miller's children:

"I just know I will enjoy Lillian—and I hope the children will call me mother—do not expect them to at once but hope they will learn to love me and call me by that dear name sometime. * * * When I went to the cemetery I felt that Frank would be pleased to know I had you to love and care for me—Surely sometime we will come here and see how things are—I only hope and pray we may live to prove our happiness. I know I shall feel so safe with you—I have no misgivings." "Yes my dear you may depend on me to help you about the children and their future. Am so glad you have them and they will soon be *mine* as well as *yours*."

On September 23, 1914, she wrote to Dr. Miller as follows:

"I do hope it [plan to intermarry] will work out all right for we do not want to live apart any longer than we have to."

On October 14, 1914, she wrote as follows:

"I have done enough for the whole family [her collateral kindred] to have my way about this matter. The point is this, we *want each other* and that is all there is to it. * * * Now, my dear, we shall go ahead and do as we please—now we are going ahead regardless for I am under obligation to *no one* and there are many under obligations to me."

If Dr. Miller succeeded in getting his first Tennessee divorce decree from Irene she suggested to him that he telegraph her at once, "Patent granted." Her purpose to possess Dr. Miller as her husband is further disclosed by the following lines taken from a letter written by her to him November 7, 1914:

"My taste does not run to society—steam yachts—private cars and palaces—but a cozy home ruled by perfect love and confidence and peace is what I want and that is your idea of happiness we will have it some day."

She expressed considerable anxiety as to the finality of the divorce proceeding that would separate the doctor and Irene. She wrote:

"Have everything exactly right, never mind the cost, the correct result is what we want."

In a letter of September 1, 1914, prior to the commencement of any divorce proceeding and well knowing that Dr. Miller was living with Irene Ayers Miller as her husband, she wrote Dr. Miller instructions as to the kind and size of a wedding ring he was to purchase for her. The details of their mutual plans, studied and cunningly devised, by which Dr. Miller, who was known to Mary Moore to be a resident of California, was to apply for a divorce in Madison county, Tenn., are elaborately set out in her letters. This divorce, which was held by the trial court to be invalid for want of bona fide residence in Tennessee, was entered on November 17, 1914, and she and Dr. Miller went through the form of marriage three days thereafter in the state of Tennessee. Their correspondence prior thereto had been conducted clandestinely and their identity as married persons was adroitly concealed until the second marriage. After their first marriage, which was not announced, they journeyed to Boston and thence to Cuba and finally homeward by way of New Orleans, where they separated, leaving upon different trains for Los Angeles. On their matrimonial trip all persons who might chance to know the two or either were avoided. They continued to keep their purported marital relations a profound secret until October 13, 1915, a few days after the entry of the interlocutory decree obtained by Irene Ayers Miller in the divorce action she had brought against Dr.

Miller, when they again indulged in another marriage ceremony in Shelby county, Tennessee.

On their first matrimonial venture, and even before the ceremony was performed, Mary Moore Miller supplied Dr. Miller with expense money, and liberally gave him other sums of considerable importance to be used for his needs. Both entertained doubt as to the legality of their first marriage. Lawyers, so the testimony goes, were divided on the question. In due course of time Mary Moore Miller returned to her Marquette home, and from there she continued to write Dr. Miller scores of letters, in which she discussed a variety of subjects, but each letter abounded in expressions of ardent affection for him, and she repeatedly manifested impatience at the circumstances which kept them apart. Being in an uncertain state of mind as to the validity of the Tennessee decree purporting to divorce Dr. Miller and his wife Irene, both parties set about to promote the divorce of Dr. Miller and Irene. It appears that their matrimonial relations had not been altogether harmonious under normal conditions, and they became more disturbed after Mary Moore became the doctor's patient. At any rate, Irene returned to her Berkeley home, and in due time brought a divorce action in the superior court of the county of Alameda, which resulted in the entry of an interlocutory decree in her favor on September 28, 1915. The final decree was entered October 5, 1916. Mary Moore largely financed Dr. Miller in his property settlement with Irene. To remove the doubt which they entertained as to the validity of the first decree obtained from Irene in the Tennessee court they proceeded immediately to that state upon the entry of the interlocutory decree granted to Irene by the superior court of the county of Alameda, Cal., where the second marriage ceremony was performed. En route from her Marquette home she broke the news of her intentions to her brother, Attorney George William Moore, in a letter dated October 12, 1915, in which, among other things, she said:

"As I am stopping over in Chicago a few hours want to write you a few lines about a very important matter. Now don't faint away when I say that I am on my way to be married tomorrow. You remember I showed you *two* photos when you were in Marquette the last time—they are both the man, different positions. I expected you would be up before I left, then would have told you what I am writing now. Our plans worked out a little different from what I expected which accounts for this haste. Have had the matter in mind for some time but have not discussed it with the family or any friends for several reasons. In the first place, I dislike talk and publicity as you know, and did not want it known, nor would I be married in Marquette or Detroit and as this is my first marriage and at my age felt more disinclined than ever to be discussed. Then

the question of my means made me feel the same way. When Frank died I heard some complaint, things that some of the youngsters said, for instance, that if he had not left a will they would have had some of the money. So all in all I decided it was nobody's business but my own. I have known the Dr. and his people for nearly two years, in fact he has treated my throat for two winters. * * * Am marrying him because I love him and want him. In fact, we want each other. As you said once when I told you 'I wanted to'—was the best reason in the world. Ever since Frank died have felt without a real home—As I do not care to live with any of my relatives, but am sure I shall have some one to share a happy home with me, for that is what we both like is our home. And I know I am fortunate in my choice, for he brings to us a thoroughly trained mind, not only in his profession but in business as well, and should anything happen to you I would have some one who is capable of looking after my interests carefully and faithfully. Of course I want everything to go on just the same as it is fixed now."

Immediately following the marriage of 1915, they resumed matrimonial relations and proceeded from the altar directly to Marquette and Detroit, where they met the relatives and friends of Mary Moore Miller. She exhibited a sense of pride in the attainments of her husband, and represented to her relatives that he was a man of affairs and possessed good professional and business ability. She knew, however, that he was a man without means, as she had all the time voluntarily financed him. In order to give him the appearance of a man of affluence she placed sums of money to his credit. Appellant has argued through hundreds of pages of briefs that her exhibition of marital pride in speaking well of her husband and representing him as a man of means to her relatives is proof positive that she was wickedly deceived by him into such belief, and had she not been thus deceived she would not have consented to a marriage with him. Such a contention is completely and effectively answered by her correspondence with Dr. Miller. In order that he might not hesitate to make known his needs to her she assured him that she had more money than she ought to spend—more than she knew what to do with. Again she wrote:

"All the afternoon was busy writing checks—the end of the month—you know that will soon be your job."

The evidence overwhelmingly defeats appellant's contention. The evidence is also conclusive to the point that it was the agreement and understanding that Dr. Miller was to retire from the practice of medicine and devote himself to the care and management of Mrs. Miller's large interests, and engage in such business affairs as might be agreeable to both. She transferred her bank accounts from Michigan to Los Angeles as expeditiously as her judgment dictated. She had much

correspondence with her lawyer brother, who visited her for several weeks at her Los Angeles home in 1919, concerning her business projects, and was fully aware of his views with reference to her business concerns. She did not take him into her full confidence as to what money or property she intended to make Dr. Miller a joint sharer with herself, but she did tell him that at least one-half of the purchase price of the property in suit was paid with her funds. This property, which did not exceed \$16,500 in value, was incumbered with a mortgage for almost one-half of its value, and said incumbrance was never discharged. The deed to said property stood of record in the joint names of Dr. Miller and his wife from the day it was recorded in 1916 to her death in 1921. Decedent formulated a number of plans which had to do with herself and Dr. Miller as husband and wife, which she afterwards executed without disclosing her purposes to her brother. These matters, personal to herself, were revealed to Dr. Miller and, except in a few instances, were concealed from others. In presenting the three cases before us appellant vehemently persists in the view that Mary Moore Miller was brought under the complete control of Dr. Miller by the exercise of some magic power which he likens to hypnotism. It is absolutely incredible that for a period of seven years the exercise of subtle or unnatural influence could have dominated the mind of a person who possessed the personality, intelligence and business experience which the record shows Mary Moore Miller to have possessed. Her independent acts of charity and the exercise of the faculty of volition refute the claim that she was lacking in will power and was easily influenced to do the things she did not choose to do. The evidence is all against such a theory. She was charitable in a sensible way, and she was responsive to certain moral obligations which she felt came to her with her wealth. The benevolences which her brother Frank had initiated were adopted by her, and she contributed annually thousands of dollars to brothers, sisters, near relatives, and family acquaintances who found themselves reduced to necessitous circumstances. Her confidence in and admiration for Dr. Miller did not once falter. And strange as it may seem, a matrimonial alliance which had its inception in intrigue and sin united a twain that lived together in a state of harmony and happiness to the end. Her written words recorded in scores of letters to Dr. Miller and to her brother, George William Moore, her legal adviser in many transactions, stand as unshaken testimonials to her devotion. There is in the record the testimony of two or three witnesses, either relatives or friends of the parties contesting the right of decedent to make disposition of her estate, who gave testimony tending to show

that decedent was unhappy and had lost confidence in Dr. Miller, but this testimony, aside from bearing the earmarks of improbability, is overwhelmed by the written words of the deceased, and is also rebutted by her action and conduct during the entire period of their relationship.

In 1919 she took up with her brother the subject of making her will, and wrote several letters telling him just how she wished him to draw the will. No unprejudiced mind can read those letters without becoming convinced that decedent in her instructions was acting freely, voluntarily, and intelligently. The following is but a sample of the many expressions which are to be found in her letters. It deals directly with testamentary intention:

"Los Angeles, April 7, 1919.

"Dear George: The revised copy of the will received and is exactly what I want and fully carries out my wishes. I see no reason why I should ever change it as it seems to me to be as just as possible all around. The way it was before it would have cut the Dr. off with \$2,400.00 a year, which I would not want. He is the one who is spending his life with me, has for several years and expect will for many more. Helps me in all the details of life, assists me in many ways. Should anything befall you I would have to depend on him much more. Companionship and service of this sort cannot be measured in money, but my first wish and care is for him naturally and I want him fully provided for while he lives."

[1] The will as finally executed carries on after her death many of the benevolences which she practiced in life, and some of those now opposing the probate of her will are named as beneficiaries therein so long as they shall live. We have no disposition to mitigate the wrong she wrought by counseling, aiding, assisting, and abetting the divorcement of Dr. Miller and his wife, Irene. That, however, is the only shadow that darkens a life that abounded in benevolent and gracious offices. But her transgression, however grievous, did not, per se, work a forfeiture of her right to dispose of her property on the same terms that are guaranteed to those who have not so transgressed.

[2] Appellant seeks to bring to his support sections 158 and 2235, Civil Code, which provide that transactions between husband and wife during the existence of the marital state by which one of the spouses obtains any advantage from the other are presumed to be entered into without consideration and under undue influence. That Mary Moore Miller had the opportunity of independent advice in all of her transactions with Dr. Miller is not a debatable question. From the first marriage ceremony to the second a period of one year elapsed, during which time she resided in the state of Michigan and Dr. Miller resided at the city of Los Angeles. All of this time she was in constant communication with

her lawyer brother, personally advising with him on any matter she chose to submit to his judgment. She was given to travel and visited a number of the prosperous cities of the middle west during this period of separation. It also appears that she actually came into personal contact with lawyers. In fact, she paid the fees of one, if not both, in the Irene Ayers Miller divorce action. With her experience in business matters generally is it not at least likely that having employed lawyers for another she was well advised of her right to employ one for herself? The court found, and the evidence abundantly supports the finding, that Mary Moore Miller was at all times fully advised as to Dr. Miller's matrimonial status, and prior to the time of the purchase of the real property involved in this proceeding she knew that Dr. Miller was without means to purchase said property, and she at all times fully intended that the whole purchase price should be paid from funds to be supplied by her to him. That she would have procured the deed to be made as it appears of record, even though she doubted the consummation of a technical legal marriage, there can scarcely exist a doubt in the light of her attitude to Dr. Miller.

[3] In the three cases before us the Tennessee decree of 1909, purporting to divorce Dr. Miller and Edith Chesley Miller, is vigorously attacked by the representative of the collateral heirs on the theory that if that decree is adjudged to be invalid for want of jurisdiction of the court to render it, then it must follow that Dr. Miller and Edith Chesley Miller, who has since remarried, are still husband and wife, and, further, that that status had a nullifying effect on his subsequent marriage to Irene Ayers and his three later marriages with Mary Moore, and that in consequence thereof all property rights that were acquired by Dr. Miller are tainted with the fraud resorted to in obtaining said decree, and all of said transactions must, as well as the will executed in 1920, fall together. Conceding the decree to be void, this would not inevitably follow. But inasmuch as it has been regarded by the collateral heirs as the keystone of all the cases, especially the will contest, we will not deny it consideration.

[4] The petition filed by J. H. Miller against Edith Chesley Miller in the Shelby county circuit court on September 4, 1909, alleged the marriage and the birth of a son, who was in legal custody of plaintiff, Dr. J. H. Miller. Petitioner alleged that he was a resident of Tennessee and that defendant was a nonresident of that state. He alleged as grounds of divorce that his wife had willfully and maliciously deserted him and declared that owing to incompatibility of temperament they could not live together. He next alleged that his wife would not remove

into the state of Tennessee with him, and that he held "a letter showing notwithstanding his consideration and efforts she adheres to her position and declares a separation is the proper course." The following waiver of process, which was mailed to the clerk of the court by his wife, was in the handwriting of Dr. Miller and was executed by her in Massachusetts and was filed as a record in the case:

"I, E. C. Miller, hereby waive notice, copy, pleading, term and agree that the application of J. H. Miller for divorce from me shall be set and tried instantler.

"Witness my hand the 10th day of September, 1909.
E. C. Miller."

The pro confesso which Edith Chesley Miller executed and caused to be filed as a record in the case constituted an appearance on her part, and she has never since questioned its true intent or binding effect. The cause regularly came before the circuit court of Shelby county, state of Tennessee, for hearing, and that court made and entered its decree on September 15, 1909, as follows:

"This cause came on this day to be heard on the bill of complaint for divorce, the pro confesso here and now taken and entered against the defendant, and the oral testimony of witnesses examined in open court, from all of which it satisfactorily appeared to the court that complainant is entitled to the relief sought on the ground of desertion without provocation on the part of the complainant, and her refusal to move into this state with him all resulting from incompatibility of temperament;

"It is therefore ordered, adjudged and decreed by the court that the bonds of matrimony heretofore subsisting between the complainant, J. H. Miller, and the defendant, E. C. Miller, be and the same are hereby absolutely dissolved and forever held for naught.

"It is further ordered that the defendant pay the costs herein accrued, for which execution may issue."

[5] Surely no fraud was committed against Edith Chesley Miller on any of the grounds which constitute the basis of the cases cited by appellant, nor was the service substituted, and she makes no claim that there was fraud or insufficient service. Her ultimate object in filing her bill of divorce against Dr. Miller in Massachusetts upon the eve of his departure for Tennessee was made more certain of attainment by the divorce action taken by Dr. Miller several months thereafter. Neither do the facts altogether harmonize with the theory of collusion, as there would have been no occasion for a duplication of divorce proceedings if there had been a collusive agreement between the parties.

[6] In considering what effect should be given to the foregoing decree in the light of the full faith and credit clause of the Constitution of the United States, it may be proper at this time to observe that neither one of the parties to the 1909 divorce proceeding,

nor the issue of the marriage sought to be dissolved, a son, are attacking said decree, but the attack is made by the collateral kindred of the wife of the last marriage, who, according to the finding of the trial court, was fully informed as to the 1909 decree. Edith Chesley Miller and Dr. Miller, each having remarried another person, respectively, are estopped from denying the validity of said decree. Even if the Tennessee decree showed upon its face want of jurisdiction of the court to make said decree and was consequently void on a collateral attack, each of the spouses having thereafter remarried another person, they are held by all the authorities to be estopped from questioning the former void decree. *Bruguiere v. Bruguiere*, 172 Cal. 199, 155 P. 988, Ann. Cas. 1917E, 122.

[7-11] There is no ground upon which the claim may be predicated that Dr. Miller did not intend to become a bona fide resident of the state of Tennessee when he departed for that state, nor that he did not in fact become a bona fide resident. His preparation to depart from Boston and the request he made in good faith of his wife to accompany him, qualifying himself to practice his profession upon arriving there, and remaining in the state several months after the sanitarium of which he was medical director had closed, and not returning to Massachusetts, but finally coming to California to visit his sick daughter, who was residing at his father's home at Lankershim, and remaining in California, are circumstances which strongly corroborate his testimony to the effect that when he left Massachusetts he did so with the intention of making Tennessee his legal domicile. The fact that he left Massachusetts after his wife had commenced a divorce action against him in that state tends to rebut the claim that he left Massachusetts with the fraudulent intent of establishing a domicile for the purpose of divorcing her. It is upon this theory that the decree is attacked. The trial court found against appellant on that issue, as well as upon the issue that the Tennessee court lacked jurisdiction of the subject-matter, and against the further claim that the judgment was void upon its face upon the grounds that the statutory requirements of two years' residence by the plaintiff in Tennessee and the desertion or absence on the part of the offending party for a period of "two years" were neither alleged in the complaint nor incorporated in the judgment. A judgment upon a collateral attack will not be held invalid on account of the omissions last above pointed out. The Tennessee court had jurisdiction of the person by reason of her appearance, and it had general jurisdiction of divorce causes. The trial court found that Dr. Miller was a bona fide resident of the state of Tennessee at the time the action was commenced and at the time the decree of di-

vorce was entered. We must presume, in the absence of a contrary showing, that the laws of Tennessee are the same as ours affecting similar subjects. It is the law of this state that the judgment of a court having general jurisdiction of the subject-matter involved in the judgment cannot be successfully attacked in a collateral proceeding because of an imperfect or defective complaint in the action in which it was rendered. If the facts stated in the complaint are not sufficient to entitle the plaintiff to the relief demanded therein and awarded by the judgment, the action of the court in decreeing otherwise and rendering its judgment in accord with the prayer of the complaint can be nothing more than error. A failure to allege that the plaintiff resided in the state and county in which the action is brought for the period of time prescribed by section 128, Civil Code, does not affect the jurisdiction of the court to hear and determine the action provided the court obtained jurisdiction of the defendant. *Estate of McNeil*, 155 Cal. 333, 100 P. 1086, citing other cases. The court in the instant case obtained jurisdiction of the defendant. Any fraud committed as to the issue of residence was intrinsic and not extrinsic, and the person injured thereby was Edith Chesley Miller, who filed her appearance.

In *Hamblin v. Superior Court*, 195 Cal. 364, 233 P. 337, 43 A. L. R. 1509, this court further said:

"The provision of section 128 of the Civil Code, forbidding the granting of a divorce unless the plaintiff has been a resident of the state and of the county for the time specified, is of a similar character. This requirement has sometimes been spoken of as 'jurisdictional.' *Flynn v. Flynn*, 171 Cal. 746, 154 P. 837; *Gould v. Gould*, 188 Cal. 505, 205 P. 1072. But it has never been so decided, so far as we are advised, in any case wherein that question was actually involved. In the cases in which this question has been actually involved and decided it has been held that this requirement is not jurisdictional, and that the failure to comply with it is nothing more than error in the exercise of jurisdiction. *Estate of McNeil*, 155 Cal. 333, 339, 100 P. 1086; *Dahne v. Superior Court*, 31 Cal. App. 664, 161 P. 280; *Bullard v. Bullard*, 189 Cal. 502, 506, 209 P. 361. The same reasoning applies with equal force to the provisions of section 130 of the Civil Code, and it follows by parity of reasoning that these requirements are not jurisdictional and that a failure to comply with them results in mere error, correctible only by means of a direct attack by appeal or motion in the same case."

[12] Counsel has cited a long list of cases, of which *Andrews v. Andrews*, 188 U. S. 14, 23 S. Ct. 237, 47 L. Ed. 366, *Bell v. Bell*, 181 U. S. 175, 21 S. Ct. 551, 45 L. Ed. 804, *Streitwolf v. Streitwolf*, 181 U. S. 179, 21 S. Ct. 553, 45 L. Ed. 807, and *Haddock v. Haddock*, 201 U. S. 562, 26 S. Ct. 525, 50 L. Ed. 867,

5 Ann. Cas. 1, are typical, which are declaratory of the rule announced in many state courts. It is well expressed by former Chief Justice Shaw in *Bruguere v. Bruguere*, supra, as follows:

"It is a well-established proposition that where one spouse goes to a state other than that of the matrimonial domicile and there obtains a divorce under a residence simulated for that purpose and not in good faith, the judgment is not binding upon the courts of other states of the Union, and upon proof of the fraudulent residence and of the fact that the divorce is obtained by substituted service only, it may be held void in any other state than that in which it was rendered. *Estate of James*, 99 Cal. 374, 377, 33 P. 1122 [37 Am. St. Rep. 601]. Whether it would be held valid in the state in which it was rendered is a question depending upon the policy and law of that state."

The rule, of course, rests upon considerations of public policy, and was adopted by courts in order to preserve the rights of wives and the issue of marriages against faithless husbands who deserted them without cause and fled to other states and gained a residence for the purpose of obtaining a divorce from the abandoned wife. There is not one of the controlling facts upon which the decisions in the cited cases are placed that is to be found in the instant case. In each of said cases the removal of the husband from the matrimonial domicile was found to be with the intent of simulating a residence for the purpose of obtaining a divorce from the wife and the service of process was constructive. The actions to annul the decrees in those cases were brought by the injured spouse. The fraudulent purpose that moved the husband to leave the matrimonial domicile and gain a residence in another state unquestionably forms the basis of all of those cases. The trial court found against the existence of all of the facts that constitute the real grounds of those cases.

[13-15] But if it be conceded that the 1909 decree is assailable by appellant and is void for the reasons urged against it, this circumstance would not establish the nonmarriage status of Dr. Miller and Mary Moore Miller, which it is incumbent upon appellant to do in order to avail himself of the force of the argument that Mary Moore Miller was deceived and misled by Dr. Miller's machinations into the belief that she was his legal wife. The last marriage ceremonial to which Dr. Miller and Mary Moore Miller were parties, performed at Fresno, Cal., May 11, 1918, estops appellant from questioning the matrimonial status of the parties to said marriage. The mere proof of a prior marriage and the continued life of both spouses is not sufficient to make a case against a *second ceremonial marriage*. There must be a further showing that the first marriage had not been set aside by judicial decree. There is a very strong presumption in favor

of the legality of a marriage regularly solemnized. The marriage ceremony of May 11, 1918, was solemnized under all the forms of law after the entry by Irene Ayers Miller of the final decree divorcing her from Dr. Miller. The deposition of Edith Chesley Beriman (formerly Miller) was taken, and not one word of testimony was given by her as to whether she had obtained a decree of divorce from Dr. Miller. Neither was it made to affirmatively appear that he had not obtained a valid decree against her. This being so, Dr. Miller and Mary Moore Miller were husband and wife under the laws of this state before the will was executed and continued to be such until her death, whatever may have been their marriage status prior thereto. *Estate of Hughson*, 173 Cal. 448, 160 P. 548; *Marsh v. Marsh* (Cal. App.) 250 P. 411.

[16] Aside from this, the California decree of divorce in which Irene was plaintiff and Dr. Miller was defendant became final October 5, 1916. It has not been attacked in any direct proceeding and only collaterally, if at all, in this proceeding. In the matter of the *Estate of Lee*, 253 P. 145, this court said:

"A divorce proceeding in so far as it relates to the marriage relation of the parties to the action and the termination of the marriage status, is a proceeding in rem. In *re Newman*, 75 Cal. 213, 16 P. 887, 7 Am. St. Rep. 146. Such an action is brought for the purpose of establishing judicially the matrimonial status of the parties, and, if it be found that a matrimonial relation exists, then for the purpose of a dissolution of that relation. *Gridley v. Boggs*, 62 Cal. 190, 202; *De la Montanya v. De la Montanya*, 112 Cal. 101, 44 P. 345, 32 L. R. A. 82, 53 Am. St. Rep. 165. As a judgment in rem it is binding upon all the world as to the determination of the marital status of the parties and is immune from collateral attack (*People v. Perris Irrigation District*, 132 Cal. 289, 64 P. 399, 773; 15 Cal. Jur. 239), except on grounds specified by the Code (section 1916, Code Civ. Proc.), none of which is urged here.

* * *

[17, 18] The policy of this state on this subject is made clear by the foregoing pronouncement. The question of marriage and divorce is one of public policy committed largely to the sound discretion of the several states, as is well demonstrated by the divergent views of the several courts of the Union in dealing with the subject. The decisions are not uniform, but all extend the judicial arm to protect the matrimonial status from the fraudulent designs of either of the spouses. From a consideration of the marriage status of the persons that may be seriously affected by this proceeding, the policy of the law would require the sustaining of the judgment of the trial court if it can reasonably be done. It is not necessary for us to rely upon such an exigency in this case, as the evidence and the law unquestionably impels an affirmance of the judgment.

[19] Appellant assigns as error the refusal of the court to receive in evidence a letter written by Dr. Miller to his attorney, dated October 19, 1915, which purports to have been written with his wife's consent and in substance was a request made to his attorney to draw up a document predetermining which one of the two died first in the event that both were killed in an accident. The letter was written in anticipation of an automobile trip from Marquette to Washington, D. C., New Orleans, and thence to Los Angeles. In the letter he said: "Should anything unforeseen happen to us, both want you to understand and get my share for my kiddies, for whom I am doing many of these things." He spoke of the Marquette property being very valuable and of the legal effect of the Irene Ayers divorce of 1914 and other matters personal to himself. He admonished his attorney to file carefully away from the office force certain papers and to burn his letter. The latter request was not observed. One of the attorneys for appellant gained permission of Dr. Miller's attorney to examine his letter files containing Dr. Miller's correspondence, and while so doing, and without permission, took from the files the letter in question. The offer to introduce in evidence said letter was objected to as being a privileged communication between client and attorney. The admission of the letter was not pressed, and it was not received in evidence. The court would have been justified in rejecting it for a number of reasons. It was clearly privileged, and its contents had little, if any, relevancy to the issue.

An examination of an excessively large and overfull record convinces us that the judgment of the trial court must be sustained.

The judgment appealed from is therefore affirmed.

We concur: WASTE, C. J.; RICHARDS, J.; SHENK, J.; CURTIS, J.; PRESTON, J.; LANGDON, J.

203 Cal. 96

KELSEY v. MILLER et al. (L. A. 8894.)

Supreme Court of California. Jan. 5, 1928.

Husband and wife  273(12)—Evidence in action for accounting held to support conclusion that defendant's wife agreed that he should control her separate estate.

In administrator's action against decedent's husband for accounting, evidence held to support conclusion that decedent and defendant agreed that latter should handle and control former's estate as if it were community property, and that each might draw on her separate funds in his personal bank account and joint tenancy accounts, as their necessities or judgment dictated.

In Bank.

Appeal from Superior Court, Los Angeles County; Elliot Craig, Judge.

Action by Frank M. Kelsey, special administrator of the estate of Mary Moore Miller, deceased, against Jared H. Miller and others. From a judgment for plaintiff in an unsatisfactory amount, he appeals. Affirmed.

See, also, 263 P. 200, 214.

Anderson & Anderson, and Victor T. Watkins, all of Los Angeles, for appellant.

Kimball Fletcher, A. P. Thomson, Hunsaker, Britt & Cosgrove, MacDonald & Thompson, and Le Compte Davis, all of Los Angeles, for respondent Miller.

PER CURIAM. This appeal is from a judgment rendered in favor of plaintiff in an accounting action for the sum of \$693.10. Plaintiff is the appellant herein.

As special administrator of the estate of Mary Moore Miller, deceased, plaintiff brought an action for an accounting for moneys and property in the superior court of the county of Los Angeles against Jared H. Miller, in which he charged him with having fraudulently obtained possession of large sums of moneys and property belonging to said estate, and which moneys and property it is alleged that the said Jared H. Miller would appropriate and embezzle, and that he threatened to remove the same out of the jurisdiction of the court unless restrained by order of the court from so doing. The banking institutions named herein are depositories in which, it is claimed, said Jared H. Miller had on deposit and in safe-deposit boxes large sums of money belonging to said estate, which he was concealing with the intention of appropriating to his own uses. The total amount of money and property for which an accounting was sought is alleged to be an unknown amount in excess of \$200,000. Cecil A. Sheward Miller, wife of Jared H. Miller, was subsequently dismissed from the action. Mary Moore Miller died a resident of the county of Los Angeles, February 17, 1921. On May 4, 1921, her husband, Jared H. Miller, was appointed executor of her will. On April 6, 1922, upon application duly made, his powers as executor were suspended pending the hearing of a proceeding to revoke letters testamentary theretofore issued to him, and Frank M. Kelsey, the appellant herein, was appointed special administrator of said estate.

Upon information and belief plaintiff alleged that Mary Moore Miller was not, prior to May 11, 1918, if at any time, the wife of Jared H. Miller, and prior to said year 1918 he claimed to be the husband of Irene Ayers Miller; that he falsely and fraudulently induced said Mary Moore to believe that he was a single person, eligible to contract mar-

riage, when as a fact he was a married man; that, believing him to be eligible to contract marriage, the said Mary Moore was fraudulently induced by him to engage in two separate marriage ceremonies with said Jared H. Miller, to wit, on November 20, 1914, and on October 13, 1915, both being celebrated in the state of Tennessee; that she entertained the belief that said Jared H. Miller was legally competent to contract marriage until at least May, 1918; that by reason of such belief and the faith that she had in the validity of said marriage ceremonies she placed in his possession and under his control, as her agent, large sums of money and valuable property. The period of time for which an accounting is asked extends from 1914 to the date of the filing of the action.

The answer of defendant Jared H. Miller denies all the allegations of the complaint, and alleges that prior to the Tennessee marriages he stated to the decedent, Mary Moore Miller, all of the facts within his knowledge concerning his status as a married or single man. In addition to alleging the Tennessee marriages, the Fresno marriage ceremony performed on May 11, 1918, is alleged. Section 343, Code of Civil Procedure, is pleaded as a bar as to all moneys or property claimed to have been received by appellant prior to April 8, 1918. It is finally alleged in the answer that each and every item of money and property formerly belonging to said decedent, which came into the hands of appellant directly from her or otherwise, was received by him with her consent and approval, and subsequently expended by him with her knowledge; that she at all times consented and directed that each of said items of money or property should be used for any purpose which appellant thought proper and expedient; that from time to time she expressed her approval of the expenditure or use of said money or property; that she never at any time made objection to the expenditure or use of said money or property; and that she and the appellant were estopped by the acts and conduct of decedent.

It is admitted that the facts relied upon in the instant case are basically the same facts that were considered by us in the case of *Frank M. Kelsey v. Jared H. Miller* (L. A. No. 8539) 263 P. 200, this day decided. In fact, the instant case should have been joined with the case last above cited, inasmuch as both involved the same questions of law and rested practically upon the same facts.

The court in the instant case found against the complaint on every allegation of fraud made therein. A number of the findings are immaterial matters, and may be disregarded. The main finding in this case, and which supports the judgment, is to the effect that Mary Moore Miller deposited in banks, or caused to be deposited in banks, the moneys

in suit in the name of herself and husband as joint tenants, with right of survivorship, and that said Jared H. Miller had the full approval and consent of Mary Moore Miller for the spending of any and all funds belonging to her, which were deposited either in his personal bank account or in joint tenancy bank accounts of said Mary Moore Miller and himself.

Unquestionably the evidence supports the conclusion in this case that it was the understanding and agreement between Jared H. Miller and Mary Moore Miller that he should handle and control her estate in the same manner that he would have controlled it had it been community property. Either one of the spouses was at liberty to draw upon, and did draw upon, the funds which were the separate property of the decedent, as their necessities or judgment should dictate. This was in accord with the express wish and will of Mary Moore Miller, as evidenced by her conduct and express words. As she sometimes expressed herself, "What belongs to one belongs to the other." This was her rule during the entire course of her relation with Dr. Miller. The evidence fully sustained the view that she desired Dr. Miller to be the head of the household, with full authority to transact the business of the family, and embark in such enterprises as might appeal to his judgment, without restraint from any source. There is no substantial ground upon which an agency or trust relation between the parties may be sustained.

The judgment appealed from is affirmed.

203 Cal. 92

In re MILLER'S ESTATE. (L. A. 9013.)

Supreme Court of California. Jan. 5, 1928.

1. Wills §166(2)—Testatrix's letters, plans and conduct, and will itself, held to show that it was voluntary, not result of husband's fraud or undue influence.

Testatrix's letters, plans and conduct, and provisions of will, including numerous bequests to friends and relatives, as well as devises and legacies to her husband and his children by former marriages, held to show it was her free and voluntary act, not the result of fraud or undue influence of husband.

2. Wills §81—Will voluntarily executed according to law cannot be lightly set aside.

A will freely and voluntarily executed according to forms of law cannot be lightly set aside.

In Bank.

Appeal from Superior Court, Los Angeles County; Victor R. McLucas, Judge.

Proceeding by George W. Moore contesting will of Mary Moore Miller, deceased. From an order revoking the probate of the will,

contestees, Jared H. Miller, as executor and individually, and others, appeal. Reversed.

Hunsaker, Britt & Cosgrove, Kimball Fletcher, A. P. Thomson, Hickey & Thompson, MacDonald & Thompson, Le Compte Davis, and Jerome H. Kann, all of Los Angeles, for appellants.

Anderson & Anderson, Victor T. Watkins, and John L. Richardson, all of Los Angeles, for respondent.

SEAWELL, J. This appeal was taken from an order revoking the probate of the will of Mary Moore Miller, deceased, wife of Jared H. Miller. The grounds of contest set out are in all material respects a duplication of the grounds upon which a cancellation of the deed of joint tenancy to certain real property was attempted in the case of Frank M. Kelsey v. Jared H. Miller (L. A. No. 8539), 263 P. 200, this day decided.

Mary Moore Miller died testate February 17, 1921, in the city of Los Angeles, leaving an estate of considerable value. Her last will and testament was admitted to probate, and her surviving husband was appointed executor. George W. Moore, a nephew of decedent, one of her heirs at law, and a legatee under the will, instituted a contest of said will on the ground that it was procured solely by reason of the fraud practiced by Jared H. Miller upon said Mary Moore Miller. The fraud alleged to have been practiced arises out of their marital relations, which were fully considered by us in *Kelsey v. Miller*, L. A. No. 8539. In short, it was the claim there, as here, that Jared H. Miller defrauded and deceived Mary Moore Miller into the belief that he was a single man, possessed of much business sagacity and considerable means, when, as a matter of fact, he was a married man and possessed no means or business ability or experience.

The same marriage ceremonies and divorce decrees that were fully considered in *Kelsey v. Miller*, supra, are alleged in the instant case as constituting a part of the fraudulent means resorted to by Dr. Miller to induce Mary Moore Miller into the belief that she was his lawful wife. The court submitted 106 special findings to the jury. The jury found by special finding (1) that Mary Moore Miller was an unmarried woman at the time of her death, to wit, February 17, 1921, and by finding (2) that she left no surviving husband. A number of issues involving purely questions of law were submitted to the jury for their determination, such as whether the circuit court of Shelby county, Tennessee, had jurisdiction of the person of Jared H. Miller at the time it heard the divorce action in 1909, and whether certain decrees were fraudulently obtained.

The court adopted the findings of the jury and entered judgment to the effect that so much of said will as gave, devised, or be-

queathed anything or any power to Jared H. Miller, Lillian M. Hays, and Russell C. Miller, children of Jared H. Miller, was not the last will and testament of Mary Moore Miller. The findings of the jury, adopted by the court, to the effect that the will is the product of the fraud practiced by Jared H. Miller upon his wife, by inducing her to believe that he was her lawful husband, when as a matter of law he was not, and that he fraudulently represented to her that he was a man of affluence and possessed superior financial ability, and that she believed said representations to be true, but as a matter of fact they were false, and that she would not have made him her beneficiary, had she not been fraudulently imposed upon in the manner above set out, are in conflict with our decision in *Kelsey v. Miller* (L. A. No. 8539), 263 P. 200, and *Kelsey*, as Special Administrator, v. J. H. Miller et al. (L. A. No. 8894), 263 P. 213, and the judgment of the two trial courts who heard said causes.

The cases above cited on the marriage status of Mary Moore Miller and the fraud alleged to have been practiced upon her by Dr. Miller, who was her husband, necessarily have direct application to the same state of facts which exists in the instant case.

[1] That Mary Moore Miller did exactly what she intended to do with respect to making Dr. Miller and his children legatees and devisees of her will, as shown by her letters, her plans, and conduct, from the first to the last, there can be no doubt. An examination of her will shows that she made, not the will that a woman would have made who was under the domination of evil and sordid influences, but such a will as a free agent would have made, who was actuated by a desire to be both just and charitable. All of her estate did not, by any means, go to Dr. Miller, the person charged with sinister designs on her wealth. She provided that a needy friend, upon whose property she held a mortgage, should not be called upon to pay during the terms of her life. She then provided for the organization of a holding corporation which was to take over all of her bonds, stocks, and other valuable properties, for the purpose of paying annuities to those she wished to make her beneficiaries. She named as trustees of this holding corporation her husband, Jared H. Miller, her brother, George W. Moore, an attorney at law, and her sister, Eliza M. Monroe. Her will then sets out in detail her instructions as to the handling of her affairs. Her bequests follow: To her husband, one-half of the net receipts of said corporation; to her sister, Eliza M. Monroe, \$2,400 per annum, and upon her death to her child; to her sister-in-law, Frances E. Moore, \$2,400 per annum during her life, and upon her death to be paid to her children; to her sister-in-law, Margaret E. Moore, \$2,400 during life; to her brother, George William Moore, \$2,400, and upon his death to his

child; to her niece, Lucy M. Sustedt, \$200 a year; to her nephew, George W. Moore, \$200 a year; to her niece, Carrie Moore Post, \$200 a year; to her stepson, Russell C. Miller, and stepdaughter, Lillian Miller, \$200 each per annum, and upon the death of their father each is to have \$1,200 a year. She then makes bequests to three friends, to two of whom she gives \$600 a year each, and to the other \$300 a year so long as they shall live.

The will upon its face answers the charge that it is the product of fraud and deceit. Her instructions as to how her estate shall pass from one to another in case of death, and the manner in which the business shall be conducted, shows much intelligent thought on the part of Mary Moore Miller. It is the voluntary product of her mind, after months of consultation with her brother by word and by letter, and with her attorney in Los Angeles, and with Dr. Miller. Her letters to her brother with reference to her will continued practically to the time the will was executed. No one can read these letters and entertain a doubt as to her testamentary freedom.

[2] The evidence is absolutely insufficient to sustain a finding that she was under the influence or domination of any person at the time she executed her will. Unquestionably she was then the legal spouse of Jared H. Miller. The will was solemnly executed according to the forms of law, and, being her free and voluntary act, it cannot be lightly set aside.

The judgment is reversed.

We concur: WASTE, C. J.; RICHARDS, J.; SHENK, J.; CURTIS, J.; PRESTON, J.; LANGDON, J.

203 Cal. 144

PEOPLE v. CORNELL. (Cr. 3015.)

Supreme Court of California. Jan. 13, 1928.

1. Criminal law $\S$ 656(5)—Court's appointing alienist to determine defendant's sanity in jury's presence, and commenting on alienist's ability, held not error (Code Civ. Proc. $\S$ 1871, as added by St. 1925, p. 305).

In a homicide trial, where the only defense offered was that of insanity, the court's appointing an alienist under the provision of Code Civ. Proc. $\S$ 1871, as added by St. 1925, p. 305, while a jury was present, and his comment on the experience, ability, and impartiality of said alienist, held not error.

2. Criminal law $\S$ 393(1)—On Insanity defense, permitting evidence of defendant's actions out of court to show simulation held not error.

In a homicide trial, where the only defense was that of insanity, permitting evidence as to the actions of defendant when out of the

courtroom, and the contrast with his actions in the courtroom, for the purpose of showing simulation of insanity, held not error as compelling defendant to be a witness against himself.

3. Criminal law $\S$ 722(2)—Prosecutor's comments before jury relative to simulations of defendant relying on insanity held proper.

In a prosecution for murder, where the only defense was that of insanity, prosecutor's comments before the jury relative to simulations of the defendant held proper, where based on evidence of defendant's actions out of court as contrasting with his actions in court.

4. Witnesses $\S$ 255(2)—Permitting deputy district attorney, as witness, to refresh memory of conversation with defendant after arrest, by referring to transcript of evidence taken at preliminary examination, and written by official reporter, held not error (Code Civ. Proc. $\S$ 2047).

In homicide prosecution, permitting a deputy district attorney, as witness, to refresh his memory of a conversation he had had with defendant shortly after defendant's arrest, by referring to the transcript of testimony taken at the preliminary examination, which testimony was there taken down by the court reporter, held not error; the transcript being a proper memorandum, under Code Civ. Proc. $\S$ 2047, for such witness to use in refreshing his memory.

5. Witnesses $\S$ 255(2)—Permitting deputy district attorney, as witness, to refresh memory from transcript of testimony taken at preliminary trial, if error, held harmless, in view of other evidence (Code Civ. Proc. $\S$ 2047).

Permitting a deputy district attorney, as a witness in a homicide trial, to refresh his memory from the transcript of testimony taken at the preliminary trial, as provided by Code Civ. Proc. $\S$ 2047, if error, held harmless, in view of the fact that the record showed other statements by defendant, in substance identical with that to which the deputy district attorney was called to testify, to the admission of which defendant had not objected at the trial.

6. Criminal law $\S$ 829(1)—Refusing instructions covered by instructions given held not error.

Refusing defendant's offered instructions covered by instructions given held not error.

In Bank.

Appeal from Superior Court, Kern County; Robert B. Lambert, Judge.

Odd Cornell was convicted of murder in the first degree, and he appeals. Affirmed.

Paul Garber, J. O. Reavis and Frederick E. Hoar, all of Bakersfield, for appellant.

U. S. Webb, Atty. Gen., John L. Flynn, Deputy Atty. Gen., H. Ray Bailey, of Bakersfield, and Joe W. Matherly, of Los Angeles, for the People.

RICHARDS, J. [1] The defendant herein appeals to this court from a judgment im-

posed upon his conviction of the crime of murder in the first degree by a jury without recommendation, and from an order denying him a new trial. The double murder of which the defendant was thus convicted was committed in the city of Bakersfield on the evening of October 17, 1926; his wife and stepdaughter being the victims of his atrocious and premeditated crime. The defendant, who at the same time made an ineffectual attempt to end his own life, was apprehended upon the scene of his crime, and has at no time denied his part in the commission of the double homicide, except possibly by his plea of not guilty, the only defense, however, offered in his behalf upon the trial being the defense of insanity, the chief points urged upon this appeal having relation to that defense. The first contention which the defendant urges upon this appeal is that the trial court committed prejudicial error in relation to the appointment by it of a certain medical expert upon the issue of the defendant's alleged insanity which had been raised on the defendant's behalf during the course of the trial. Such appointment was made under the provisions of section 1871 of the Code of Civil Procedure as amended in 1925 (St. 1925, p. 305). The defendant does not question the power of the court to make such appointment under the terms of such provisions, but relies upon certain irregularities alleged to have occurred in the course of making the same. At the time of its selection of the medical expert so chosen, the trial judge made some comment in the presence of the jury with relation to the experience, ability, and impartiality of said expert, and to the fact that he had been theretofore acting as an expert alienist in the superior courts of Los Angeles. The defendant, while objecting through his counsel to the appointment of said expert by the court, placed such objection upon the ground that the defendant had secured the services of his own experts, and hence was not in need of said or any appointive alienist, but he neither then nor since offered any objection to the character, qualifications, or impartiality of the chosen expert. It would thus seem that no prejudicial injury was suffered by the defendant either through the making of such appointment by the court or by its remarks touching the qualities of the proposed appointee. The appellant cites no authority, and offers no sufficient reason why the action of the court in the matter of the appointment of an official expert under the provisions of the foregoing section of the Code should be had without the presence of the jury. Like every other step in the trial of a criminal cause, it is a proceeding which should be held in open court and in the defendant's presence, and with respect to which the jury should be informed in order to determine what merit there might be in the defendant's objections, if any, to the

character, ability, or impartiality of the alienist thus officially to be chosen and to act, and what weight was to be given to his expert observations or opinions.

[2, 3] The appellant's next specification of error relates to the alleged erroneous ruling of the trial court in permitting certain witnesses to testify that the actions and demeanor of the defendant while in court and in the presence and observation of the jury differed from the actions and demeanor of the defendant upon other occasions when out of court. The purpose of this offered evidence was evidently that of showing that the action and demeanor of the defendant while in court and in the presence of the jury were simulated in aid of his defense of insanity. The appellant bases this contention upon the proposition that, since the defendant in a criminal trial cannot be compelled to be a witness against himself, his actions and conduct in court and during his trial cannot be made the subject of comparison with his actions and conduct elsewhere without violating the rule which affords to all defendants this protection. The appellant presents no authority in support of such a proposition, nor do we think any such could be found or could in reason exist. The law which requires the presence of a defendant in court during his trial of necessity submits him to the observation and scrutiny of the court and jury. In being thus submitted to inspection and to whatever impressions or deductions the court or jury may draw therefrom, the defendant does not occupy the position or come within the definition of a witness either for or against himself, since to place him in that category would be to place a limitation upon his constitutional right to be there. In the case of *People v. Goldenson*, 76 Cal. 328, 347, 19 P. 161, 170, it was held that the action of the court in ordering a defendant to stand up for identification by a witness was not a violation of the constitutional provision that no person shall be compelled to be a witness against himself; this court aptly observing that the defendant was not thereby "compelled to exhibit any part of his person which the jurors could not see as he walked in and out every day." If a defendant, being thus brought as of right into the presence of the court and jury, so conducts himself as to be suspected of simulation, we can perceive no reason why those who may have observed his actions and conduct elsewhere may not be heard to describe his normal appearance and actions for the purpose of exposing his deception. In this same connection, and upon the like ground, the appellant insists that prejudicial error was committed by the comments which the district attorney in his closing argument was permitted to make upon the conduct and demeanor of the defendant in the courtroom as evincing simulation and as contrasted with his actions and demeanor

outside of court. In support of this contention the appellant relies upon the case of *People v. Peete*, 54 Cal. App. 333, 370, 202 P. 51, wherein a certain comment of a district attorney upon the defendant's conduct was held improper and prejudicial. In that case, however, the observation of the district attorney was based upon a supposition which had no evidence to support it, viz., that an innocent woman in the ordeal to which the defendant was being subjected during the trial would have given way to tears. In the instant case the inferences which the prosecution sought to present to the jury were strictly within the scope of the evidence which had been introduced before it relating to the defendant's actions and demeanor in and away from the presence of the jury. In so arguing, the district attorney was clearly within his line of duty.

[4, 5] The appellant's next contention is that the trial court was in error in permitting a witness before it to refresh his memory as to a conversation had by him with the defendant shortly after the latter's arrest by referring to the transcript of the testimony taken at the preliminary examination. The appellant insists that such transcript could not be availed of by said witness as a memorandum by which to refresh his memory, for the reason that such memorandum was not made by himself or under his direction, as required by section 2047 of the Code of Civil Procedure. The appellant cites a number of cases which, without attempting to review them in detail, would seem to be clearly distinguishable from the case at bar. In the instant case the statements of the defendant with respect to which the witness wished to refresh his memory were made, not in court or before the magistrate, but were made prior to the preliminary examination and in the presence of the official reporter. The witness being a deputy district attorney, the memorandum of such conversation then taken down by the court reporter comes fairly within the definition of a memorandum made under the witness' direction, and hence available to him as a means of refreshing his recollection under the very provisions of section 2047 of the Code of Civil Procedure upon which the appellant relies. The fact that the same statement was read into the record at the preliminary examination by the same reporter does not militate against its availability by the witness upon the trial of the action. It is not contended that the reporter's transcript was not correct as to the details of the original conversation. If, however, technically an error was committed in this regard, we are of the opinion that it would not be prejudicial, in view of the fact that, as disclosed by the record herein, a number of other statements of the defendant in substance identical with that to which this

particular witness was called to testify were offered and admitted in evidence without objection.

[6] The appellant's final contention is that the trial court committed error in the giving or refusing to give certain enumerated instructions to the jury. We have examined the several instructions which were given and of the giving of which the defendant complains, and we fail to find either that they are properly subject to the defendant's criticisms or that the cases which he cites sustain his objections thereto. As to the instructions which he offered and the court refused to give, we find that the appellant in his closing brief concedes that, as to the instruction upon which he most strongly relied as predicated error in its refusal, the trial court in such refusal to give the same committed no error. The other of the defendant's offered instructions which the trial court failed to give are, we find, sufficiently covered by the general body of instructions which had been already given.

The judgment and order are affirmed.

We concur: WASTE, C. J.; SEAWELL, J.; SHENK, J.; CURTIS, J.; PRESTON, J.; LANGDON, J.

203 Cal. 150

STUART ARMS CO. v. CITY AND COUNTY OF SAN FRANCISCO et al.
(S. F. 11769.)

Supreme Court of California. Jan. 16, 1928.

1. Appeal and error $\S$ 781(4)—Questions raised on appeal from dismissal of action to restrain tax levy held moot one and one-half years after fiscal year in which taxes were levied.

Questions raised on appeal from dismissal of action to restrain the levy of a tax held moot one and one-half years after the fiscal year in which the taxes were levied, since it was presumed that the tax had been by that time lawfully collected and expended, and hence a restraining order would be useless.

2. Municipal corporations $\S$ 956(2)—Taxes collected for fiscal year are presumed spent for expenses of year.

Presumption is that taxes collected by municipality for a definite fiscal year are expended for municipal expenses of that year.

3. Municipal corporations $\S$ 956(2) — Presumption is that excess municipal income from taxes in one year would enter into computing rate for next year.

It is to be presumed that any excess in municipal income from taxes in one fiscal year entered into the computation of the fixing of the rate for the following year.

4. Evidence — 83(1)—No presumption of irregularity may be indulged against public officers.

No presumption of irregularity or failure to perform official duty may be indulged against municipal, or public, officers.

In Bank.

Appeal from Superior Court, City and County of San Francisco; E. N. Rector, Judge.

Action by the Stuart Arms Company against the City and County of San Francisco and others to restrain the levy of a tax. Judgment for defendants, and plaintiff appeals. Appeal dismissed.

H. W. Hutton, of San Francisco, for appellant.

George Lull, City Atty., and Maurice T. Dooling, Jr., Asst. City Atty., both of San Francisco, for respondents.

SEAWELL, J. On July 13, 1925, Stuart Arms Company, a corporation organized under and by virtue of the laws of the state of California, and owning property subject to taxation in the city and county of San Francisco, filed its complaint on behalf of itself and for the benefit of all the taxpayers of said municipality, and particularly those who might choose to join in the action and contribute to the expense of the suit, for a judgment restraining the city and county of San Francisco, the board of supervisors, the mayor, and the tax collector of said city and county from levying a tax for the fiscal year 1925-1926 in excess of \$2.7096 on each \$100 of the assessed value of all property situate in said city and county, and subject to taxation, and that the mayor be restrained from approving any tax in excess of the rate above named, and that the tax collector be restrained from collecting any tax in excess thereof for said fiscal year, and for a temporary restraining order pendente lite, and for general relief. It is alleged by the complaint that the sum of \$2.7096 on each \$100 of the assessed value of all property situate within said city is the maximum rate that may be lawfully levied under the provisions of the charter, and that said municipal officers threaten to levy a tax of \$4.2179 on each \$100 of assessable property in said city and county, computed according to purported budget appropriations adopted by said board of supervisors.

The four defendants, excepting the mayor, who joined with the board of supervisors, demurred separately to the complaint, specifying as the grounds thereof that the complaint stated no facts sufficient to constitute a cause of action, and that the court did not have jurisdiction of the subject-matter of the action against said respective defendants. The court sustained the respective demurrers, with ten days to the plaintiff to amend, which privilege it declined to avail itself of, and in

consequence thereof a judgment of dismissal was entered by the court, and this appeal was taken from said judgment.

The city and county of San Francisco is a municipal corporation, organized and existing under and by virtue of the laws of the state of California, operating under and by authority of a charter.

We do not deem it helpful to enter into a consideration of the several interesting questions of law presented by counsel in the case, for the reason that there is no substantial relief that we can grant appellant, even if we should adopt its view, and hold, as to the main question, that the levying of a tax was a judicial, rather than a legislative, act, and, further, that appellant's petition was immune from the several attacks made by respondents, and particularly to the objection made by respondents that sections 3819 and 3804, Political Code, furnish the exclusive remedy for the recovery of taxes paid in excess of the amount which the taxing power is authorized by law to levy. Other objections are made to the complaint by respondents, in that it alleges conclusions of law rather than probative facts, and that it does not negative the existence of certain conditions, which, according to the provisions of the charter, may furnish sufficient reason for exceeding the \$2.71 levy, claimed by appellant to be the maximum amount that may be lawfully levied.

Respondents make further objection to the complaint on the ground that the tender of payment of appellant's taxes, computed upon a \$2.71 basis on the \$100, was made in July, a time prior to the day that the tax collector was authorized to receive said tax or any tax, and therefore said tender was premature, and it was not thereafter renewed. Other objections are raised by the demurrants, but, inasmuch as the questions presented by the appellant have become moot by lapse of time, a discussion of them would be nothing more than a profitless task.

[1-4] The assessment, whatever it may have been, has long since been levied and the tax collected. The presumption is that it has been lawfully expended in the administration of municipal affairs. Since the fiscal year of 1925-1926, another fiscal year, 1926-1927, and one-half of 1927-1928, have intervened. The presumption would be that the moneys collected for a definite fiscal year have been expended in payment of municipal demands which accrued during the year for which the fund was provided. If there was an excess for the year 1925-1926, the presumption is that it was carried over into the next year, and entered into the computation of the fixing of the rate for said following year. No presumption of irregularity or failure to perform official duty may be indulged against municipal or public officers. The pre-

sumption is that none of the funds raised for the fiscal year 1925-1926 remain uncollected or unexpended. A restraining order therefore would be an idle act.

The appeal is dismissed.

We concur: WASTE, C. J.; SHENK, J.; RICHARDS, J.; CURTIS, J.; PRESTON, J.; LANGDON, J.

203 Cal. 165

SULLIVAN v. HESS. (Sac. 3915.)

Supreme Court of California. Jan. 19, 1928.

Wills §93—Finding that grantor's transfer of deed in escrow, to be delivered on his death, was not mere testamentary disposition, held proper.

Finding that transaction by which grantor executed deed and placed it in sealed envelope, to be held in escrow and delivered on his death, was intended to constitute absolute delivery, vesting title in property in grantee and reserving in grantor only a life estate therein, and was not mere testamentary disposition, held proper, where grantor by signed statement on envelope expressly surrendered all dominion and control over deed.

In Bank.

Appeal from Superior Court, Placer County; J. B. Landis, Judge.

Action by J. M. Sullivan against Cecelia Hess. Judgment for defendant, and plaintiff appeals. Affirmed.

Donald Wachhorst, of Sacramento, and Edwin V. McKenzie, of San Francisco, for appellant.

Hughes, Bradford, Cross & Prior, of Sacramento, for respondent.

WASTE, C. J. The plaintiff brought an action to quiet title to real property. On the issues raised by the answer and cross-complaint of the defendant, and the answer of the plaintiff thereto, judgment was entered for the defendant, and the plaintiff appeals.

The plaintiff and appellant, John M. Sullivan, is the surviving brother of M. J. Sullivan, who died intestate. The defendant and respondent, Cecelia Hess, claims title under a deed executed by the decedent, which was placed in escrow and not recorded until after the grantor's death. The appellant claims as an heir of the decedent, and seeks to avoid the operation of the deed upon the ground that its execution constituted an attempt to make testamentary disposition of the property, and that there was in fact no valid delivery. Contending that there is no evidence to justify it, he challenges the finding, "that said deed was on said December 6, 1923, duly executed, acknowledged, and delivered by the said M. J. Sullivan with the intention of making the delivery absolute,

vesting title to said property therein described in the said Cecelia Hess, and retaining unto himself only a life estate therein; that said deed was not made by the said M. J. Sullivan as a testamentary disposition of the property described therein."

There is no merit in the appeal. **Smith v. Smith**, 173 Cal. 725, 161 P. 495; **Stewart v. Silva**, 192 Cal. 405, 221 P. 191. The intention of the grantor to pass title and the delivery were satisfactorily proved by the uncontradicted testimony of the grantor's attorney. He prepared the deed at the grantor's request, and as directed by him. After the due execution of the instrument, the grantor, who was carefully and fully advised in the matter, placed the deed in a sealed envelope, on which he wrote the following indorsement:

"The within deed was on the 6th day of December, 1923, by me, the undersigned, delivered to J. R. Hughes, to be by him held in escrow until my death. I do hereby surrender all dominion and control over said deed. On the happening of my death, he shall deliver the same to Cecelia Hess.

"[Signed] M. J. Sullivan."

On the day after the grantor died, the deed was recorded in the office of the county recorder.

The judgment is affirmed.

We concur: **CURTIS, J.**; **PRESTON, J.**; **SEAWELL, J.**; **SHENK, J.**; **RICHARDS, J.**; **LANGDON, J.**

203 Cal. 116

BERGUIN et ux. v. PACIFIC ELECTRIC RY. CO. (L. A. 8943.)

Supreme Court of California. Jan. 10, 1928.

1. Appeal and error §1046(5)—Remarks of court when plaintiff was assisted to witness stand that such help was unnecessary held prejudicial error (Const art. 6, § 19; Pen. Code, § 1126).

In action for injuries causing weakened physical condition, abnormally fast pulse, bodily tremor, and bad heart condition, remarks of court when, on second day of her testimony, plaintiff was assisted to stand, that such assistance was unnecessary, held to constitute prejudicial error, where evidence was sufficient to justify a verdict for plaintiff, and in view of evidence as to injuries, and lack of any showing that plaintiff's condition was feigned, or that she was attempting to create false impression with jury, as such conduct of the court involved an invasion of the exclusive province of the jury, contrary to Const. art. 6, § 19, and Pen. Code, § 1126.

2. Appeal and error §201(2)—Failure to request court to instruct jury to disregard court's own prejudicial utterances held not to prevent asserting error.

Failure of plaintiffs to request court to instruct jury to disregard court's own prejudicial

statements when one of plaintiffs was assisted to stand *held* not to prevent plaintiffs from claiming court's conduct was error.

3. Street railroads ☞99(5)—Motorist, driving on street car tracks, is not guilty of negligence per se.

Conduct of motorist, in driving automobile on street car tracks, does not constitute negligence per se.

4. Street railroads ☞117(35)—Right of occupant of automobile to recover under last clear chance doctrine for injuries by street car held for jury.

Issue of plaintiffs' right to recover under last clear chance doctrine *held* for jury, in action for injuries to occupant of automobile, where driver made left turn in front of street car and proceeded along or near street car tracks, and motorman overtook automobile and bumped into it, causing injuries.

5. Negligence ☞83—Last clear chance doctrine applies, where negligent plaintiff is unconscious of danger.

Last clear chance doctrine applies, not only to cases where negligent plaintiff knows his position of danger and cannot by exercise of ordinary care escape from it, but also where negligent plaintiff is oblivious to or unconscious of dangerous position.

6. Street railroads ☞103(3) — Street railway was liable under last clear chance doctrine for injuries, if motorman could by exercise of proper care have avoided collision.

Occupant of automobile was entitled to recover against street railway for injuries under last clear chance doctrine, even if her husband, driving automobile, who was coplaintiff, was negligent in driving near to or on street car tracks, if motorman on street car, aware of dangerous situation of automobile, could, by exercise of proper care, have avoided bumping into it.

7. Street railroads ☞113(7)—Failure of motorman to ring bell held material in action for injuries to occupant of automobile proceeding ahead at supposedly safe distance.

Where driver of automobile, making left turn in front of street car and proceeding on or near street car tracks, testified that he believed he was in safe position with respect to on-coming street car, failure of street car motorman to ring bell was material, in action for injuries to occupant of automobile resulting from collision, and excluding such question from jury's consideration was error.

8. Street railroads ☞99(5)—One driving vehicle on street car tracks is not guilty of negligence per se in failing to keep constant watch behind.

It is not negligence per se for one who is driving his vehicle astride of or in close proximity to a street car track to fail to keep a constant watch behind for an approaching street car.

Department 1.

Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

Action by George F. Berguin and wife against the Pacific Electric Railway Company and another. Judgment for defendants, and plaintiffs appeal. Reversed.

I. Henry Harris, of Los Angeles (Aubrey M. Finley, of Pasadena, of counsel), for appellants.

Frank Karr, E. E. Morris, and C. W. Cornell, all of Los Angeles, for respondents.

PRESTON, J. This is an appeal from judgment in favor of defendants in an action to recover alleged damages resulting from collision between automobile in which plaintiffs were riding and an electric street car of defendant corporation operated by defendant Stringfellow. Praying for damages in amount of \$36,000 for injuries suffered by plaintiff Clara F. Berguin, consequential damages suffered by the husband, and damage to the automobile, plaintiffs allege negligent operation of the street car by defendant Stringfellow. The answer charges plaintiffs with contributory negligence. Verdict of the jury was for defendants.

The facts are substantially as follows: Plaintiff George F. Berguin, with his wife and son, was driving north on Serrano avenue, Los Angeles, with the intention of turning left into and thence proceeding west on Hollywood boulevard, a cross-boulevard on which street cars run east and west. When plaintiff reached Hollywood boulevard, he noticed a street car some distance away—this distance, as testified to by the different witnesses, varying from a block and a half to but a few yards. At any rate, plaintiff made a square left turn into Hollywood boulevard ahead of the street car and proceeded along the car track, whereupon the car crashed into his machine, knocking it over to the right curb, and entangling a Ford automobile there parked in the collision. The testimony is conflicting on many points, for instance, as to speed of both automobile and street car, as to the distance the automobile proceeded on Hollywood boulevard before being hit, and as to whether the motorman rang his gong continuously for a block before and after reaching the crossing, or whether he neglected to ring it until a second before the impact. It is unnecessary, however, to discuss the evidence at length, as appellants do not attack its sufficiency or insufficiency to support the verdict. It is only necessary to consider parts of it in connection with the errors of law claimed.

Appellants first allege misconduct of the trial court; second, they complain of his failure to give their requested instruction, or any instruction, upon the doctrine of the last clear chance; and, third, they attack the instruction given as to the lack of materiality of sounding the street car gong.

[1] The act of the trial court upon which misconduct is predicated occurred when plaintiff Clara F. Berguin was being assisted by some one when she was about to resume the witness stand at the convening of court on the second day of her testimony. The record shows the following occurrence:

"The Court: I think Mrs. Berguin was on the stand.

"Mr. Harris: I have a doctor here.

"The Court: Just a moment. One thing I want to say: It is not necessary for this lady to be helped to the witness stand. I don't imagine she is helped around her own home, and I don't like to see that in court.

"Mr. Harris: I don't know that she is being helped.

"The Court: I saw it just now.

"Mr. Harris: I don't know that your honor knows whether it is necessary.

"The Court: Then we will find out.

"Mr. Harris: I take exception to that.

"The Court: All right. You can take your exception, and I will examine her and find out whether she is or not.

"Mr. Harris: Then do that, but I think the comment is unnecessary.

"The Court: It is not unnecessary. Whenever anything of that kind happens in my department, I expect to speak about it.

"Mr. Harris: I know, but your honor is intimating to the jury— (Interruption.)

"The Court: Call your doctor, Mr. Harris.

"Mr. Harris: I assign that as misconduct. I don't think a remark is necessary, and I don't know that the remark is necessary.

"The Court: She came up to the witness stand yesterday by herself.

"Mr. Harris: I think your honor will find you are in error.

"The Court: She came up to the witness stand yesterday by herself.

"Mr. Harris: I know she did, but yesterday is one day and to-day is another day.

"The Court: Proceed with your case.

"Mr. Harris: Dr. Wright."

The extent of the physical condition of this witness as the result of the collision was the chief element of damages in the case. At the time of the above remarks of the court, one physician had already testified that this plaintiff was suffering from a toxic exophthalmic goiter, the result of which was a greatly weakened physical condition, an abnormally fast pulse, and a tremor of the body, with protrusion of the eyes. The proof also showed that she was unable to adequately perform the duties of her household and spent much of her time in bed; also, that her heart was badly involved. There was no evidence whatsoever that her condition was in any way feigned, nor was there any evidence that her attorneys, or her husband, or any other persons were contriving to create a false impression in the minds of the jury as to her condition, or even to exaggerate or emphasize it. The offer of assistance was apparently a spontaneous impulse, presumably of her 15 year old son or her husband.

Following the colloquy above quoted, Dr.

Wright, instead of this plaintiff, took the witness stand and gave the same diagnosis of her condition as had been given previously, testifying that at the time he was called, which was on a recent date, she had all the symptoms above mentioned, together with a pulse of something like 160. He also observed that excitement tended to intensify and aggravate her malady and increase her weakness; that sometimes a patient with this disease could navigate, notwithstanding such rapid heart action, but at other times "their heart beats in a tumultuous manner and rest seems imperative." He also said that "anything that over-excites the nervous system, if finally continued, will bring on exhaustion." The trial of the cause and the strain of being on the witness stand were impliedly recognized by him as one of the causes of such excitement.

This condition was apparently present when the lady, a few moments after the incident above referred to, did in fact resume the witness chair. She could not make herself heard and complained of being nervous. A pause was made in the proceedings to allow her to compose herself, whereupon the court said:

"I think you had better defer the examination until later in the day."

The examination proceeded, however, for a few questions, whereupon the court again said:

"Now, it is difficult for her to speak loud. The reporter evidently hears it. He can repeat each answer after the witness. It is difficult for her to make herself heard."

The foregoing facts show clearly the absence of any intentional effort to deceive the court or jury. The remarks of the court, in view of these facts, could not have been other than highly prejudicial. A perfect case in plaintiffs might well have been destroyed by such remarks. The standing of plaintiff, both as a witness and as a litigant, doubtless withered like a leaf in a flame before these burning words of the court. It needs no citation to convince any unbiased observer that a jury has both ears and eyes open for any little word or act of the trial judge, from which they may gather enough to read his mind and get his opinion of the merits of the issues under review. The learned and distinguished trial court doubtless regretted the hasty act on his part, but the jury were not adequately or at all apprized of this fact. In fact, throughout the trial plaintiffs' counsel were repeatedly subjected to the severest strictures by the court, many of which seem unwarranted.

The evidence of plaintiffs' witnesses would have amply supported a verdict in their behalf. We agree with the language of *O'Connor v. United Railroads*, 168 Cal. 43, 47, 141 P. 809, 811, as follows:

"It must be apparent that, in operating a street car over a public street, a motorman cannot under ordinary circumstances run down a vehicle proceeding in the same direction without having been negligent in the operation of his car. The mere fact that he does so furnishes cogent evidence of negligence, which is rarely capable of explanation."

See, also, *Callett v. Cen. Cal., etc., Co.*, 36 Cal. App. 240, 246, 171 P. 984, and *Adamson v. San Francisco*, 66 Cal. App. 256, 259, 225 P. 875.

The above error must therefore be held sufficient, in and of itself, under the circumstances of this case, to compel a reversal of the judgment, for under our system of procedure the trial judge may not thus invade the exclusive province of the jury. "Under a system of law which prohibits judges from charging juries with respect to matters of fact (Const. art. 6, § 19), and which gives to the jury the exclusive power to determine the facts (Pen. Code, § 1126), the trial judge should, as has often been pointed out, use the greatest care to avoid, in the presence of the jury, any utterance which may be construed as an intimation of his opinion on the issues of fact which are to be determined by the jury [citing cases]. * * * Anything said by the judge, indicating that the witness on the stand had, by her demeanor, created a favorable impression on his mind, would naturally tend to lead the jury to give to her testimony greater weight than they otherwise might. * * * Such an intimation constituted an invasion of the jury's province of judging the facts, in the light of the appearance and demeanor of witnesses, and might be highly prejudicial." *People v. MacDonald*, 167 Cal. 545, 550, 551, 140 P. 256, 258. See, also, *McMinn v. Whelan*, 27 Cal. 300, 320-321; *People v. Willard*, 92 Cal. 482, 490, 28 P. 585; *Abbott v. Coronado Beach Co.*, 55 Cal. App. 179, 182, 203 P. 145; *People v. Frank*, 71 Cal. App. 575, 580, 581, 236 P. 189.

[2] There is no merit in the suggestion that an exception by counsel to these remarks of the court cannot avail appellant, because he did not go further and request the court to instruct the jury to disregard the court's own utterances. The rule contended for is set down in such cases as *Compton-Gardena Milling Co. v. McCartney*, 69 Cal. App. 708, 231 P. 764, *People v. Shears*, 133 Cal. 154, 159, 65 P. 295, *Hale v. San Bernardino, etc.*, 156 Cal. 713, 717, 106 P. 83, and *People v. Babcock*, 160 Cal. 537, 545, 117 P. 549. But the reasons for this rule are entirely absent when applied to the acts and conduct of the court himself. A second appeal of this character to the court would in all probability have made a bad matter worse. The remarks would probably have been repeated with emphasis, and in addition counsel would have found himself in a position anything but pleasant or secure.

[3, 4] The evidence of plaintiff was also sufficient to justify an instruction on the doctrine of last clear chance. This is true because of the following facts: Plaintiff George F. Berguin's testimony was that ample time and space existed when he last saw the street car to warrant the belief on his part that it would be safe to enter the intersection and turn west upon the boulevard, and, in view of the congested traffic, to drive along or upon the car tracks. There is no rule of law that required him, after making up his mind to this effect to continue to look backward for the on-coming of the street car, when his duties directed him to look in front. It is not negligence to drive even upon the car tracks of a street. The rule in this behalf has been stated as follows:

"As a general rule, whether a person has exercised ordinary care or not is to be left to the jury, to be determined by them from all the circumstances surrounding him at the time. But it was not negligence per se for the plaintiff to drive along the street as he did in proximity to the track of the defendant. This of itself did not constitute negligence at all. The streets of a municipality are for the use of the traveling public, and the right of a street car company is only to use it in common with the public. The fact that the company has been granted a right to lay tracks and operate cars along the streets gives it no exclusive right to travel even over that portion of the street covered by its tracks. Other vehicles have a right to travel over the entire street, including the space between the tracks. Nor is this right restricted to the times when other portions of the street may be crowded or in bad condition. Nor is a traveler, in doing so, in any sense of the term a trespasser." *Adamson v. San Francisco*, supra, at page 259 (225 P. 876), quoting from *O'Connor v. United Railroads*, supra.

See, to the same effect, *Callett v. Cen. Cal., etc., Co.*, supra.

Taylor v. Pacific Electric Ry. Co., 172 Cal. 638, at 650, 158 P. 117, 123, approves the language of *Fujise v. Los Angeles Ry. Co.*, 12 Cal. App. 207, 216, 107 P. 317, as follows:

"The sum of the adjudicated cases bearing upon the relative rights of street cars and citizens traveling in vehicles drawn by horses or other animals is that both have a right to use the street, but neither has the exclusive right. The motorman of a street car is not necessarily obliged to stop his car when he sees a man driving in a vehicle along the line of a railway ahead of the car, but he may continue to run the car in a proper manner until he is conscious of the fact that the driver is unaware or heedless of his danger. * * * Seeing a man driving along the track, the motorman may assume that he will turn aside and out of the way of the car; but he cannot rest on the assumption so long as to allow his car to reach a point where it will be impossible for him to control his car or give warning in time to prevent injury to the man or vehicle."

It is also true, taking the defendants' evidence, that the jury would have been war-

ranted in believing that the motorman saw the position of plaintiff, and knew it was one of danger, from which he could not alone extricate himself, and had time thereafter within which to check the speed of his car, or to stop same outright, if necessary, and thus avoid the collision. For the motorman himself testified that he saw plaintiff coming at a terrific rate of speed, and that he had so much speed he could not stop. This observation on the part of the motorman must have occurred at least 125 feet and may have occurred at a much greater distance, from the point of the impact. He admitted, also, that he did not stop his car until some 90 or 95 feet beyond that point. At a rate of 15 miles per hour he could have stopped in about 75 feet; at 18 miles in less than 100 feet.

[5] It is no answer to this observation to say that plaintiff by the exercise of ordinary care could have extricated himself. The rule of last clear chance applies, not only to cases where the negligent plaintiff knows his position of danger and cannot by the exercise of ordinary care escape from it, but also applies equally as well to cases where the negligent plaintiff is oblivious to or unconscious of his position of danger. *Arnold v. Oak Term. Rys.*, 175 Cal. 1, 164 P. 798. In other words, and as a second hypothesis, the motorman practically admitted a realization of plaintiff's position of danger, of which the jury might well have believed said plaintiff was oblivious; that the motorman knew of this fact, and after thus realizing it could have stopped the car in time to have avoided the accident. The rule has also been stated in this language:

"The plaintiff's right of recovery exists when the defendant, after having discovered his peril, having also reasonable ground to believe him unconscious of danger, or unable to avoid it, might himself, by the exercise of ordinary diligence, have prevented the mischief which followed." 20 R. C. L. p. 143, § 117.

[6] The court gave no instruction on this subject. The instruction requested and refused by the court was in the following words:

"If you believe from the evidence that the driver of the automobile was guilty of negligence in driving too near, or upon, the track of the street railway company, but you also believe from the evidence that the motorman driving the street car belonging to the railway company was aware of the dangerous situation of the automobile and that he had a clear opportunity by exercise of proper care to have avoided the collision but failed to do so, and as a direct consequence of such want of proper care the collision occurred, then your verdict should be for the plaintiff and against the defendant."

This instruction was expressly approved in *Spear v. United Railroads*, 16 Cal App. 649, 117 P. 956, and while it is true the instruc-

tion could have been better framed by stating therein that the motorman must have known of plaintiff's inability to escape his position of danger or of his obliviousness thereto, nevertheless, in view of the practical admission of the motorman as to such knowledge, or at least to such belief, we cannot say that it was erroneous as applied to the facts of this cause.

[7] Lastly, the court instructed the jury as follows:

"I do not think that the failure to ring a bell, if he did fail to ring a bell, as it was approaching this crossing, has anything to do with this case, because it appears beyond controversy by the testimony of Mr. Berguin that he saw the car coming. A motorman or a party driving an automobile, in this case, Mr. Berguin, suddenly confronted with unexpected danger, is required to exercise only that care which an ordinarily prudent man confronted with such unexpected danger would exercise."

We think that the giving of this instruction under the facts of this case was also error. To give this instruction was to ignore the testimony of plaintiffs. It is true, that, if said plaintiff George F. Berguin had known that the street car was bearing down upon him and demanding that he surrender his position to give right of way to it, the ringing of the bell would have been immaterial; but ordinarily an automobile will easily, all things being equal, maintain a lead over an ordinary street car. The cases of *Starck v. Pac. Elec. Ry. Co.*, 172 Cal. 277, 280, 156 P. 51, L. R. A. 1916E, 58, *Taylor v. Pac. Elec. Ry. Co.*, 172 Cal. 638, 647, 648, 158 P. 119, and *Lambert v. So. Pac. R. R. Co.*, 146 Cal. 231, 236, 79 P. 873, are not applicable to the case before us. Plaintiff's testimony to the effect that he was in a safe position with respect to the on-coming car at the time he turned west at the intersection cannot be ignored. This being true, his duty to look ahead, and not behind, would have demanded of the motorman the ringing of the bell, or the use of some other method of attracting attention of said plaintiff, before coming into collision with him. It being also conceded that a great deal of traffic existed on this boulevard at the time of the collision, the necessity for travel on or near the car tracks may have existed. The true rule in this behalf may be found in the following cases:

[8] *Simmons v. Pac. Elec. Ry. Co.*, 60 Cal. App. 129, 134, 135, 136, 212 P. 637, 639, where the court said:

"As one of the traveling public the driver of an automobile is entitled as of right to use the entire street, subject only to the limitation that, as the use of the street by the railway company is confined to its tracks, the driver must not unnecessarily interfere with or obstruct a car in its movement thereon. *O'Connor v. United Railways* [168 Cal. 43, 141 P. 809] *supra*. Equally true is it that it is not negligence per

se for one who is driving his vehicle astride of or in close proximity to a street car track to fail to keep constant watch behind for an approaching car. In *O'Connor v. United Railways*, supra, at page 49 [141 P. 811], the court says: 'Nor did the fact that he (the driver of the hotel bus) did not keep a constant watch behind for an approaching car while driving near the track show want of ordinary care on the part of the plaintiff or constitute negligence *per se*.' (Italics ours.) The reason for this, as stated in the *O'Connor Case*, is that one driving along a public highway in the same direction in which a car may approach from behind is necessarily engaged in looking in front of him to have a care that he does not collide with some other vehicle ahead enjoying also the common use of the highway. The exercise of ordinary care makes it his duty to look ahead so as to avoid any collision with those in advance of him. And as it is not possible for him to look simultaneously forward and backward, it necessarily is not negligence *per se* to fail to keep a constant watch behind for an approaching street car. * * * For this reason, although it cannot be said that one who is driving a vehicle along or in close proximity to a street car track is in duty bound to keep a constant watch behind for approaching cars, it is his duty to turn off or away from the tracks when he sees or hears, or by the exercise of reasonable care should see or hear, a car approaching from the rear. He should listen for and he should heed whatever signal there may be of an approaching car."

See, also, *O'Connor v. United Railways*, supra; *Lawyer v. L. A. Pac. Co.*, 161 Cal. 56, 118 P. 237; *Smith et al. v. S. P. Co.* (Cal. Sup.) 255 P. 500.

Judgment reversed.

We concur: CURTIS, J.; SEAWELL, J.

203 Cal. 201

ROOS v. HARRIS et al. (S. F. 11991.)

Supreme Court of California. Jan. 24, 1928.

Malicious prosecution §24(5)—Accused had no cause of action for malicious prosecution after judgment of conviction became final by failure to appeal.

Plaintiff convicted of petit larceny in prosecution instituted by defendants had no cause of action for malicious prosecution against defendants after judgment had become final by reason of the absence of an appeal, since such judgment after becoming final is conclusive on the question of probable cause for arrest, prosecution, and conviction, in absence of a direct and successful attack thereon based on extrinsic fraud in its procurement.

Department 2.

Appeal from Superior Court, Santa Cruz County; Harry C. Lucas, Judge.

Action by Mary Roos against J. C. Harris and another. Judgment for defendants, and plaintiff appeals. Affirmed.

George W. Smith and Ralph H. Smith, both of Santa Cruz, for appellant.

James A. Hall and Wyckoff & Gardner, all of Watsonville, for respondents.

RICHARDS, J. This appeal is from a judgment in favor of the defendants made and entered in the superior court in and for the county of Santa Cruz after the granting of a motion made by the defendants for a judgment on the pleadings, upon the ground that the complaint did not state facts sufficient to constitute a cause of action. This action was one for malicious prosecution; the complaint alleging that the defendants caused to be instituted against the plaintiff a criminal proceeding for petit larceny, by reason of which the plaintiff was arrested, tried, found guilty, and sentenced to imprisonment for six months. The complaint further alleges that the acts of the defendants in that regard were malicious and without reasonable or probable cause, and that the conviction of the plaintiff was obtained by means of conspiracy on the part of the defendants and by means of false testimony given by the defendants in said criminal proceeding. It is nowhere alleged in the complaint that the judgment of conviction was either appealed from or reversed upon appeal. We cannot agree with the contention of the plaintiff and appellant herein that a complaint containing the foregoing averments sufficiently states a cause of action for malicious prosecution. The vice of the plaintiff's contention in that regard consists in her failure to aver that the proceedings in the criminal action taken against her by the defendants had terminated in her favor. On the contrary, it sufficiently appears that said proceedings resulted in her conviction and that such judgment of conviction had become final prior to the institution of the present action. We are pointed to no authority by the appellant, and we are satisfied that none such exists, wherein a civil action for malicious prosecution has ever been sustained when the plaintiff, as a result of such prosecution, has been convicted, and when the judgment of conviction has either been sustained upon appeal or has become final by reason of the absence of an appeal. When such judgment has thus become final, it is conclusive upon the question of probable cause for the arrest, prosecution, and conviction of the defendant, in the absence of a direct and successful attack thereon based upon extrinsic fraud in its procurement.

The assault which the plaintiff and appellant herein makes upon said judgment is collateral, and is predicated upon averments of intrinsic fraud. The finality of said judgment having foreclosed any and every assault thereon by the person adjudged guilty thereunder (*People v. Mooney*, 178 Cal. 525, 174 P. 325), in the proceeding which resulted in such

judgment, on the ground of intrinsic fraud, we are unable to perceive how the conclusive presumption arising therefrom could be as-sailable by the person convicted thereunder, or by any one else, in a collateral proceeding up-on the same ground. The cases of Holliday v. Holliday, 123 Cal. 26, 55 P. 703, Carpenter v. Sibley, 153 Cal. 215, 94 P. 879, 15 L. R. A. (N. S.) 1143, 126 Am. St. Rep. 77, 15 Ann. Cas. 484, and Black v. Knight, 44 Cal. App. 770, 187 P. 89, do not support her contention, since in each of said causes the judgment had been re-versed or the suit dismissed before the com-mencement of the action for malicious prose-cution. We are satisfied that the complaint of the plaintiff and appellant herein, in the absence of a like essential averment, failed to state a cause of action.

The judgment is affirmed.

We concur: SHENK, J.; LANGDON, J.

203 Cal. 210

BUCK v. BORCHERS. (S. F. 12207.)

Supreme Court of California. Jan. 25, 1928.

Appeal and error §1015(2)—Where evidence is conflicting, trial court will be deemed not to have abused discretion in granting new trial for insufficiency of evidence.

Where there is substantial conflict in the evidence, the trial court will not be deemed to have abused its discretion in granting new trial for insufficiency of evidence, and its decision will not be disturbed.

Department 2.

Appeal from Superior Court, Santa Clara County; J. R. Welch, Judge.

Action for damages for personal injuries by Krell Buck against B. W. Borchers. Verdict for plaintiff. From an order granting defendant's motion for a new trial, plaintiff appeals. Affirmed.

C. M. Booth, of San Francisco, and C. W. Moore, of San Jose (George B. Harris, of San Francisco, of counsel), for appellant.

F. H. Benson and D. T. Jenkins, both of San Jose, for respondent.

LANGDON, J. This is an appeal by the plaintiff from an order granting defendant's motion for a new trial based upon insufficiency of the evidence. The action was for damages for personal injuries resulting from defendant's alleged negligence. The defendant was driving an automobile, and the plaintiff was riding upon a motorcycle at the time of the accident. The record discloses a conflict in the testimony. While there is evidence in support of the verdict, there is also evidence which, if believed, would exonerate the de-

fendant, such as the testimony to the effect that the plaintiff was driving at a terrific rate of speed at the time of the accident and that there were no lights upon the motorcycle, although the accident occurred at night; that the defendant swerved to his left in a vain attempt to avoid plaintiff. There is also the evidence afforded by the photographs that the motorcycle crashed into the side of the defendant's automobile, evidently at a high rate of speed. There is also in evidence the further fact that the plaintiff was riding upon a motorcycle having a seat for only one person, and that that seat was occupied by a girl companion, while plaintiff sat in front of her in a position not intended for the operator of the vehicle.

Under these circumstances we may not interfere with the discretion vested in the trial court upon an application for a new trial. This court has recently stated in *Rosenberg v. Moore*, 194 Cal. 393, 229 P. 34, that, if there is a substantial conflict in the evidence, the trial court will not be deemed to have abused its discretion when it has determined that the verdict or finding is against the weight of the evidence and that there should be a new trial. It is useless to cite further authorities for a proposition of law as well settled as is the one applicable here. Numerous authorities are cited in the case last mentioned, and many more are available to the same effect.

The order appealed from is affirmed.

We concur: RICHARDS, J.; SHENK, J.

203 Cal. 128

PEOPLE v. KELLY. (Cr. 2996.)

Supreme Court of California. Jan. 13, 1928.

1. Jury §9—Right of jury trial guaranteed by Constitution is right as it existed at common law (Const. art. 1, § 7).

The right of a trial by jury guaranteed by Const. art. 1, § 7, is the right as it existed at common law, hence any act of the Legislature attempting to abridge that right is void.

2. Jury §31(11)—Statute permitting indictment to charge two or more offenses held not violative of right to jury trial (Const. art. 1, § 7; Pen. Code, § 954).

Pen. Code, § 954, providing that an indictment may charge two or more offenses connected in commission, or two or more of same class though not connected in commission, held constitutional, against objection that it violated the provisions of Const. art. 1, § 7, guaranteeing right of trial by jury.

3. Indictment and Information §127—Crimes of same grade could be joined in separate counts in one indictment at common law.

Crimes of the same grade or class could at common law be joined in separate counts in one indictment.

4. Indictment and Information $\S$ 130—Indictment charging three murders in separate counts, committed at different times, held not objectionable (Pen. Code, $\S$ 954).

Indictment charging, in three separate counts, accused with having committed three murders on the same evening, and night, but at different times, held not objectionable, under Pen. Code, $\S$ 954.

5. Criminal law $\S$ 618—Refusing to order separate trials on three counts in indictment, each charging different murder, held not abuse of discretion, where indictment showed murders committed on same day, in same city and county (St. 1915, p. 744).

Where homicide indictment showed that the three murders stated therein were committed by the same person, on the same day, and in the same city and county, court's refusal to order separate trials on the three counts held not abuse of discretion, under St. 1915, p. 744.

6. Jury $\S$ 136(8)—On trial for three murders, defendant held not entitled to same number of peremptory challenges as if trials were separate (Pen. Code, $\S$ 1070).

Where defendant was charged in three separate counts of one indictment with three different murders, held, that the fact that Pen. Code, $\S$ 1070, gave him the right to exercise twenty peremptory challenges did not permit his exercising three times that many, or the number which he would have been permitted had the trials been separate, merely because the prosecutions were combined into one trial.

7. Homicide $\S$ 171(3)—In trial for three murders, evidence of all crimes committed by defendant and accomplice on night of murders held admissible.

In trial of defendant for three murders committed at different times, but on the same evening and night, admitting evidence of all crimes committed by defendant and his accomplice on that night held not error.

8. Criminal law $\S$ 768(1)—Instructing jury to disabuse minds of idea prosecution was improperly attempting to convey wrong impression concerning defendant's crimes, together with prosecutor's remarks objected to, did not make trial unfair.

Where, during the prosecutor's closing argument in a murder trial, the court instructed the jurors that they were to disabuse their minds of the idea that the prosecution was improperly attempting to convey a wrong impression to them concerning the crimes committed by the defendant, such instruction, together with the prosecutor's remarks objected to, held not to have made the trial an unfair one.

9. Jury $\S$ 103(9)—Denying challenge for cause of prospective juror who stated objection to insanity defense, but that he could give insanity plea fair consideration, held not error.

In a murder trial, where a prospective juror upon voir dire expressed his prejudice against defenses based on insanity pleas, but stated further that, if chosen as a juror, he would set aside the prejudice, receive the evidence with open mind, and consider it fairly, denying de-

fendant's challenge of witness as a juror held not error.

10. Criminal law $\S$ 1170½(1)—Refusal of doctor's testimony, given before coroner's jury, to impeach his trial testimony as to kinds of bullets taken from bodies of deceased held not prejudicial.

In a murder trial, refusal to permit defendant to introduce testimony of a doctor, given before the coroner's jury, to impeach such doctor's testimony at the trial as to the kind of bullets which he had taken from the bodies of the murdered victims held not prejudicial, the only apparent discrepancy in his testimony being as to one bullet being steel jacketed, and bullets being admitted in evidence so subject to jury's examination.

11. Homicide $\S$ 174(7)—Officers' testimony that defendant was hiding when arrested week after murders and attempted to escape held admissible.

In murder trial, testimony of police officers that when the defendant was found at his home a week after the murders were committed he was in hiding and attempted to escape held properly admitted for the purpose of showing a consciousness of guilt.

12. Criminal law $\S$ 406(2)—Evidence of defendant's response and reaction when confession of alleged accomplice was read to him preceding trial held admissible.

Where defendant, while lying wounded in hospital, had been visited by police officers and alleged accomplice who was recognized by defendant, and there was read to him an alleged confession of such accomplice, evidence of defendant's response and reaction when such confession of the alleged accomplice was read to him held admissible.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Harold Louderback, Judge.

Clarence Kelly was convicted of murder in the first degree, and he appeals. Affirmed.

Milton T. U'Ren, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., William F. Cleary, Deputy Atty. Gen., and Matthew Brady, Dist. Atty., and Isadore Golden, Asst. Dist. Atty., both of San Francisco, for the People.

WASTE, C. J. The appellant, Clarence Kelly, and Michael Papadaches were jointly charged by indictment with the commission of three murders, each alleged in a separate count. Both defendants entered pleas of not guilty. Their separate motions for a severance were granted, and the record now before us relates only to the trial and appeal of the defendant Kelly. His demurrer to the indictment was overruled, and his motion to compel the prosecution to elect as to which charge in the indictment it would submit to the jury was denied. After a lengthy trial, the jury

returned three verdicts, one for each count of the indictment, each finding the defendant guilty of the crime of murder in the first degree, without recommendation. A motion for a new trial was made and denied, and the court pronounced judgment sentencing the defendant to pay the extreme penalty. He has appealed from the judgments of conviction and from the order denying his motion for a new trial. He rests his appeal upon the contention that he was deprived of certain constitutional and legal rights, greatly to his prejudice in the light of the evidence, and upon alleged prejudicial errors occurring during the trial.

According to the evidence, the appellant, Papadaches, and a boy known as "Spannie" spent the greater part of October 11, 1926, loafing and drinking in various places in San Francisco. In the early evening, the appellant, who was armed with a pistol, and Papadaches procured a Yellow taxicab, driven by Walter Swanson, and were taken to Third and Sixteenth streets, at which point they entered upon an almost unbelievable orgy of crime. They there compelled Swanson to get out of the cab, searched him, took away his cap and badges, and the appellant shot and killed him. The appellant then put on Swanson's cap and badges, which he wore during the rest of the evening, got in the driver's compartment of the taxicab, and drove away from the scene of the shooting with Papadaches as an ostensible passenger. The killing of Swanson is charged in the first count of the indictment.

A few minutes after the shooting of Swanson, the appellant, driving the taxicab, approached Mike Petrovich, who was walking along the sidewalk near the intersection of San Bruno avenue and Mariposa street. He asked Petrovich the time, and almost instantly shot and killed him, for no apparent reason other than a lust for killing, and with no apparent provocation. This offense is charged in the second count of the indictment.

Appellant and Papadaches then robbed a "soft drink place" at the corner of Seventeenth and Mississippi streets. A few minutes later they entered a restaurant at Seventh and Brannan streets. While Papadaches "cleaned out the till," the appellant intimidated the patrons and others in the place with his pistol. Louis Ferrando appears to have said something about the affair being a "joke," and the appellant instantly shot him, inflicting a wound in his neck. The bandits then robbed a gasoline service station across the street from the restaurant, where the appellant shot and seriously wounded Carl W. Johnson, the proprietor, and Rex Hayden, and shot and killed John Duane. The murder of Duane is charged in the third count of the indictment.

The appellant and Papadaches then held up, beat, and robbed three other men at dif-

ferent points. While they were searching the last victim, an attendant at an oil station, a police officer drove his automobile into the place, and the bandits fled in the taxicab. In the pursuit which followed, during which a number of shots were fired by the pursuers, the appellant wrecked the taxicab. Papadaches and he separated, running in different directions. A week afterward the appellant was arrested at his home in San Francisco. The place was surrounded by police officers, and a search was made for Kelly. He was in hiding, and, when discovered, attempted to get away, but was shot and seriously wounded by the arresting officers. Papadaches, who became a witness for the prosecution, testified to all that occurred during the wild escapade in which he and the appellant had engaged. His testimony was amply corroborated by other witnesses in remarkable detail. As a witness in his own behalf, the appellant admitted that Papadaches, "Spannie," and he were together, and drinking during the day, but insisted that his mind was a blank and he remembered nothing that happened on the evening and night in question. He does not make a direct attack on the sufficiency of the evidence to support the judgments of conviction, but contends that the evidence regarding the murder of Swanson and the murder of Petrovich was of such weak character that if he had been tried separately upon those charges he would have been entitled to an advisory verdict of acquittal as to each. He contends, also, that if the evidence of those murders and the evidence of the other crimes committed by him, which was permitted to be introduced because of the threefold charge in the indictment, had been eliminated, there would have been such reasonable doubt as to his having murdered Duane that a verdict of acquittal could reasonably have been looked for. Because of this situation, he contends that he suffered irreparable injury when the trial court overruled his demurrer to the indictment and denied his demands for separate trials upon the three charges of murder. Because of this situation, he also claims that by his being compelled to go to trial on the one indictment, charging the three separate offenses, he was deprived of his constitutional rights to a common-law trial. He rests the proposition on his assertion that, at the common law, there could be no joinder of charges of separate and distinct felonies in the same indictment, and no joint trial of separate and distinct felonies which did not relate to the same act.

[1-3] It is well settled that the right of a trial by jury, guaranteed by the state Constitution (article 1, § 7), is the right as it existed at common law, and any act of the Legislature attempting to abridge that right is void. *People v. Powell*, 87 Cal. 348, 355, 25 P. 481, 11 L. R. A. 75. Appellant therefore argues that the provision of law (Pen. Code, § 954),

under which the present indictment was filed, is unconstitutional in that it makes it possible for one, accused as he was, to be placed on trial at the same time, and with the same jury, on three separate and distinct charges of murder, committed at different times, at different places, upon different individuals, and requiring different evidence from different witnesses to establish each separate act. We know of nothing in the state or Federal Constitutions sustaining appellant's position, and we do not agree with his contention that two crimes of the same grade, or class, could not be joined in separate counts in one indictment at the common law. The authorities appear to hold the other way. The Supreme Court of the United States has announced the view that there is no impropriety in trying one accused of crime for different offenses at the same time, if the offenses are charged in the same indictment and are of the same grade, and subject to the same punishment, and says that "substantially to the same general effect are the decisions of other American courts" (citing cases), and that "the rule in England is not materially different." *Pointer v. United States*, 151 U. S. 396, 401, 14 S. Ct. 410, 38 L. Ed. 208. The court says (page 403 [14 S. Ct. 412]):

"While recognizing as fundamental the principle that the court must not permit the defendant to be embarrassed in his defense by a multiplicity of charges embraced in one indictment and to be tried by one jury, and while conceding that regularly or usually an indictment should not include more than one felony, the authorities concur in holding that a joinder in one indictment, in separate counts, of different felonies, at least of the same class or grade, and subject to the same punishment, is not necessarily fatal to the indictment upon demurrer or upon motion to quash or on motion in arrest of judgment, and does not, in every case, by reason alone of such joinder, make it the duty of the court, upon motion of the accused, to compel the prosecutor to elect upon what one of the charges he will go to trial. The court is invested with such discretion as enables it to do justice between the government and the accused. If it be discovered at any time during a trial that the substantial rights of the accused may be prejudiced by a submission to the same jury of more than one distinct charge of felony among two or more of the same class, the court, according to the established principles of criminal law, can compel an election by the prosecutor."

[4] Section 954 of the Penal Code, as in force when the crimes here considered were committed, expressly provided, as now, that an indictment may charge two or more different offenses connected together in their commission, or two or more different offenses of the same class of crimes or offenses, and the prosecution is not required to elect between the different offenses or counts so set forth. The defendant may be convicted of any number of the offenses charged, and each offense upon which he is convicted must be

stated in the verdict. The court may, however, in the interest of justice and in its discretion, order that the different offenses or counts be tried separately. St. 1915, p. 744. These provisions appear to be in close harmony with the decision in *Pointer v. United States*, supra, and to preserve to accused persons the rights of the common law. The offenses in the present case were properly joined in one indictment, and the prosecution was not required to elect between them at the instance of the defendant. *People v. Dasey*, 75 Cal. App. 439, 442, 242 P. 876. The contention that the indictment is defective in that it contains no averment of the theory upon which the joinder of offenses is made falls with its making. The three counts set forth three offenses of the same class of crimes.

[5] The trial court did not abuse its discretion in refusing to order separate trials on each of the counts. The indictment showed that the three murders were committed by the same person, on the same day, and in the same city and county. These facts alone justified the court in forbearing, at the inception of the trial, to compel an election by the prosecution. When the evidence was concluded, the wisdom of the court's ruling was manifest. *Pointer v. United States*, supra. The circumstances under which each crime was committed, and the proof required to establish it, necessarily threw light upon the other two. We are therefore of the opinion that no constitutional guaranties of the appellant were denied him.

[6] It is next contended on behalf of the appellant that he was deprived of the number of peremptory challenges allowed him by law. During the course of the examination of the jury on voir dire, the defendant exercised and exhausted the twenty peremptory challenges allowed by section 1070 of the Penal Code. He then demanded that he be permitted to exercise the number of challenges to which he would have been entitled if he had been separately charged with three separate offenses of like nature and tried therefor at different times. The demand was properly denied. *People v. Potigian*, 69 Cal. App. 257, 266, 231 P. 593; 35 Cor. Jur. 414, par. 474. See, also, *People v. Howard*, 31 Cal. App. 358, 369, 160 P. 697.

[7] No error was committed by the admission in evidence of all the crimes committed by the appellant and Papadaches on the evening and night of the murders. The proof of one tended to prove facts material to proof of the others. The evidence was, therefore, admissible, and the fact that it might have tended to prejudice the defendant in the minds of the jurors was no ground for its exclusion. *People v. Nakis*, 184 Cal. 105, 114, 193 P. 92.

[8] Appellant complains that:

"The atmosphere created by the assistant district attorney trying the case was of such nature as to preclude a fair and impartial trial."

He has specified a number of instances of alleged misconduct on the part of the prosecuting officer. Although he did not assign all of such occurrences as error at the time, we have closely scrutinized the record of all of them, and are satisfied that nothing took place which was of such nature as to prejudicially affect the case of the defendant, or to warrant a reversal of the judgment. Some of the specifications relate to trivial matters, others to the exchange of comment, sometimes amounting to insinuations and direct charges, which were continually passing between counsel. The trial court, although frequently appealed to by counsel for the defense, did not always interfere or rule on the request, for the very sufficient reason that it was unnecessary. At other times he sustained the contention of the defense and instructed the jury to disregard the incident and any inferences which might have arisen from it. In one of the instances most complained of, which occurred during the closing argument of the assistant district attorney, the court instructed the jurors that they were "to disabuse their minds of the idea" that the prosecution was improperly attempting to convey a wrong impression to them concerning the crimes committed by the defendant.

[9] Complaint is made that the trial court committed error in denying the challenge for cause, interposed by the defendant, to juror Smith, who, upon examination on voir dire, expressed himself as prejudiced against a defense based on a plea of insanity. On his answering further that, if chosen as a juror, he would set the prejudice aside, receive the evidence with a free and open mind, take the facts from the witnesses and not from anything heard or read on the outside, give the plea of insanity, if presented, a fair and careful consideration, and follow the instruction of the court upon the subject, the challenge was denied. There was a conflict between different answers of the juror, which it was the function of the trial court to decide (*People v. Loper*, 159 Cal. 6, 11, 112 P. 720, Ann. Cas. 1912B, 1193), and from the record of the entire examination we are convinced that no error was committed.

[10] Another contention of the appellant is that error was committed when the trial court did not allow the defendant to impeach the testimony of Dr. Strange, the autopsy surgeon, regarding the bullets taken from the bodies of Swanson and Petrovich. In order to show an alleged contradiction, the defense offered the testimony of the witness given at the coroner's inquest. A designated portion of the record was shown to the witness and read by him, but the court sustained the objection of the prosecution to the line of cross-examination. The testimony before the coroner was not admitted, but is brought here

as an exhibit "for identification." The witness testified before the coroner that he performed autopsies upon the bodies of the three murdered men within a few hours after they were killed, and that the bullet taken from the body of Swanson was a steel-packed bullet weighing 93 grains, and that the bullet taken from the body of Petrovich was a lead bullet, not of the "steel-jacketed variety," weighing 68.5 grains. At the trial the witness testified exactly the same way, except that he could not say whether the bullet taken from the body of Petrovich was steel jacketed, that he found it without a steel jacket, and did not search for pieces of steel jacket in Petrovich's body. The only apparent discrepancy in the testimony of the witness, given upon the two occasions, is that at the inquest, and without any further pursuit of the subject, he said the bullet was "not the steel-jacketed variety," while at the trial he said, for the reasons stated, that he could not tell, after it had been fired, whether it was steel jacketed when fired into the body of Petrovich; that he had found many bullets, and later found the steel jackets and fitted them on the bullets. The bullets were admitted in evidence at the request of the defendant, and we fail to perceive how any injury was done to his case.

[11] The testimony of the police officers that, when the defendant was found at his home in San Francisco, a week after the murders were committed, he was in hiding and attempted to escape was properly admitted for the purpose of showing a consciousness of guilt. *People v. Fowler*, 178 Cal. 657, 673, 174 P. 892.

[12] While the appellant lay wounded at the City and County Hospital he was visited by police officers who read to him an alleged confession made by Papadaches, who was present, and who was recognized by the appellant. When asked if he had heard what was read, the appellant answered, "Yes sir," and said nothing more. Whether or not the circumstances were such as to permit the introduction of the statement and the evidence of what the defendant did when it was read to him was a question for the trial court to determine. We are satisfied that the statement and the evidence were properly admissible. *People v. Byrne*, 160 Cal. 217, 235, 116 P. 521.

The defendant, Kelly, having been accorded a legal, fair, and impartial trial, the judgments of conviction and the order denying the motion for a new trial are, and each is, affirmed.

We concur: KOFORD, Justice pro tem.; RICHARDS, J.; SEAWELL, J.; SHENK, J.; CURTIS, J.; LANGDON, J.

203 Cal. 183

(263 P.)

GORDON v. PERKINS. (S. F. 12193.)

Supreme Court of California. Jan. 23, 1928.

- 1. Venue** §52(1)—Venue will not ordinarily be changed, where convenience of witnesses requires action to be tried in county where it was brought.

When, in opposition to motion for change of venue to residence of defendant, convenience of witnesses is alleged and requires that action be tried in county where it was brought, place of trial will not ordinarily be changed.

- 2. Venue** §37—Unless answer was filed at time demand for change of venue was made, counter-motion to retain case for convenience of witnesses will not lie.

Unless answer has been filed at time demand for change of venue is made, counter motion to retain case on ground of convenience of witnesses will not lie, since, until issues are settled, court cannot determine what testimony will be material.

- 3. Appeal and error** §863—Sufficiency of complaint is not before reviewing court on appeal from order granting change of venue.

On appeal from order granting motion for change of venue, question whether complaint states facts sufficient to constitute cause of action which was determined by overruling of demurrer in trial court is not before reviewing court.

- 4. Appeal and error** §1024(3)—Order on conflicting affidavits, granting or refusing change of venue, supported by substantial evidence, will not be disturbed.

Where there is substantial evidence to support action of trial court, an order based on conflicting affidavits either in granting or refusing change of venue will not be disturbed.

- 5. Appeal and error** §912—Where affidavits on motion for change of venue are conflicting, those favoring prevailing party must be taken as true by reviewing court.

Where there is any conflict in affidavits presented on motion for change of venue, those in favor of prevailing party must be taken as true by reviewing court, and facts stated therein must be considered established.

- 6. Venue** §7—Affidavits supporting motion for change of venue back to county where action was brought, on ground of convenience of witnesses, held to authorize granting of motion.

Where venue had been changed to county of defendant's residence in action for damages for breach of contract for sale of real property, affidavits supporting plaintiff's motion for change of venue back to county where action was originally brought, showing names of numerous proposed witnesses, all residents of such county, who would testify to circumstances alleged in complaint and value of land involved which was situated in such county, and various other relevant matters, held to authorize granting of motion.

- 7. Appeal and error** §912—All presumptions on appeal favor order changing venue, which will not be interfered with, in absence of clear abuse of trial court's discretion.

All presumptions on appeal are in favor of order as made changing place of trial on ground of convenience of witnesses, since much is confided to court's discretion, and it is only where it is clear that there has been abuse of such discretion that reviewing court will interfere.

Department 1.

Appeal from Superior Court, Contra Costa County; H. V. Alvarado, Judge.

Action by Virgel Gordon against S. J. Perkins. From an order granting a change of venue, defendant appeals. Affirmed.

Lee D. Windrem and W. T. Kearney, both of Richmond, and John W. Maloy, of Madera, for appellants.

Henry I. Maxim and John J. Coghlan, both of Madera, for respondent.

PRESTON, J. This is an appeal from an order of the Contra Costa county superior court granting a change of venue from that county to the county of Madera.

The complaint, which was filed in Madera county, alleged damages in the sum of \$8,000 suffered by plaintiff because of defendant's failure and refusal to perform his part of a certain written agreement respecting the sale by him to plaintiff of a 40-acre tract of land situate in said county. Defendant filed a demurrer to the complaint, together with notice of motion and demand for change of venue; also affidavit of merits in support thereof, alleging also therein his residence in Contra Costa county. In opposition thereto plaintiff filed his counter affidavit, alleging that the convenience of witnesses and ends of justice would be promoted by retention of the cause in Madera county.

[1, 2] When, in opposition to a motion for a change to the residence of the defendant, the convenience of witnesses is alleged, and requires that an action be tried in the county where it was brought, the place of trial will not ordinarily be changed. This rule, however, is subject to the exception that, unless answer has been filed at the time the demand for change of venue is made, a counter-motion to retain the case on such ground will not lie, for the obvious reason that, until the issues are settled, the court cannot determine what testimony will be material. *Cook v. Pendergast*, 61 Cal. 72; *Dawson v. Dawson* (Cal. App.) 256 P. 491; *Pascoe v. Baker*, 158 Cal. 232, 110 P. 815; and *San Jose Hosp. v. Etherton*, (Cal. App.) 258 P. 611, and cases there cited; also *Sheffield v. Pickwick Stages*, 191 Cal. 9, 214 P. 852. The court therefore properly granted defendant's motion changing the place of trial to Contra Costa county.

When the matter was heard in the superior

court of the latter county, that court overruled the demurrer to the complaint, and thereafter defendant duly filed his answer. Plaintiff then gave notice of motion for change of venue back to Madera county, supporting it with affidavit of merits and supplemental affidavit, in opposition to which defendant filed a counter affidavit. Upon the hearing the court made its order granting plaintiff's motion, and it is from that order that defendant is now appealing.

[3] We are not called upon to consider his contention that the complaint does not state facts sufficient to constitute a cause of action, as this issue was determined by the overruling of the demurrer in the court below, and is not before us on this appeal.

[4, 5] The remaining question involves the sufficiency of the averments of plaintiff's affidavits in support of his motion. On this point we have no hesitancy whatsoever in declaring that there is substantial and abundant evidence to uphold the order appealed from, nor will anything be found in the counter affidavits of defendant of sufficient weight to disturb this conclusion. Where there is substantial evidence to support the action of the trial court, an order based upon conflicting affidavits, either in granting or refusing a change of venue, will not be disturbed. *Brown v. S. F. Sav. Union*, 122 Cal. 648, 55 P. 598; *Lakeshore Cattle Co. v. Modoc, etc., Co.*, 108 Cal. 261, 41 P. 472; *McKenzie v. Barling*, 101 Cal. 459, 36 P. 8. "In considering the affidavits used upon the said motion this court is bound by the same rule that controls where oral testimony is presented for review. If there is any conflict in the affidavits, those in favor of the prevailing party must be taken as true, and the facts stated therein must be considered established." *McKenzie v. Barling*, 101 Cal. 462, 36 P. 8; *Doak v. Bruson*, 152 Cal. 18, 91 P. 1001; *Henderson v. Cohen*, 10 Cal. App. 585, 102 P. 826." *Sourbis v. Rhoads*, 50 Cal. App. 98, 100, 194 P. 521. See, also, *Smillie v. Smillie*, 24 Cal. App. 420, 424, 141 P. 829.

[6] The affidavits of plaintiff disclose the names of numerous proposed witnesses—all residents of Madera county—whom he avers will testify as to the circumstances alleged in the complaint, as to the value of the land involved, which is also situated in said county, and as to various other relevant matters, which need not be here set forth in detail. It is sufficient to state that the allegations thereof reveal ample support for the action of the court.

[7] It should be remembered that all presumptions upon appeal are in favor of the order of the court as made changing the place of trial. *Grant v. Bannister*, 145 Cal. 219, 78 P. 653. As said in the case of *Miller & Lux v. Kern Co. Land Co.*, 140 Cal. 132, 136, 73 P. 836, 838:

"Much is necessarily confided to the discretion of the trial court on motions for a change of place of trial on the ground of convenience of witnesses, and it is only where it is clear that there has been an abuse of such discretion that this court will interfere."

See, also, *Grant v. Bannister*, supra, and *Mayson v. Baker*, supra.

Order affirmed.

We concur: CURTIS, J.; SEAWELL, J.

203 Cal. 203

ZIMMER et al. v. CONGREGATION BETH ISRAEL et al. (S. F. 11986.)

Supreme Court of California. Jan. 25, 1928.

Cemeteries — 18—Refusal to enjoin interference with erection of tombstone violating cemetery regulations held warranted.

Findings of fact based on sufficient evidence that cemetery association, before sale of burial rights to plaintiff, had established regulations concerning size, type and style of tombstones permitted in cemetery, held to support refusal of injunction against interference with erecting tombstone violating such regulations.

Department 2.

Appeal from Superior Court, City and County of San Francisco; Walter Perry Johnson, Judge.

Action by Max Zimmer and another against the Congregation Beth Israel and another for an injunction. From a judgment for defendants, plaintiffs appeal. Affirmed.

Olin L. Berry, of San Francisco, for appellants.

Redman & Alexander and G. C. Ringole, all of San Francisco, for respondents.

RICHARDS, J. This appeal is from a judgment of the superior court in and for the city and county of San Francisco in favor of the defendants in an action instituted by the plaintiffs having for its purpose the prevention of the defendants from interfering with the attempted effort and action of the plaintiffs to place a tombstone of a certain type upon and over the grave of one Bertha Zimmer, the deceased wife of the plaintiff Max Zimmer and sister of the plaintiff Joseph B. Kasser, the said grave of said decedent being located in a certain portion of a cemetery known and designated as "Salem Cemetery," located in the county of San Mateo, and maintained and conducted by the defendant Congregation Beth Israel, a religious association, for the burial of persons of the Jewish faith. The decedent, Bertha Zimmer, died on January 20, 1922, in the city of San Francisco. Subsequent to her death her husband purchased from said defendant Congregation Beth Israel the right to bury the body of his deceased wife in said Salem Cemetery

and in a portion thereof wherein single graves are sold to persons who do not desire to purchase more than the space for one grave. At the time of said purchase and for some years prior thereto the said defendant Congregation Beth Israel had in operation certain duly adopted rules and by-laws of said association with relation to the size, type, and style of tombstones to be permitted to be erected or placed upon and over graves in the several portions or divisions of said cemetery, depending upon their location, which rules and by-laws had, since their adoption, been uniformly enforced. That by virtue of such rules and by-laws no person was to be permitted to erect a full-length tombstone over any grave in the division of said cemetery known and maintained as a single grave portion or division thereof by said rules and by-laws. Said rules and by-laws were peculiarly applicable to those portions or enlargements of said cemetery which had been opened up for burials since the year 1917, and, while such rules and by-laws could not be given retroactive operation in the other portions of said cemetery wherein burials had been had and tombstones and monuments erected in the earlier history of said place of interment, they were given application uniformly to the portions and divisions of said cemetery which had been opened up for interments and in which purchases of plots for single graves had been made since said date. That the purpose underlying the adoption and uniform enforcement of said rules and by-laws within the above-named portions and divisions of said cemetery was that of facilitating the care and beautification of said cemetery in the interest of all of those who had or should acquire burial plots therein.

The trial court has found upon sufficient evidence: That such rules and by-laws were reasonable and were uniformly applied and enforced within the above-named portions or divisions of said cemetery. The said rules and by-laws further provided that no monuments or other adornments of burial lots were to be constructed or placed thereon without the approval of the cemetery committee of said association, and particularly that no monument or gravestone was to be erected thereon until the inscription thereof had been approved by the rabbi of said congregation. The purchase of the burial plot for the interment of said Bertha Zimmer, deceased, in said cemetery had been made by her said surviving husband long after the date of the adoption of said rules and by-laws and while the same were in full and uniform operation upon and over the portion or division of said

cemetery within which such purchase and interment were made. Notwithstanding this, the said plaintiffs, the husband and brother, respectively, of said decedent, after the interment of her remains in said purchased lot, proceeded to contract with a manufacturer of tombstones for the creation and placing upon and over the grave of said decedent of a marble slab 6½ feet long by 3 feet wide, which, when so placed, was to lie horizontally over, and was to entirely cover, the grave of said decedent. That said tombstone, as to its size and the manner of placing the same, was in violation of the aforesaid rules and by-laws of said association and was proposed by said plaintiffs to be so constructed and so placed upon the grave of said decedent without the permission first to be procured from the said association or the governing officials, and without any application either for such permission or for the approval of the inscription to be placed thereon. That, upon learning of the desire and intent of said plaintiffs to place said tombstone upon and over the grave of the decedent, the association, through its said officials, made offers to the plaintiffs to permit them to remove the remains of said decedent to another plot whereon said tombstone might be placed, which, though of higher price, was to be at no additional cost to them, and further offered to pay all of the charges and expenses of such removal, but which offers the plaintiffs refused to accept, but, on the contrary, commenced this action.

The foregoing facts were found by the trial court and were fully supported by the evidence deduced at the trial of this action. That the judgment of the trial court based upon such a state of facts was proper and should be sustained requires little if any argument in its support. The right of associations of this character to make and enforce reasonable rules and regulations and by-laws for the government and beautification of places of interment is conceded by the appellants themselves. That such rules and regulations are sufficiently uniform in their operation when they are given equal application to the added portions of such places of interment which come into use as the years of accumulating interments go by would seem to be supported by the nature of things and to be unopposed by any reasoning or authority to which this court has been referred by the appellants herein. We find no merit in this appeal.

The judgment is affirmed.

We concur: LANGDON, J.; SHENK, J.

203 Cal. 199

GRACE CORSET CO. v. BROWN BROS. et al.
(S. F. 12123.)

Supreme Court of California. Jan. 24, 1928.

Judgment ⇨138(1)—Setting aside default judgment held not abuse of discretion in view of attempted adjustment after judgment, and defendants' counsel's and family's sickness (Code Civ. Proc. § 473).

Where application was made for relief under and within the time provided by Code Civ. Proc. § 473, court's setting aside a judgment and vacating the default held not an abuse of discretion where it was shown that after entry of default judgment the parties had carried on negotiations as to settlement and setting aside default, and for some time after the default was entered, both the defendant's counsel and his family were ill, but counsel, upon release from the hospital, immediately had engaged associate counsel to proceed to have the default judgment set aside.

Department 2.

Appeal from Superior Court, City and County of San Francisco; John J. Van Nostrand, Judge.

Action by the Grace Corset Company against Brown Bros. and others. From an order setting aside a default judgment for plaintiff, plaintiff appeals. Order affirmed.

John W. Marshall, and Ernest K. Little, both of San Francisco, for appellant.

Daniel Hone, and Derby, Single & Sharp, all of San Francisco, for respondents.

SHENK, J. This is an appeal from an order setting aside a default judgment in the sum of \$3,235.70. The plaintiff is engaged in business at Kalamazoo, Mich., and the defendants are located at San Francisco. Summons was served on the defendant Joseph Brown on September 11, 1925, and on the defendant Arthur Brown on the 17th day of October following. On the day last named the defendants employed counsel to represent them. Counsel for defendants endeavored to obtain from plaintiff's counsel a stipulation extending time to plead, but without success. On the morning of October 28, 1925, counsel for defendants examined the records of the clerk's office and ascertained that no default had been entered. He thereupon applied to the court for and obtained an order extending the time of the defendants to plead to November 10, 1925. He then proceeded to the clerk's office to file the order and found that the default had been entered. It appeared by the affidavit of counsel for the defendants that counsel for both parties had occupied offices together and had been friends for a long period of time. After the default was entered negotiations were entered upon looking to a mutual agreement to set aside the default, with the suggestion from both sides

that the case should be settled out of court. Plaintiff concluded that he would not stipulate to have the default opened up without the consent of his client. Correspondence was had with the plaintiff in Michigan who declined to authorize its counsel to set aside the default. These negotiations continued until after the holidays when illness invaded the family of counsel for the defendants, resulting in the death of his mother and his own hospitalization. Immediately upon coming out of the hospital in March, 1926, and feeling not sufficiently recovered to attend to the matter, he engaged associate counsel to proceed in court to have the default set aside. Application was made for relief under and within the time provided by section 473 of the Code of Civil Procedure. Whereupon the judgment was set aside and the default vacated. It also appeared that after the defendant Joseph Brown had been served with summons on September 11, 1925, and before the default was entered, counsel for plaintiff wrote to said defendant requesting certain information concerning the claim sued on. As late as October 15th and before the defendant had employed counsel, plaintiff's counsel wrote to defendant Joseph Brown asking that the matter be adjusted. Other facts shown by the record tending to uphold the ruling of the trial court need not be related. It is enough to say that no abuse of discretion on the part of the trial court is shown.

The order is affirmed.

We concur: **RICHARDS, J.; LANGDON, J.**

203 Cal. 173

BLACK v. BLACK. (S. F. 11993.)

Supreme Court of California. Jan. 20, 1928.

1. Divorce ⇨245(2), 309—Divorce decrees are subject to modification as to allowances for alimony and children's support where situation of parties is changed.

Allowance, in divorce decree for alimony and support of children, is always subject to modification by chancellor, where changed situation of parties affected requires such modification.

2. Divorce ⇨245(3), 309—Wife, resisting husband's proceedings to have allowance to her and children reduced, had burden to establish agreement for permanent allowance.

When husband sought to have final divorce decree modified by reducing monthly allowance to wife for alimony and support of children, burden was on wife to show agreement that allowance provided for in decree was to be permanent, conceding that parol evidence could be resorted to to show intent in this particular.

3. Appeal and error ⚭1011(1)—Decision by trial court on conflicting evidence is final.

Decision of trial court as to issues on conflicting evidence is conclusive.

4. Divorce ⚭245(2), 309—Reduction of monthly allowance under divorce decree for support of wife and 18 and 20 year old sons, whose combined income exceeded that of husband, from \$60 to \$30 monthly, held proper.

Where combined income of divorced wife and two sons, aged 18 and 20, was greater than that of husband, and wife, by decree, had been allowed corner lot containing residence, free of incumbrances, order of trial court reducing amount of monthly allowance under divorce decree for wife's alimony and support of children from \$60 to \$30 per month held proper.

Department 1.

Appeal from Superior Court, City and County of San Francisco; J. J. Trabucco, Judge.

Suit by Lillian Ella Black against Frank Morris Black for divorce. From an order modifying a final decree of divorce by reducing the monthly allowance awarded plaintiff for alimony and support of minor children, plaintiff appeals. Affirmed.

Herbert Choynski, of San Francisco, for appellant.

Robert E. Fitzgerald, of San Francisco, for respondent.

SEAWELL, J. This appeal is taken from an order modifying a final decree of divorce by reducing the monthly allowance of \$60 awarded by said decree for the support of plaintiff (appellant) and the minor children of the marriage to \$30 per month.

[1-3] Appellant and respondent intermarried October 17, 1901, and two sons and one daughter were the issue of the marriage. On January 24, 1905, respondent's mother, in consideration of the love and affection she bore unto him, and to provide for his better maintenance and support, conveyed to him a lot situate at the northeast corner of Geary street and Eighteenth avenue, city and county of San Francisco, and being 120½ feet on Geary street by 100 feet on Eighteenth avenue. On January 24, 1905, in consideration of love and affection, and for her better support and maintenance, respondent conveyed said lot to his wife, appellant herein. On May 27, 1920, appellant brought an action in divorce against respondent, alleging cruelty. On October 14, 1920, the court rendered its decision in favor of the appellant, granting her a divorce, awarded her the custody of the minor sons, and made an allowance of \$60 per month for the support of the wife and said minor sons. This order became final October 17, 1921. Pending the divorce action, an adjustment of property rights was made by the parties. On September 20, 1920,

during the pendency of the action, the wife, who was the owner of the legal title of the lot in question, in consideration of love and affection, conveyed to her husband the easterly portion, 80x100 feet, of the lot formerly conveyed by his mother to him, and later conveyed by him to her. The wife retained the corner lot, 40x100 feet, which was occupied by the family residence. The husband's portion of the lot was unimproved. On the same day the husband quitclaimed unto his wife said lot 40x100 feet. A mortgage in the sum of \$3,200, which covered the entire lot, was assumed by the husband, and the wife's lot was free of incumbrance, and was valued at about \$9,000. She afterwards sold it, and purchased property elsewhere. It was the claim of the wife, appellant, that she and her former husband entered into an oral agreement whereby the allowance of \$60 per month for the support of herself and said minors was to be permanent, and it was the agreement of said parties that said monthly allowance of \$60 was to be carried into the judgment, and was not subject to modification or change thereafter. The judgment makes no reference to any such stipulation or agreement, and, upon its face, is the usual decree entered in divorce actions. Such decrees are always subject to modification by the chancellor as the changed situation of the parties affected thereby may seem to require a modification or change in the original decree. The burden of showing that an agreement was entered into between the parties to the effect that the decree as entered was to be permanent, and was not subject to modification or change thereafter, granting that parole evidence may be resorted to to show the real intent of the parties as to the effect of the decree in this particular, was upon the wife, and, inasmuch as the evidence was conflicting as to that issue, the decision of the trial court would conclude the question.

[4] We are of the opinion from the record before us, that the trial court rendered a just and equitable decision. Beyond doubt the wife was the holder of the legal title to the property in question, and the husband was the owner of a beneficial interest therein. The fact that the wife, in the settlement of their property rights in contemplation of divorce, deeded to her husband a portion of the lot originally deeded by her husband's mother to him, and then by him to her, is a strong circumstance against her claim that she was the owner absolute of said lot. In the settlement of their property rights the wife was permitted to retain as her own the corner lot, upon which the house stood, free of incumbrances, and the husband took the remaining unimproved portion of said lot, and assumed the \$3,200 mortgage which formerly covered the entire lot. At the

time the decree was made, the husband, who was a police officer, was receiving a monthly salary of \$140. Since the decree was entered, his salary and other emoluments have increased his income to \$203 per month. He has since married, and his family consists of himself, his wife, and a step-daughter. At the time this proceeding was before the trial court the two sons, whose custody was given to the mother, were 18 and 20 years, respectively. The younger was a part-time employee of the Crocker National Bank of San Francisco, and was receiving a salary of \$75 per month; the elder was an employee of the Standard Oil Company, receiving a salary of \$100 per month, and the wife was employed by the Sanborn Map Company at a weekly salary of \$16.23. Their combined salaries were greater than the husband's and father's by \$36 per month. Adding the \$30 allowance, which respondent is required to contribute, makes their income \$66 per month in excess of respondent's.

The evidence, considered in the light of the transactions between the parties, fully justified the court in reducing the amount of the monthly allowance from \$60 to \$30 per month.

The order appealed from is affirmed.

We concur: PRESTON, J.; CURTIS, J.

203 Cal. 197

STONE v. EVERTS et al. (S. F. 12155.)

Supreme Court of California. Jan. 24, 1928.

1. Venue ⇐70—Refusal of change of venue on uncontradicted affidavit alleging defendants were residents of other county held error (Code Civ. Proc. § 395).

Under Code Civ. Proc. § 395, in action to recover reasonable value of legal services, affidavit filed by one defendant, alleging that, at commencement of action, and at all times since, all defendants were residents of county other than that in which action was brought, was sufficient affidavit of nonresidence of defendants other than affiant, and, being uncontradicted, rendered refusal of change of venue, error.

2. Venue ⇐22(1)—On uncontradicted affidavit showing defendants resided in county other than one where personal action was brought, venue should have been changed (Code Civ. Proc. § 395).

Under Code Civ. Proc. § 395, where, in action to recover for legal services, uncontradicted affidavit showed defendants all resided at beginning of suit and at time of trial in county other than one in which suit was brought, venue should have been changed to their county on motion.

Department 2.

Appeal from Superior Court, City and County of San Francisco; Edmund P. Morgan, Judge.

Action by Ruth Stone against P. L. Everts and others, individually and as copartners, under the name of Everts, Ewing, Wild & Everts, and another. From an order denying a motion for a change of venue, defendants appeal. Reversed, with directions.

L. W. Young, of Fresno, and Sullivan & Sullivan and Theo. J. Roche, of San Francisco, for appellants.

Barry J. Colding and Theodore Hale, both of San Francisco, for respondent.

LANGDON, J. [1] This is an appeal by the defendants from an order denying their motion for change of place of trial from the superior court of the state of California, in and for the city and county of San Francisco, to the superior court of the state of California, in and for the county of Fresno.

The plaintiff brought an action against the defendants upon an assigned claim of Messrs. Colding & Hale, to recover the reasonable value of legal services alleged to have been rendered, to defendants at their special instance and request. At the time of pleading by way of general demurrer, defendants gave due and proper notice of motion for change of place of trial, and also served and filed an affidavit of merits executed by the defendant Conway, not only on his own behalf, but on behalf, and at the request, of the other defendants; and included in said affidavit the following allegations regarding the residence of the defendants:

"Affiant further states that he was, at the time of the commencement of this action, and now is, a resident of the county of Fresno, state of California, and also that he has a personal acquaintanceship with each of the remaining above-named defendants, and has personal and direct knowledge of the residence of each of the remaining above-named defendants at the time of the commencement of this action, and that, by reason of his acquaintanceship and his personal knowledge, he avers that all of the remaining above-named defendants were at the time of the commencement of this action, and ever since have been, and now are, residents of the county of Fresno, state of California."

The trial court denied the said motion as to all the defendants, except D. F. Conway, and from this order the appeal is taken. Respondent seeks to justify the order upon the sole ground that the affidavit of D. F. Conway as to the residence of the other defendants was insufficient. It is admitted that one defendant may make such an affidavit upon behalf of the others, but the contention is made that the foregoing language is insufficient to allege that the city and county of San Francisco is not the residence of the defendants. From the allegation "that all of the remaining above-named defendants were, at the time of the commencement of this action, and ever since have been, and now are, residents of the county of Fresno,

State of California," it must necessarily follow that said defendants are not residents of the city and county of San Francisco. Furthermore, the case of *Simpson v. Hosin*, 49 Cal. App. 585, 193 P. 867, is authority upon the point that it is not necessary to make a negative showing that a defendant is not a resident of the county where the action is brought. The court in the last cited case said:

"But the Code does not require this negative showing. Section 395 of the Code of Civil Procedure provides that an action must be tried in the county in which the defendant resides at the commencement of the action."

It is also to be observed that no counter affidavits were filed by plaintiff, and the facts alleged in the affidavit of defendant Conway stand uncontradicted in the record.

[2] As the action was a personal one, and the affidavit showed that all the defendants resided in the county of Fresno, their motion for a change of the place of trial to that county should have been granted.

The order appealed from is reversed, with directions to the trial court to grant the motion for a change of the place of trial as to all the defendants.

We concur: RICHARDS, J.; SHENK, J.

203 Cal. 187

SEATON v. GARCIA & MAGGINI CO.
(S. F. 11710.)

Supreme Court of California. Jan. 24, 1928.

1. Appeal and error $\hookrightarrow$ 1010(1)—**Judgment for buyer's breach of apple purchase is affirmed where trial court's finding is supported by evidence.**

In seller's action for buyer's breach of contract to purchase apples and to furnish lug boxes for harvesting crop, on appeal from judgment for plaintiff in which fact question only is involved, judgment is affirmed where trial court's findings are supported by evidence.

2. Sales $\hookrightarrow$ 384(1)—**On buyer's failure to furnish lug boxes, seller held not required to secure boxes elsewhere to minimize loss.**

As respects duty to minimize loss, where buyer of crop of apples breached its contract to furnish necessary lug boxes to harvest the apples, seller was not required to secure boxes elsewhere, but was entitled to rely on buyer's repeated promises to furnish sufficient boxes on seller's repeated demands for boxes.

In Bank.

Appeal from Superior Court, Sonoma County; Ross Campbell, Judge.

Action by Elwyn D. Seaton against the Garcia & Maggini Company. From a judg-

ment for plaintiff, defendant appeals. Affirmed.

W. F. Cowan and A. W. Hollingsworth, both of Santa Rosa, for appellant.

Geary & Geary, of Santa Rosa, for respondent.

LANGDON, J. This is an appeal by the defendant from a judgment against it for \$4,845.98, damages for breach of contract. The plaintiff was the owner of an apple orchard in Sonoma county, Cal., and entered into a contract with the defendant by which the defendant agreed to purchase and the plaintiff to pick and deliver "all the Gravenstein apples, below specified and grown during the current year on his [seller's] ranch." The seller agreed to haul the apples from the plowed ground of the orchard and place them in a convenient place to be loaded on auto trucks and to assist the drivers of said trucks in loading the same. It was also agreed that said apples were to be weighed at the packing house of the buyer at Sebastopol, Cal., and that the buyer would furnish the necessary lug boxes for harvesting the crop. The contract also contained the following provision:

"It is understood that the price paid for these apples is \$60 per ton and is for fruit two inches in diameter and larger and is free from worms and any deceased imperfections which would cause same to be unfit for packing and drying."

The complaint alleged that plaintiff had delivered to defendant 303,178 pounds of apples of the kind described in the contract, upon which there was a balance still due of \$1,450.74; and as a second cause of action, it was alleged that the defendant had failed and refused during the harvesting season, though repeated demands were made upon it to furnish lug boxes in sufficient quantity to harvest said crop of apples sold by plaintiff to defendant; that by reason of the failure of defendant to furnish a sufficient quantity of lug boxes or any boxes to harvest said crop of apples, many of the apples raised by the plaintiff and by the plaintiff sold under said contract to defendant fell from the trees on the plaintiff's ranch to the ground, and became unfit and unsuited for delivery by plaintiff to the defendant under said contract. It is also alleged that for the purpose of minimizing the damage to the defendant by reason of such failure of defendant to furnish boxes for harvesting of said apples, this plaintiff gathered said apples and sold them at the best price obtainable in the vicinity in which said apples were grown. It is alleged that by reason of the failure of the defendant to furnish said boxes, and the consequent necessity of a sale by plaintiff of the fallen apples (83½ tons) at a price of \$6 per ton, the plaintiff has been damaged. It is also alleged that by reason of the failure of

defendant to furnish the lug boxes in accordance with its contract, plaintiff was unable to harvest and sell for any purpose or any price 120 tons of apples of the kind and character described in the contract, resulting in additional damage to plaintiff in the sum of \$7,200. Judgment was prayed for a total of over \$13,000.

The findings conform substantially to the allegations of the complaint. The number of apples sold by the plaintiff at \$6 per ton to minimize the damage caused by defendant's failure to furnish the lug boxes, was found to be 82½ tons; that there fell to the ground and remained unsold, by reason of defendant's default, 6¾ tons of apples described in said contract, all resulting in a loss to plaintiff of \$4,845.98, the amount for which judgment was given.

[1] The appeal is taken entirely upon questions of fact, no errors of law being alleged by appellant. The contentions in the briefs of appellant involve nothing more than an argument upon the evidence and the position taken is entirely without merit. An examination of the transcript and especially of that portion thereof printed in respondent's brief, which sets forth the testimony of several witnesses for the plaintiff, abundantly justifies the findings made by the trial court.

The defendant set up a counterclaim upon the theory that it had overpaid plaintiff for the apples actually received by it, as some of them were not in accordance with the specifications in the contract. Conceding to the appellant that its receipt and payment for the apples would not bar this counterclaim, if the facts supported it, nevertheless, it is perfectly apparent from the entire record and from all the facts and circumstances surrounding this transaction that the trial court was justified in concluding that there was no merit in the claim set forth.

A detailed discussion of the evidence would serve no useful purpose; it has been carefully examined and found to abundantly support the findings, which justify the judgment given.

[2] The contention of appellant that it was the duty of the plaintiff to secure lug boxes elsewhere upon breach by defendant of the provision of the contract relating thereto is without merit under the facts of this case. The record shows that the defendant promised time and again to furnish sufficient boxes; that the plaintiff, from day to day, waited and telephoned and demanded boxes; and that plaintiff's losses occurred gradually while he was waiting, in reliance upon defendant's promises. It is also a fair inference from the testimony appearing in the record that there were no lug boxes to be had in the vicinity during the packing season. Plaintiff was in a helpless situation when defendant breached his contract under

the circumstances shown in the record, and he seems to have done what he could to minimize the loss.

The judgment appealed from is affirmed.

We concur: WASTE, C. J.; CURTIS, J.; PRESTON, J.; SHENK, J.; RICHARDS, J.; SEAWELL, J.

203 Cal. 167

ROCHA v. GARCIA et al. (S. F. 11951.) *

Supreme Court of California. Jan. 20, 1928.

Hearing Denied in Bank Feb. 16, 1928.

1. Municipal corporations ☞706(5)—Evidence held to show automobile driver's negligent failure to keep lookout or to avoid striking child at street intersection.

In action by 5 year old child for injuries from being struck by automobile which turned at intersection, evidence that driver was negligent either in failing to keep proper lookout for safety of small children on streets or that he observed plaintiff and could have avoided hitting him had he exercised proper care *held* to support judgment against driver of automobile.

2. Appeal and error ☞197 (5)—Judgment for plaintiff struck by automobile will not be reversed because based on acts of negligence not alleged where evidence was not objected to.

In action by child from being struck by automobile, where only acts of negligence alleged were operating automobile at high and reckless speed, which was disproved by evidence, and that defendant carelessly and negligently permitted automobile to strike plaintiff, judgment for plaintiff will not be reversed on appeal because based on evidence of acts of negligence other than those specifically alleged, introduced without objection, even if such evidence was not admissible under complaint.

3. Municipal corporations ☞706(5)—Evidence held to show automobile driver had last clear chance to avoid injuring child notwithstanding contributory negligence.

In action by 5 year old child for injury from being struck by automobile, turning corner at street intersection, evidence that automobilist had last clear chance to avoid injury *held* to support judgment for plaintiff, regardless of plaintiff's alleged contributory negligence in running in front of automobile.

4. Appeal and error ☞999(1)—Verdict and judgment sustainable on any reasonable theory, will not be disturbed on appeal.

Where verdict and judgment based thereon may be sustained on any reasonable theory, they will not be disturbed on appeal.

5. Municipal corporations ☞706(5)—Testimony as to defective brakes of automobile entrusted to inexperienced driver held to support recovery against owner for injury to child.

In action by 5 year old child for injury from being struck by automobile, automobile owner's testimony as to defective condition of brakes *held* to support judgment against owner who entrusted car to 15 year old driver.

☞For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

★Hearing denied in bank.

6. Parent and child ~~§~~13(1)—Parents held not liable for son's negligence in driving third person's automobile without license, though they had signed application for license (Motor Vehicle Act 1923, § 62).

Under Motor Vehicle Act, § 62 (St. 1923, p. 532), imposing liability on parents in certain cases for negligent operation of motor vehicles by their children who are licensed to drive motor vehicles, where parents of 15 year old son forbade his driving automobile, they were not liable to child injured by third person's automobile driven by their son, though they had signed son's application for motor vehicle operator's license which had not been issued.

Department 1.

Appeal from Superior Court, Marin County; Edward I. Butler, Judge.

Action by Joao Dos Santos Rocha, Jr., a minor, by Joao Dos Santos Rocha, his guardian ad litem, against Willis Garcia, Manuel Garcia, Ella Garcia, and Beverly Bones. From a judgment for plaintiff, defendants appeal. Affirmed as to defendants Willis Garcia and Beverly Bones, and reversed as to defendants Manuel and Ella Garcia.

George H. Harlan, of San Rafael, for appellants.

Edward D. Mabson, of San Francisco, for respondent.

SEAWELL, J. [1] Defendants appeal from a judgment entered upon a jury verdict awarding plaintiff \$500 as damages for personal injuries received when he was struck by an automobile owned by defendant Beverly Bones and operated by defendant Willis Garcia, a minor 15 years of age at the time of the accident and the son of the defendants Manuel Garcia and Ella Garcia.

Appellants contend that the evidence establishes, as a matter of law, an absence of negligence on the part of appellant Willis Garcia, the driver of the car, and contributory negligence of the respondent, who was 5½ years of age at the time he received the injuries complained of. The appellants Manuel Garcia, Ella Garcia, and Beverly Bones disclaim responsibility for the injuries on grounds which will be stated hereafter.

The accident occurred on the afternoon of April 8, 1924. Appellant Willis Garcia was a student at the Mt. Tamalpais Union High School, and had been participating in a parade being given by the students of the school to advertise a high school circus which the student body was promoting. The automobile was a touring car model, and had been decorated for the occasion. Three other students, two boys and a girl, were in the car with Willis Garcia, the two boys sitting in the front seat with him and the girl sitting in the tonneau. The cars were returning from the parade and were proceeding northerly on Caledonia street, in the town of Sau-

salito, in procession, each car following closely behind the preceding vehicle. Willis turned west on Turney street at the corner of Caledonia and Turney streets for the purpose of letting out the high school girl, who lived on Turney street near Caledonia; it being his intention to stop at the corner upon completing the turn. As he was turning, or immediately after he had made the turn, respondent, who, with two small boys, was running across the street, was struck by the automobile driven by appellant Willis Garcia and received the injuries complained of.

The complaint alleged that Willis Garcia was operating the automobile at a high and reckless speed, and that, after turning into Turney street at a high and reckless speed he "carelessly and negligently permitted said automobile to strike said plaintiff." Witnesses for both respondent and appellants united in testifying that the parade line out of which Willis turned at Caledonia and Turney streets was moving at a speed between 10 and 15 miles an hour as it approached Turney street, and Willis and the other occupants of the car stated that he was slowing down from the speed at which he had previously been traveling to stop and let out the high school girl in the car when he struck respondent. Willis testified that he had given the signal for turning and had blown his horn. It would seem, therefore, that a lack of control of the car, due to a high rate of speed, was not the cause of the accident. Willis testified that respondent ran directly into the automobile. The facts and circumstances surrounding the accident, as related by the witnesses who testified upon the trial, would, however, seem to justify the jury in inferring that appellant Willis Garcia was negligent in either failing to keep a proper lookout for the safety of small children who might reasonably be expected to throng the streets upon the occasion described, or that he observed respondent and the other young children and could have avoided hitting respondent had he exercised the care that he should have exercised upon the occasion.

[2] We cannot disturb the implied finding of the jury on this point. Although the only acts of negligence charged in the pleadings were that Willis Garcia was operating the automobile at a high and reckless speed, which was disproved by the evidence, and that he "carelessly and negligently permitted said automobile to strike said plaintiff," it appears that the evidence as to the acts and conduct of appellant Willis Garcia in striking respondent which would be sufficient to sustain a verdict for damages was introduced without objection on the part of appellants. This being so, the decision will not be reversed because based upon other acts of negligence than those specifically alleged in the com-

plaint, even if it be conceded, for the purposes of argument, that evidence of other negligence was not admissible under the allegation that Willis Garcia "carelessly and negligently permitted said automobile to strike said plaintiff."

[3, 4] As to appellants' claim that recovery is barred because the evidence shows, as a matter of law, contributory negligence on the part of respondent in running into the street in the path of the automobile, if we grant, for the purpose of argument, that respondent's conduct did constitute negligence even in one so young, we would nevertheless be required to affirm the decision, for the evidence is susceptible of the inference that appellant Willis Garcia had the "last clear chance" to prevent the accident. Where the verdict of the jury and the judgment based thereon may be sustained on any reasonable theory, it will not be disturbed by an appellate court.

[5] We pass now to a consideration of the responsibility of the appellant Beverly Bones, the owner of the car, and appellants Manuel Garcia and Ella Garcia, parents of appellant Willis Garcia, for injuries resulting from the accident. Assuming, without deciding, that the evidence fails to establish liability on the part of Bones for all injuries caused by the negligence of Willis Garcia on the theory that he committed an act of negligence proximately contributing to the accident in intrusting his automobile to a person whom he knew to be insufficiently experienced, the testimony of said Bones as to the condition of the brakes upon his car is such as to indicate carelessness proximately contributing to the injury in permitting it to be driven by his nephew. Said witness testified that the condition of the brakes on the car was not excellent; that they were a little bit worn; that the car did not respond to the brakes rapidly, but pretty close to the measurement; that they were "good enough" and held and were not worn down bad, but were worn down some.

[6] Appellant Willis Garcia was driving the automobile upon the occasion without the consent or permission of his parents and in violation of their explicit command. Both parents had absolutely forbidden him to drive their car or any other car in the parade on the previous evening, and both had reiterated their command on the following morning when the boy left home for school. There is no showing of any act of negligence on the part of said parents in permitting their son to drive the car upon the occasion or otherwise which would render them liable to respondent, and, unless they are within the statutory provisions of the Motor Vehicle Act (Stats. 1923, p. 517, § 62), imposing a liability upon parents in certain cases for the negligent operation of motor vehicles by

their children, the award must be annulled as to said parents. *Perry v. Simeone*, 197 Cal. 132, 239 P. 1056; *Arrelano v. Jorgensen*, 52 Cal. App. 622, 199 P. 855. The pertinent provisions of the act are to the effect that an operator's license shall not be granted to a minor unless the application therefor is signed by both the father and mother of the applicant if both father and mother are living and have custody of the applicant and that any negligence of a minor "so licensed" in driving a motor vehicle upon a public highway shall be imputed to the person or persons who shall have signed the application of such minor, who shall be jointly and severally liable with such minor for any damage caused by such negligence. *Bosse v. Marye* (Cal. App.) 250 P. 693. Willis Garcia had made application for an operator's license before the accident occurred, and his parents had signed his application, as required by statute, but the license had not been issued when the accident took place. Willis was therefore violating the law in driving without a license. Although his parents had done all that was required on their part to obtain a license for their son and had indicated their willingness to assume the consequences of his negligent acts by signing his application, it is only for the negligence of a minor "so licensed" that the parents are liable. Appellant Willis Garcia was not "so licensed" or licensed at all, and hence the provisions of the statute imposing a liability upon parents of minor licensed drivers do not apply.

We find no other reversible error in the case. The judgment appealed from is therefore affirmed as to appellants Willis Garcia and Beverly Bones and reversed as to appellants Manuel and Ella Garcia, parents of Willis Garcia.

We concur: PRESTON, J.; CURTIS, J.

203 Cal. 26

**DRAPER v. HELLMAN, COMMERCIAL
TRUST & SAVINGS BANK.
(L. A. 7895.)**

Supreme Court of California. Jan. 3, 1928.

1. Libel and slander $\S$ 10(6)—Telegram to plaintiff's employer, charging him with fraudulently appropriating funds of defendant, held libelous per se.

Telegram sent to plaintiff's employer, charging plaintiff, who was former bank teller for defendant, with having fraudulently appropriated funds of defendant, is libelous per se.

2. Libel and slander $\S$ 54—Truth of defamatory statements is absolute defense in libel action.

In action for libel, truth of defamatory statements is an absolute defense.

3. Libel and slander $\hookrightarrow$ 123(7)—Truth of statements in telegram charging plaintiff, while bank teller, with embezzlement, held not established as matter of law under evidence failing to show teller had exclusive opportunity to embezzle.

In action for libel, based on letter and telegram charging plaintiff, who was former bank teller for defendant, with fraudulently appropriating funds of defendant by destroying deposit slips and keeping money, evidence showing that plaintiff did not have exclusive opportunity to embezzle money and destroy records, but that other tellers had access to his cage, and that adjoining teller assisted plaintiff in finishing work on night he quit, did not establish as matter of law truth of defamatory statements.

4. Trial $\hookrightarrow$ 140(2)—Jury held judge of plaintiff's credibility in libel action.

In action for libel, jury was judge of plaintiff's credibility.

5. Appeal and error $\hookrightarrow$ 930(1)—Jury is deemed to have resolved conflicts in evidence in favor of plaintiff recovering judgment.

Conflict in evidence on material points must be deemed to have been resolved by jury in favor of plaintiff recovering judgment.

6. Libel and slander $\hookrightarrow$ 103—Plaintiff's telegrams to defendant, stating address, denying defendant's charges of embezzlement, and threatening suit, held admissible in libel suit.

In action for libel, based on letter and telegram charging plaintiff, who was defendant's former bank teller, with destroying deposit slips and keeping money, telegrams sent by teller to defendant, stating his address, emphatically denying charges, and threatening action unless matter was cleared up with his employer, held admissible.

7. Libel and slander $\hookrightarrow$ 44(3)—Bank's communication to other bank charging employee with misappropriating funds while employee of first bank held not privileged unless in response to legitimate inquiry (Civ. Code, § 47, subd. 3).

False communication from one bank to another to effect that ex-employee of former bank, then in service of latter bank, had unlawfully appropriated funds of ex-employer is not privileged, under Civ. Code, § 47, subd. 3, unless made in response to legitimate inquiry by bank to which communication is made.

8. Libel and slander $\hookrightarrow$ 44(3)—Relations between Los Angeles bank and Montreal bank held not such as to render privileged a voluntary false communication charging latter's employee with misappropriating money while employee of former.

In action for libel based on communication by one bank to another, charging ex-employee, then in employ of bank receiving communication, with unlawfully appropriating funds of ex-employer, relation between bank in Los Angeles sending communication to bank in Montreal, Canada, receiving communication, held not such as to render communication privileged though volunteered.

9. Libel and slander $\hookrightarrow$ 44(3)—Communication to plaintiff's employer in answer to inquiry is not privileged, where inquiry was provoked by defendant to afford opportunity to make libelous statement made for purpose of inducing repayment of moneys believed embezzled.

Where inquiry of plaintiff's employer was provoked by defendant in order to afford opportunity to make libelous statement and for the purpose of inducing plaintiff to repay money believed to have been embezzled, it is not privileged as made in response to inquiry by person interested.

10. Principal and agent $\hookrightarrow$ 159(1)—Defendant, requesting detective agency to inform plaintiff's employer of plaintiff's misappropriation of funds, could not escape responsibility for libelous telegram sent by agency on ground that it did not authorize same.

In action for libel, defendant, presenting facts to detective agency and requesting it to inform plaintiff's employer as to reason for wishing to locate plaintiff, could not escape liability for telegram sent by detective agency, falsely accusing plaintiff of misappropriating funds, on ground that agency acted as independent contractor in sending telegram, and that telegram was sent without defendant's consent or authorization.

11. Principal and agent $\hookrightarrow$ 159(1)—Principal is liable for agent's libel published within scope of employment, though in excess of authority.

Principal is liable for agent's libelous communication published within scope of employment and in performing service on behalf of principal, even though in commission of unlawful act agent violated principal's express instructions or exceeded his authority.

12. Libel and slander $\hookrightarrow$ 25—Libel suit requires proof of publication or communication of defamatory statement.

In action for libel, sufficient publication or communication of defamatory statement must be proved.

13. Libel and slander $\hookrightarrow$ 74—Author of defamatory statements, not authorizing or intending publication thereof, is not liable for libel.

In action for libel, author of defamatory statements is not liable for publication thereof, where he neither authorized nor intended publication to be made.

14. Libel and slander $\hookrightarrow$ 74—Bank held responsible for several publications of defamatory matter transmitted through several hands to plaintiff's employer in manner contemplated by it.

Where defendant bank directed detective agency to communicate facts concerning plaintiff's alleged misappropriation of funds to correspondent bank of plaintiff's employer, with intention that such bank should communicate with bank employing plaintiff, and all steps in transfer of information were taken as contemplated by defendant, defendant must be deemed in law responsible for several publications of defamatory matter involved in transmitting information.

15. Evidence ⇨157(1)—Libelous communication received by plaintiff's employer through correspondent bank held not objectionable as not best evidence; publication having occurred both to correspondent and plaintiff's employer.

In action for libel based on letter and telegram accusing plaintiff of misappropriating funds, sent by detective agency at defendant's request to correspondent bank of plaintiff's employer and thence to employer, publication of libel took place when message was exhibited to correspondent bank and also when read by plaintiff's employer, and hence communications received by plaintiff's employer constituted original evidence admissible in evidence, over objection that best evidence was not being offered, and that message received by agent of detective agency for delivery to correspondent bank should have been produced, or absence accounted for.

16. Evidence ⇨189—Where libelous message sent to plaintiff's employer was same as that sent to employer's correspondent bank, it was not necessary to identify member of detective agency delivering communication to correspondent bank.

In action for libel based on telegram sent by detective agency at defendant's request and exhibited to correspondent bank of plaintiff's employer by branch of detective agency, it was not necessary that individual representing himself to be of detective agency, who exhibited communication to correspondent bank, should have been present at trial to be identified by detective agency, where it was sufficiently established that communication sent by detective agency hired by defendant was identical with communications presented to plaintiff's employer.

17. Libel and slander ⇨110(1)—Evidence tending to prove truth of charges made is admissible in libel action.

In action for libel, evidence which tends to establish truth of charges made is admissible.

18. Libel and slander ⇨110(1)—Evidence rebutting proof tending to establish truth of libel is admissible for plaintiff.

In action for libel, defended on ground of truth of defamatory statements, plaintiff may offer proof rebutting evidence tending to establish truth of libel.

19. Libel and slander ⇨103—Evidence that criminal act, which plaintiff suing for libel was charged with committing, was committed by another, is relevant to establish falsity of charge.

In action for libel based on charge that plaintiff committed criminal act, evidence that act has been committed by another is relevant to establish falsity of charge that plaintiff is guilty party, to be governed by appropriate rules of evidence.

20. Libel and slander ⇨110(1)—Evidence of crimes by another similar to that charged in libel is prima facie inadmissible to prove falsity of libel.

Where libel charged plaintiff with commission of crime, evidence of commission of simi-

lar crimes by another, in absence of showing of circumstances indicating relevancy of testimony to issue in case, is prima facie inadmissible to prove commission of crime at issue by such other and so to prove falsity of libel.

21. Trial ⇨114—Counsel's remarks in course of propounding leading questions held not evidence, though they may be prejudicial to opposing party.

Remarks of counsel, made in course of propounding leading questions to witnesses, are not evidence, though their effect on minds of jury-men may be prejudicial to opposing party.

22. Libel and slander ⇨101(5)—Burden of establishing defense of truth of defamatory matter is on defendant.

In action for libel, defended on ground of truth of defamatory statements, burden of establishing defense of truth is on defendant.

23. Appeal and error ⇨1060(1)—Allusions by plaintiff's counsel to conviction for embezzlement by teller working with plaintiff were not prejudicial, where evidence as matter of law was insufficient to show truth of charge that plaintiff misappropriated defendant's funds.

In action for libel based on charge that plaintiff, while bank teller, misappropriated defendant's funds, allusions by plaintiff's attorney in questioning witnesses to fact that head night teller had been convicted of embezzling funds belonging to defendant were not prejudicial, where all evidence legally admitted would be insufficient as matter of law to sustain finding that charges were true.

24. Appeal and error ⇨933(1)—Excessive damages are deemed eliminated by trial court's reduction on denying new trial.

In action for libel, all excessive damages not justified by facts legally admitted in evidence must be deemed to have been eliminated from case by reduction made by trial court on denying of appellant's motion for new trial.

25. New trial ⇨162(1)—Trial court, deeming damages excessive, may require remission of portion as condition to denying new trial.

Where trial court deems damages awarded by jury excessive, it has power to require remission of portion of verdict as condition of denying motion for new trial.

26. Appeal and error ⇨901, 1032(1)—Appellant has burden to show commission of reversible error.

Appellant has burden of showing that error has been committed and that error is sufficiently prejudicial to require reversal.

27. Appeal and error ⇨933(1)—Trial court, reducing damages for libel without indicating whether compensatory or exemplary damages were reduced, is presumed to have eliminated exemplary damages, if proof failed to show actual malice necessary therefor.

In action for libel, in which jury awarded plaintiff \$15,000 compensatory damages, and \$5,000 exemplary damages, and trial court reduced total sum to \$10,000 damages, without indicating whether compensatory or exemplary damages were reduced, if there was insufficient

proof of actual malice to sustain exemplary damages, it must be presumed that court acted in accordance with law, and eliminated such damages entirely in reducing verdict by amount greater than exemplary damages.

28. Appeal and error ⇨222—Defendant, failing to require court to specify whether it reduced compensatory or exemplary damages in reducing total damages, is deemed to have acquiesced in court's action and lost right to urge objection on appeal.

In action for libel, in which jury awarded both compensatory and exemplary damages, defendant failing to require trial court to specify whether it reduced compensatory or exemplary damages, so that error of court, if committed, in not eliminating exemplary damages for want of proof of actual malice, would have appeared, must be deemed to have acquiesced in court's action, and lost right to urge objection on appeal as ground for reversal.

29. Libel and slander ⇨101(1), 103—Generally good reputation of plaintiff suing for libel is presumed until assailed and cannot be offered except to refute evidence of bad reputation.

In action for libel, it is general rule that plaintiff cannot offer evidence of good reputation except to refute evidence of bad reputation, since good reputation is presumed until assailed by defendant.

30. Libel and slander ⇨103—Where plaintiff suing for libel is injured in business or professional capacity, rule excluding evidence of good reputation except to rebut evidence of bad reputation, does not apply.

Rule that evidence of good reputation of plaintiff suing for libel is not admissible except to refute evidence of bad reputation does not apply where injury alleged was to plaintiff in his business or professional capacity.

31. Appeal and error ⇨1050(1)—Admission of evidence of good reputation in community rather than among bankers, of bank teller suing for libel, if error, would not be sufficiently prejudicial to justify reversal.

In action for libel based on charge that plaintiff, former bank teller, misappropriated defendant's funds, admission of evidence of plaintiff's good reputation in the community rather than among bankers, if error, would not be sufficiently prejudicial to justify reversal.

32. Appeal and error ⇨1032(2)—Clear showing of prejudice must be made to prove that admission of presumed fact of plaintiff's good reputation in libel suit requires reversal.

Where allegations of complaint for libel as to plaintiff's good reputation were denied in answer, and basis for excluding evidence of good reputation was that evidence was superfluous as good reputation is presumed, Supreme Court would require clear showing of prejudice before holding that admission of presumed facts requires reversal.

33. Appeal and error ⇨1050(1)—Admission of evidence of good reputation of plaintiff suing for libel before defendant's attack on plaintiff's reputation held not reversible error.

In action for libel, admission of evidence of plaintiff's good reputation before, rather than

after, defendant's attack on plaintiff's reputation, could not have prejudiced defendant to any material extent, and was not reversible error.

In Bank.

Appeal from Superior Court, Los Angeles County; Frank R. Willis, Judge.

Action for damages for libel by C. M. Draper against the Hellman Commercial Trust & Savings Bank, a corporation. From a judgment of the District Court of Appeal (256 P. 260) affirming a judgment of the superior court for plaintiff, defendant appeals. Judgment of superior court affirmed, and opinion of District Court of Appeals superseded.

Page & Hurt, Page, Nolan, Rohe & Freston, Rohe & Freston, Ralph E. Lewis, Eugene D. Williams, and Albert M. Cross, all of Los Angeles, for appellant.

W. I. Gilbert and Raymond L. Haight, both of Los Angeles (Allen W. Ashburn, of Los Angeles, of counsel), for respondent.

PER CURIAM. This is an appeal by defendant, Hellman Commercial Trust & Savings Bank, a corporation, from a judgment awarding plaintiff \$10,000 as damages for the publication by defendant of alleged libelous communications concerning plaintiff. A judgment providing for \$15,000 as compensatory damages and \$5,000 as exemplary damages was originally entered upon the verdict of the jury, but thereafter defendant moved for a new trial, which was denied upon plaintiff's filing with the court a written consent to the reduction of the total amount of damages from \$20,000 to \$10,000. The court thereupon entered its order amending the judgment by reducing the amount of damages. The appeal is taken from the judgment as thus reduced.

Appellant conducts a general banking business in the city of Los Angeles, and remains open for the receipt of deposits and the paying out of money until 12 o'clock midnight. Respondent was employed by appellant as a night teller between the dates of April 20, 1921, and October 15, 1921, when he voluntarily left the service of appellant bank, after having given two weeks' notice of his intention to quit and having told the head night teller that he was going to leave a month previously. He had worked for the Bank of Montreal at its branch in Brantford, Canada, in various capacities for more than eight years preceding his employment by appellant, and, according to his own testimony, had left Brantford for Los Angeles in the hope that the change of climate would benefit his health. He remained in Los Angeles for approximately two weeks after leaving the employ of appellant and then returned to Canada, where he was immediately re-employed by the Bank of Montreal. During said two weeks he called at the bank for the purpose

of bidding his fellow workers good-bye. He left his Canadian address with certain of them, and he himself wrote to three of them after reaching Canada. He was 25 years of age at the time of his employment by appellant.

During the latter part of October or the early part of November, 1921, two depositors, named J. P. Berry and John Burkhartsmeier, respectively, appeared at appellant's banking house and claimed that they had each made a deposit of \$100 in cash on October 15, 1921, the last day on which respondent worked for appellant, which had been received by respondent in the course of his duties as a teller, but for which they had not been given credit on the books of the bank. The depositor Burkhartsmeier had in his possession his bank book, which contained an entry of the deposit alleged to have been made. Said entry bore the imprint of a rubber teller's stamp marked "15," which was the number assigned to respondent, and Burkhartsmeier testified upon the trial that he was positive he made the deposit through respondent, Draper. The depositor Berry exhibited a duplicate deposit tag which respondent admitted upon the trial was in his handwriting and bore his stamp. Each teller was required to file all original deposit slips received by him at the end of the day's business, and the deposit slips for the two deposits in question were not among those filed by respondent or by any other teller on October 15, 1921, or on any other date. Each teller was also required to list the amount of every deposit received by him during the day on his daily teller's sheet. The total amount received by respondent, as noted on his teller's sheet, exactly equals the total found by adding together the amounts indicated on the deposit tags filed by respondent on October 15, 1921, which did not include tags for the deposits made by Burkhartsmeier and Berry, and for the amount indicated on each tag there is a corresponding entry on the teller's sheet, but there are no additional entries on said sheet which might represent additional deposits, such as those made by Berry and Burkhartsmeier. The amount of cash turned over by respondent on October 15, 1921, corresponded with the figures on his teller's sheet, which did not include the deposits of Berry and Burkhartsmeier. The inference is irresistible that the appellant bank did not receive either the \$200 delivered to respondent or the tags representing said deposits, and that said deposits were ignored in composing Draper's teller's sheet. Respondent, Draper, upon the trial of the action herein, denied absolutely abstracting any cash whatsoever, destroying deposit tags, or making false entries.

Upon receiving notice of the above-stated facts from Percy W. Wilson, assistant cashier of appellant, Emanuel Cohen, one of its

three vice presidents, wrote a letter to the Bank of Montreal, which is the first communication upon which the present action is based. Said letter is as follows:

"Los Angeles, November 16, 1921.

"Manager Staff Department, Head Office, Bank of Montreal, Montreal, Quebec, Canada—Dear Sir: We had in our employ for several months C. M. Draper, who left us on October 31st, and whose references show that he was in the employ of your branch at Brantford, Toronto, for a long time.

"We have information to the effect that he left to return to your city. We are anxious to learn his present whereabouts, and have requested Pinkerton's National Detective Agency to locate him for us. Should he present himself to you we will much appreciate it if you will send us a wire, at our expense, telling us where he can be reached.

"Your attention will oblige,

"Yours very truly,

"Emanuel Cohen, Vice President."

On November 21, 1921, the Bank of Montreal, through its agent, the British American Bank of San Francisco, which it largely controlled through stock ownership, wired to appellant, stating that respondent was then in the employ of the Bank of Montreal, and that he had a good record, and asking to be informed of appellant's reason for requesting the Pinkerton Detective Agency to locate respondent. The Pinkerton Detective Agency in Los Angeles, at the direction of appellant's officers, on November 22, sent to its San Francisco office the telegram, which respondent claims constitutes the second libelous communication. Said telegram, which was in cipher, reads as follows when translated:

"Hellman Commercial Trust & Savings Bank had teller named C. M. Draper, quit there October fifteenth went to Montreal. On last day employment received several deposits, destroyed deposit slips kept money (stop) Hellman's wired Bank of Montreal, Canada, asking if Draper in their employ advising we looking for him and received reply from San Francisco Branch, Bank of Montreal, asking for explanation (stop) You call personally Bank of Montreal immediately explain why inquiry being made regarding Draper secure present address."

An agent of the San Francisco office of the detective agency then exhibited a translation of the telegram to the British American Bank of San Francisco, which the Los Angeles agency had referred to in said telegram as the San Francisco branch of the Bank of Montreal. The employee of the British American Bank to whom the telegram was shown made a copy of it, and the message was then dispatched verbatim to the Bank of Montreal in Canada, which thereupon suspended respondent from its employ. The complaint set forth the publication of a third libelous communication. Respondent made no attempt to prove said libel upon the trial of the action herein, and it will not therefore be considered.

[1-5] The telegram of November 22 clearly charges respondent with having fraudulently appropriated funds of appellant, and is libelous per se. Appellant contends that the truth of all charges made in the libelous communication as to respondent's having abstracted funds of appellant was established upon the trial; that, even if said charges were not proved to be true, it cannot be held liable, for the reason that the communications were privileged; and that, in any event, it cannot be held liable for any injury to respondent's reputation resulting from the publication of the telegram of November 22 received by the San Francisco branch of the detective agency, or copies thereof, because it did not authorize said detective agency to send such a telegram. In an action for libel, proof of the truth of the defamatory statements is an absolute defense. *Snively v. Record Publishing Co.*, 185 Cal. 565, 198 P. 1; *Chavez v. Times-Mirror Co.*, 185 Cal. 20, 195 P. 666; 16 Cal. Jur., 60. It cannot be held in the instant case, however, that appellant established as a matter of law the truth of the defamatory statements published by it or its agents concerning respondent. It was not shown that respondent, Draper, had the exclusive opportunity to embezzle the \$200 and destroy the record of its receipt. Draper testified that there was a small aperture back of the steel grating separating the teller's cages in appellant bank, that the tellers frequently passed materials back and forth between the cages, and that it would be possible for a teller to reach through said opening into the adjoining cage and remove whatever he might find near the opening. He further testified that the tellers usually left the door of their cages unlocked, except when they were at lunch, and that other tellers than the one in charge not infrequently entered the cage. It also appears from Draper's testimony that the teller in the cage adjoining his, who was the head night teller, upon finishing his own work, offered to assist Draper by listing on an adding machine on Draper's teller's sheet the amounts indicated on his deposit tags. For this purpose Draper delivered possession of all deposit tags he had received during the day to said teller. Thus it appears that it would have been possible for some one other than Draper to secure possession of both the money and the deposit tags in question. It was customary, Draper stated, for the tellers to occasionally assist each other in the manner in which said head night teller aided him. Upon quitting at midnight, Draper turned over his cash to said head night teller, who had previously assisted him. The jury was the judge of Draper's credibility, and any conflict in the evidence on material points must be deemed to have been resolved in his favor.

[6] Draper's conduct following the alleged

abstraction does not indicate a consciousness of guilt of having committed a crime so likely to be speedily discovered and to be attributed to him. He called at the bank on the day he was leaving, according to his testimony, and told several of the tellers good-bye; he left his address with several and wrote to three upon reaching Canada and returning to the employ of the Bank of Montreal. According to Draper, the manager of the bank in Brantford informed him that he was wanted by the Pinkerton Detective Agency and that he was alleged to have embezzled from appellant. Respondent sought to offer in evidence certain telegrams and a letter sent by him to appellant. There is some confusion in the record as to whether these telegrams were admitted by the court. They are treated by both parties as having been received in evidence, and we will so regard them. We think they were evidence properly admissible, as the subject-matter seems pertinent to the case. The first telegram was sent on November 23, 1921, and in it Draper stated that his address was 245 Malboro street, Brantford, Canada, and that he emphatically denied the charges made. He also requested the bank to wire and write him at once. Receiving no reply, he telegraphed as follows on November 25:

"Unless matter is cleared immediately with Bank of Montreal, will enter action against you."

On November 30 the following message was sent:

"Do you or do you not intend replying to my telegrams, you know the alternative."

On January 3, 1922, he wrote the following letter:

"Brantford, Jan'y 3--22.

"Emanuel Cohen, Esq., Hellman Bank, Los Angeles, California—Dear Sir: In view of the reply you made to the British American Bank, San Francisco, regarding your charges against me, would say, if you will fully clear my name with the general manager, Bank of Montreal, at once, I will withdraw any statements I have made against you and will promise not to proceed with any suit for libel or to take action of any kind. I have suffered six weeks' loss of work as well as damage to my business reputation through your willful, unbusinesslike course in not either pressing or withdrawing your charge. If you still refuse to straighten out this matter, I will take the only course left, coming to Los Angeles and entering action against you. Yours truly, C. M. Draper, "245 Malboro St., Brantford, Ontario, Canada."

Although the bank received said telegrams and letter, it never replied to Draper.

[7-9] Appellant further argues that the alleged libelous communications were privileged, because made "without malice, to a person interested therein, by one who is also interested." Section 47, subd. 3, Civ. Code.

Certain false communications, which are not privileged if volunteered, become privileged when made in response to an inquiry from a person having an interest in the subject-matter of the communication. We are of the view that a false communication from one bank to another to the effect that an ex-employee of the former, then in the service of the latter, had unlawfully appropriated funds of his ex-employer is of this class, and is not privileged unless made in response to an inquiry by the bank to which the communication is made. The relations between banks by reason of their geographical proximity and interchange of business may be such that a moral or social duty rests upon the communicant to impart the information, which renders the false and libelous communication privileged although volunteered, but no such relations were shown to exist between the Hellman bank in Los Angeles and the Bank of Montreal in Canada in the instant case. Although the communication made in the telegram of November 22 was made after inquiry by the Bank of Montreal, the inquiry was not initiated by said Bank of Montreal, but was provoked by the Hellman bank by the letter of November 16, 1921. If the purpose of said letter was legitimate, or one which the law will recognize as proper, the fact that the inquiry resulted therefrom and would not otherwise have been made, becomes immaterial and the communication is privileged; otherwise it stands upon the same footing as a volunteered communication and is not privileged. Appellant contends that the letter of November 16 is a mere request for information as to Draper's address. If the Hellman bank did not have Draper's address, it certainly was entitled to ascertain it and to locate him by all reasonable means. It would be difficult, if not impossible, for a bank to frame a letter asking another bank for information as to the location of a former employee, and requesting a reply by wire, which would not cause the recipient of the letter, if the person concerning whom information was sought was then in its employ, to inquire as to the reason for the request, with a view of ascertaining whether it was for any suspected wrongdoing. There was some evidence in the instant case, however, from the testimony of Emanuel Cohen, vice president of appellant, which would warrant the jury in inferring that the bank had knowledge of the address to which Draper proposed to return in Canada at the time the letter of November 16 was written, although said evidence is somewhat equivocal. If appellant was in possession of said address, it must have written the letter with some other motive than the purported one of ascertaining Draper's address. Said witness Cohen, the author of the letter, testified that he wrote it because he thought it would cause Draper to admit that he took the money and

to pay it back; that he then believed Draper guilty and was still of that opinion. The letter also brought into the inquiry a nationally known detective agency. The witness Briggs, who was the Los Angeles manager for the Pinkerton Detective Agency, after refreshing his recollection by looking at his records stated that the agency was not employed until November 22. The letter in which Cohen stated that the agency had been requested to locate Draper was written on November 16. From a consideration of this witness' testimony as a whole it is to be inferred that appellant's officers had reason to believe that Draper had planned to return to the employ of the Bank of Montreal, or that said bank would have knowledge of his whereabouts, and that it was intended that Draper, through said bank, should be informed of the communication. We cannot uphold the method pursued by appellant to obtain repayment of the amount it suspected respondent had taken from it. If a letter purporting on its face to be a mere inquiry for an address, but actually written for the purpose outlined above, provokes an inquiry as to why the information is sought, and in reply thereto the author of the original letter makes the false and libelous statements, the communication stands upon the same footing as if it had been volunteered, and is not privileged unless a voluntary communication would have been privileged. We conclude, therefore, that appellant cannot avoid liability on the ground that the communications were privileged.

[10, 11] We are further of the opinion that appellant cannot escape liability for the second communication, the telegram of November 22, on the ground that it was a libel published without its consent or authorization. The witness Cohen testified that he instructed the Pinkerton Detective Agency in Los Angeles to inform the Bank of Montreal as to the reason for wishing to locate Draper. He claimed that he stated the facts as to the disappearance of the money and deposit slips to the representative of the detective agency and told him to communicate such facts to the Bank of Montreal through the San Francisco correspondent of said Bank of Montreal. It does not appear from the testimony of said witness that he directed the detective agency to charge Draper with actually having taken the money. Neither does the contrary directly appear. The principal is liable for the agent's torts committed in the scope of his employment and in performing service on behalf of the principal, even though in the commission of the unlawful act the agent violated the principal's express instructions or exceeded his authority. Appellant cannot avoid liability in the instant case under the claim that the Pinkerton Detective Agency acted as an independent contractor in sending the communication, for whose act it was not legally responsible unless it expressly and

unequivocally authorized said agency to charge Draper with fraudulent misappropriation.

[12-15] A sufficient publication or communication of the defamatory statements must be proved in a libel suit, and it is the rule that the author of defamatory statements is not liable for a publication thereof where he neither authorized nor intended such publication to be made. In the instant case, the Hellman bank having directed the detective agency to communicate with the British American Bank in San Francisco, which was the correspondent of the Bank of Montreal, with the intention that said San Francisco bank should in turn communicate with the Bank of Montreal, and all steps in the transfer of the information from appellant to the Bank of Montreal having been taken in precisely the manner contemplated by appellant, appellant must be deemed in law responsible for the several publications of the defamatory matter which the transmission of the information involved. A publication of the libel took place not only when the San Francisco agent of the Pinkerton Detective Agency exhibited the message received from the Los Angeles agency to one Cotter, who was connected with the British American Bank, but also when the message sent by the British American Bank to the Montreal bank was read by the officials of the Montreal bank. Since a publication of the libel took place when officials of the Montreal bank received and read the message, communications received at Montreal constituted original evidence and the court below did not err in admitting said communications in evidence over the objection that the best evidence was not being offered and that the message received at San Francisco by the Pinkerton agency there should have been introduced or its absence accounted for.

[16] Appellant contends that it was not shown by competent evidence that the person exhibiting to Cotter at the British American Bank the message received by the San Francisco detective agency from the Los Angeles agency was a duly authorized agent of the San Francisco branch of the detective agency for whose acts the Los Angeles agency and, in turn, the appellant was liable. No claim is made that the message was in fact exhibited to the British American Bank by a person without authority. We are of the view that it was sufficiently established upon the trial that the telegram sent by Briggs of the Los Angeles agency to the San Francisco branch of the agency was identical in content with the libelous communication published at Montreal. Briggs testified that the message was sent to one P. E. Geaque, manager of the San Francisco branch. Cotter of the British American Bank, to whom was exhibited the message which he copied and sent to Montreal, stated in his deposition, which consti-

tutes part of the record herein, that a man whom he had never met before, and who represented himself to be P. E. Geaque, of the San Francisco Pinkerton Detective Agency, presented himself and exhibited the message. We do not deem it necessary that the individual who appeared before Cotter and represented himself to be P. E. Geaque, of the detective agency, should, under the circumstances of the instant case, have been present at the trial in order to be identified by the Pinkertons as P. E. Geaque, of their agency.

[17-24] Appellant also contends that the case must be reversed because of certain allusions made by one of the attorneys for respondent in the course of his questioning of several witnesses to the fact that the head night teller, who had assisted respondent on the last day of respondent's employment when the money disappeared, had since been tried and convicted of embezzling funds belonging to the Hellman banking house, and was serving a term of imprisonment in San Quentin at the time of the trial. Since proof of the truth of defamatory matter will exonerate the defendant in a libel action, evidence which tends to establish the truth of the charges made is admissible. Conversely, the plaintiff may offer proof which will rebut evidence tending to establish the truth of the libel. Where plaintiff is charged with having committed a criminal act, evidence that the act has been committed by another is relevant to establish the falsity of the charge that plaintiff is the guilty party. 8 Cal. Jur. 49; 1 Wigmore on Evidence, p. 367. However, the introduction of such proof is to be governed by the appropriate rules of evidence. Evidence of the commission of similar crimes, in the absence of a showing of circumstances indicating the relevancy of the testimony proposed to be offered to an issue in the case, is prima facie inadmissible in proof of the commission of the crime at issue, and in any event remarks of counsel made in the course of propounding leading questions to witnesses are not evidence, although their effect upon the minds of the jurymen may, under some circumstances, be prejudicial to the opposing party. But in the instant case the judgment as it now stands cannot be attributed in any extent to said remarks. Even though said remarks had not been made, the evidence establishes as a matter of law the publication of the libel, defendant's responsibility therefor, and a lack of privilege. Further, the burden of establishing the defense of truth rested upon appellant, and all the evidence legally admitted would be insufficient as a matter of law to sustain a finding that the charges were true. It follows that the only respect in which the said remarks of counsel could have influenced the jury to the prejudice of appellant was in the assessment of damages. However, all excessive damages not justified by facts legally admitted in evidence must be deemed to have been eliminat-

ed from the case by the reduction made by the trial court upon the denying of appellant's motion for a new trial.

[25-28] Appellant further contends that the court acted without right in reducing the total amount of damages awarded from \$20,000 to \$10,000. It is well settled in this state, although a contrary rule prevails in some jurisdictions, that it is within the power of the trial court, where it is of the view that the damages awarded by the jury are excessive, to require a remission of a portion of the verdict as a condition to the denying of a motion for a new trial, as was done in the instant case. *Doolin v. Omnibus Cable Co.*, 125 Cal. 141, 57 P. 774; *Zibbell v. Southern Pacific Co.*, 160 Cal. 237, 116 P. 513; *Kinsey v. Wallace*, 36 Cal. 462; *Riley v. Davis*, 57 Cal. App. 477, 207 P. 699; *Lynch v. Southern Pacific Co.*, 24 Cal. App. 108, 140 P. 298. Here the jury awarded compensatory damages in the sum of \$15,000 and exemplary damages in the sum of \$5,000. The court, upon denying the motion for a new trial, required the reduction of the total sum from \$20,000 to \$10,000, without specifying whether the exemplary damages should be entirely eliminated and the compensatory damages reduced \$5,000, or the compensatory damages reduced \$10,000, the exemplary damages remaining \$5,000, or whether both compensatory and exemplary damages should be reduced. Appellant argues that the evidence will not sustain an award of exemplary damages in any amount whatsoever, for the reason that there is no proof of malice in fact, as distinguished from legal malice, proof of malice in fact being essential to an award of exemplary damages, and that it cannot be determined from the manner in which the court below made the reduction whether exemplary damages have been entirely eliminated. From these premises it argues that the case must be reversed. Conceding, for the purpose of argument only, that there was no sufficient showing of malice in fact, or actual ill will or animosity on the part of the appellant bank toward Draper personally to sustain an award of exemplary damages, we do not deem it necessary to reverse the case. The burden rests upon the appellant to show that error has been committed and that the error is sufficiently prejudicial to require a reversal. If there was insufficient proof of actual malice to sustain an award of exemplary damages, it must be presumed that the court acted in accordance with law and eliminated such damages entirely when it ordered the jury's verdict reduced in an amount greater than the exemplary damages, rather than that he permitted the award or any portion thereof to stand. Appellant

might have objected in the court below to the manner in which the reduction was made, and have required the court to specify the sums in which the two types of damages, compensatory and exemplary, were to be reduced, in which event any error of the court in not eliminating exemplary damages would have been made to appear. It does not appear that such a demand was made upon the trial court. This being the case, appellant must be deemed to have acquiesced in the court's action and to have lost the right to urge this objection upon appeal as a ground for reversal.

[29-33] It is further argued that the court erred in permitting the witnesses David Wright and Mary Wright to testify as to Draper's good reputation. Said witnesses had known Draper in Brantford, Canada, for eight or nine years. Both testified, without going into detail, that his reputation in the community for truth, honesty, and integrity was very good. It is the general rule in actions for libel, that the plaintiff may not offer evidence of his good reputation except in rebuttal of evidence of bad reputation adduced by defendant, for the reason that the good reputation of the plaintiff is presumed until it is assailed by the defendant. *Davis v. Hearst*, 160 Cal. 143, 116 P. 530. An exception to this rule has been made where the injury alleged is to the plaintiff in his business or professional capacity. We deem it unnecessary to decide whether evidence of Draper's good reputation in the community, rather than among bankers, was admissible under this exception, for the reason that any error in admitting such testimony would not be sufficiently prejudicial to justify a reversal. The allegations of the complaint as to Draper's good reputation were denied in the answer. Since the basis of excluding the testimony is that it is superfluous, for the reason that good reputation is presumed, we would require a clear showing of prejudice before we would hold that evidence of facts that are presumed requires a reversal. Subsequent to the testimony of the Wrights, appellant offered evidence to impeach Draper's good reputation. The testimony of the Wrights would, in any event, have been admissible in rebuttal of such testimony. Its introduction before, rather than after, appellant had attacked plaintiff's reputation, could not have prejudiced appellant's rights to any material extent.

An examination of the other assignments of error made by appellant, as to the admission of evidence and the giving or refusal of certain instructions, reveals no error sufficiently prejudicial to warrant a reversal.

The judgment appealed from is affirmed.

87 Cal. App. 744

(263 P.)

**TULARE COUNTY v. CITY OF DINUBA
et al. (Civ. 6072.)★**

District Court of Appeal, First District, Division 2, California. Dec. 22, 1927.

Rehearing Denied Jan. 27, 1928.

- 1. Electricity** ⇐10—Division between county and city of tax paid by holder of light and power franchise held proper (Broughton Act as amended).

Division between county and city of tax paid by holder of electric light and power franchise for use of highway under Broughton Act (St. 1905, p. 777), as amended, made by awarding city sum equal to tax on same proportion of gross receipts of corporation from consumers in city which total value of all pole lines of company's entire system bore to total investment of company in its entire system, *held proper*, in view of fact that portion of franchise system serving city could be dealt with as a unit.

- 2. Appeal and error** ⇐907(5)—Appellate court might assume that stipulation not in record, but referred to in findings, sustained judgment dividing tax between city and county.

Appellate court might assume that stipulation referred to in trial court's findings contained facts showing legality of judgment dividing tax, paid by holder of electric light and power franchise for use of highway under Broughton Act (St. 1905, p. 777) as amended, between county and city, where stipulation was not in record and trial court's finding adopted correct principles and rules for division.

Appeal from Superior Court, Fresno County; S. L. Strother, Judge.

Consolidated action by the County of Tulare against the City of Dinuba and others to determine share of franchise tolls. From portions of the judgment and decree, plaintiff appeals. Affirmed.

U. S. Webb, Atty. Gen., and Le Roy McCormick, Dist. Atty., and Frank Lamberson, Deputy Dist. Atty., both of Visalia, for appellant.

J. E. Greene, of Dinuba, and W. W. Middlecoff, of Los Angeles, for respondent.

KOFORD, P. J. [1] This appeal is from portions of a judgment and decree given in three consolidated actions. The portion of the decree appealed from divides between the county of Tulare and the city of Dinuba, in that county, the county's total share of franchise tolls paid by San Joaquin Light & Power Corporation. The payment is required by the provisions of its franchise obtained under the Broughton Act (Stats. 1905, p. 777, and amendments thereto). The city was incorporated after the franchise had been granted by the county. The Tulare county franchise was granted as a whole at

one time, but under the principle declared by this court in *San Francisco-Oakland Terminal Rys. v. County of Alameda*, 66 Cal. App. 77, 225 P. 304, the tolls are to be divided between the county and the city. The amount of the payment is annually 2 per cent. of the gross receipts arising from the use, operation, and possession of the franchise. The statute fails to provide how to divide such payments received from a system of franchises extending through several counties and cities. One of these consolidated actions was previously tried and appealed to the Supreme Court, where the judgment of the trial court holding the tolls uncollectible was reversed by an opinion which set out a method of dividing such gross receipts among the several counties and municipalities served under one franchise or one system of franchises granted under the said Broughton Act. The other cases by stipulation abided that appeal, and after the remittitur and some delay all three cases were tried as one action. The question presented upon this appeal is whether the division of such tolls made by the trial court between the county of Tulare and the city of Dinuba is according to law. See *County of Tulare v. City of Dinuba*, 188 Cal. 664, 206 P. 983.

The appeal is upon the judgment roll, and the method of allocation and division is contained in the findings, particularly in finding No. 13. The method is as follows: First. Arrive at the gross receipts properly attributable to the franchise privilege by: (a) Deducting from the total gross receipts a proportion equal to the proportion of the investment cost of intangibles to the investment cost of properties used in generation and distribution of electricity; (b) from the remainder thus obtained deduct a proportion equal to the proportion which the mileage of transmission and distribution lines on private rights of way bears to the total mileage of such line through the entire system; (c) all transmission and distribution lines existing under franchises obtained otherwise than under the Broughton Act shall be considered as though they were on private rights of way and deducted as under subdivision b above. Second. Having thus obtained the amount of gross receipts attributable to the entire system of public street franchises under the Broughton Act, it is determined that 2 per cent. of said sum shall be paid to the several counties and municipalities in the proportion that the length of such franchise lines on public highways in the said counties and said municipalities bears to the total mileage of such franchise lines on public highways in the entire territory. Third. It is then especially provided that in dividing the amount which thus falls to the county of Tulare as a whole between that county and the

city of Dinuba it shall be considered that the receipts upon which the said city of Dinuba will be entitled to 2 per cent. shall be deemed to be the same proportion of the gross receipts of said corporation from consumers in Dinuba which the total value of all pole lines of the company's entire system bears to the total investment of the company in its entire system. Without this special provision, which we have numbered third, the division between the city and the county, under the other provisions of the findings, would have been made in proportion to the length of franchise lines in the city and in the county, respectively—treating the whole county as one inseparable unit of franchise. It is only this exceptional provision which is attacked by appellant herein. By this special provision for the city of Dinuba, it results (the briefs state) that of the amount of tolls to be divided between the city and the county, the city receives more than it would receive if the exception had not been made. Further findings contain two groups of facts which read as if they were inserted as justification for this exception, and these facts will elucidate the meaning of the clause third above. One of these groups of facts found amounts to this: That whereas in the county at large (outside the city) the franchise lines are many and long in proportion to the receipts from consumers, in the city itself the franchise lines are few and short in proportion to the receipts from consumers, the city being less than one square mile in area. For this reason it was evidently concluded that it would be just and equitable that the city should receive a greater share of the tolls than it would receive had the tolls been divided upon the theory that they should be divided in direct relation to the relative length of franchise lines maintained in the two political subdivisions (the city and the county) respectively. In other words, it was evidently concluded that the franchise had greater earning power per mile of franchise line in the city than in the county. In the effort to make for this reason a more just and equitable division of the tolls between the county and city, a rule of proportion or division was sought and found for the purpose. This rule of proportion was taken from a comparison made between (1) the value of all pole lines of the company's entire system and (2) the total investment of the company in its entire system; the fraction being made up of the amount of clause one as the numerator and the amount of clause two as the denominator.

Without consideration of the second group of facts found, this exception in the method of allocation between the city and the county would seem to us to be contrary to the principles laid down by the Supreme Court in the former appeal. For, suppose 50 miles of franchise line ran through a sparsely pop-

ulated county with no consumers and then served a congested city with, say 5 miles of line and a great number of consumers, it should be all considered as one unit. The toll being a payment for the use of the highway and not a 2 per cent. tax upon receipts, the political subdivision sustaining the burden of the 50-mile franchise line should receive ten times the toll that the political subdivision should receive which sustained the burden of only 5 miles of franchise line upon the theory that it earned ten times as much—not because the payment is according to mileage nor burden, but because it is according to earnings arising from the use of the franchise which is in turn normally in proportion to mileage or burden. Under such conditions the franchise lines in the county are helping to earn the receipts collected from the city consumers. "The reasonable construction of the language used (in the Broughton Act) is that each county or municipality is entitled to its percentage of the gross earnings arising from the use of its highway, in the proportion that the receipts arising from the use of such highways bears to the receipts attributable to all the rights of way of the entire system." *County of Tulare v. City of Dinuba*, 188 Cal. 664, at page 676, 206 P. 983, 987.

The second group of facts found, however, is to the general effect that the system of franchise lines serving the city of Dinuba is capable of segregation and separation from the system as a whole, from which it results that the city of Dinuba system may feasibly be considered and treated as a separate unit of the franchise rights. This finding sets out that only two trunk lines (each being less than two miles in length) serving electricity to Dinuba use Tulare county roads. They come from a substation located just across the boundary of Fresno county, less than two miles away from Dinuba. Each of these lines, in addition to serving Dinuba, serve consumers outside of the city to the south and west and to the east and south respectively. Dinuba, as a system, enjoys only two miles of county franchise, or at most the aggregate of four miles of county franchise lines, and these lines furthermore are shared with the system enjoyed by consumers outside the city and in the county district. Some of the city franchise lines are used by the company in transmitting electricity through the city to county consumers beyond. The through lines in the city serving the county may thus be an offset for the short county lines serving the city, and this furnishes a reason for the court to leave out of the fraction the investment cost of the short county lines running to the city, if in fact that was done. These conditions give justification for treating the Dinuba part of the franchise system as a separate unit the earnings from which can be segre-

gated—not with absolute accuracy, but reasonably and practically so.

In arriving at the "gross receipts arising from the use, operation and possession" (language of Broughton Act) of what might be called the Dinuba city unit portion of the franchise, the court by applying this special rule of proportion may not have awarded to the city as great a share as it might logically have done by pursuing this unit theory or subunit theory to its logical extremity. The investment costs of the company's property using franchises to supply the city compared with the investment cost of all the company's property used in serving the city as a unit might be a larger fraction than the one applied by the court, to wit, the proportion "which the total value of all pole lines of the company's entire system bears to the total investment of the company in its entire system" (language of the findings). If so, the amount upon which 2 per cent. was awarded to the city was less than the gross receipts arising from the use of all franchises enjoyed in serving the city.

We have said "may" and "might." The appeal is upon the judgment roll. The findings refer to a stipulation of the parties which we conclude from the context was a stipulation of facts. This stipulation is not in this record. Respondent states that we may assume that all lines in Dinuba are franchise lines—that none are private or of a kind for which the 2 per cent. is not payable. The record does not show to the contrary. Consequently, so it is argued, Dinuba is entitled to all the tolls thereon unless the other franchises of the system show affirmatively some equity to part of them. This argument has merit because of the fact that the record here omits that important stipulation of counsel.

There is no dispute and no appeal concerning the amount due from the company to the county as a whole (including Dinuba). The company paid into court the sum of \$4,546.94 for the year 1923 and \$15,074.34 for the years up to and including the year 1922. The language of the court's findings used in dividing these two sums follows, in part:

"20. That under and by virtue of the terms of said franchise * * * and pursuant to the stipulations of the parties hereto on file herein, there is now due and unpaid * * * for the calendar years 1923 and 1924, the total sum of \$4,546.94, computed according to the rules and principles hereinbefore set forth (finding No. 13), and the court finds that in accordance with the stipulation filed herein by said plaintiff, and the defendant city of Dinuba, said sum of \$4,546.94 should be allocated as follows:

"The sum of \$4,069.51 shall be paid to said plaintiff, and the sum of \$477.43 shall be paid to said defendant city of Dinuba."

"19. That in accordance with the stipulation filed herein by the plaintiff, county of Tulare, and the said defendant, city of Dinuba, the court finds that if computed on the basis set

forth in finding No. 13 herein, the said sum of \$15,074.34 deposited * * * as * * * due * * * up to and including the calendar year 1922, should be allocated as follows:

"The sum of \$13,491.53 shall be paid to the county of Tulare, and the sum of \$1,582.81 shall be paid to the city of Dinuba. * * *"

[2] The allocation was made, therefore, first, according to finding No. 13, and, second, according to the stipulation. The stipulation not being in the record, and the burden of showing error being upon appellant, we assume in favor of the judgment that it furnished all necessary facts and data to make the judgment legal and just, provided, of course, the principles and rules announced in the findings are just and equitable and in harmony with the decision upon the former appeal. As there said, the mileage rule of division is not exclusive. On page 681 (206 P. 989) the court in that case outlines the method by which a division of the toll payment should be divided among the counties and municipalities. It is there said:

"Each municipal franchise will be entitled to its 2 per cent. of whatever portion of such fund can be shown to arise wholly from the use of the easements under such franchise, and such portion of the remaining fund as the mileage of the given franchise easements bears to the entire mileage of the distributing system contributing to such gross earnings.

"We have adopted this appropriation, to the various rights of way, according to mileage, not necessarily as an exclusive method of distribution of the gross receipts, but as a practicable one where the contribution of the various franchise easements to the gross earnings cannot be otherwise determined. There may be portions of the distributing system where the entire transmission from the producing plant to the consumer is supplied through a given franchise, or is entirely supplied over private easements. Such earnings would inure to such specific franchises or easements. There may be instances where the extent or value of the distributing system over a given right of way may indicate its earning capacity; or where the service of lateral lines may be differentiated from that of main conduits in the value of their use of the easements. In such cases these conditions should be taken into account. But where, as will often happen, contribution to the earnings of the various rights of way is general and indistinguishable, we can see no reason why the proportionate mileage basis should not be used in apportioning the statutory percentage of gross receipts."

The foregoing is predicated upon the idea previously expressed in the opinion at page 677 (206 P. 988) in the following language:

"But since the state is dealing, in this phase of the matter, with the distribution of a fund among its own political subdivisions, any plan may be adopted consistent with substantial justice."

The amount of franchise tolls awarded to the city of Dinuba apparently is not in excess of 2 per cent. of the gross receipts aris-

ing from the use of the franchise lines within the boundaries of said city, and the method of determining the amount thereof is in harmony with the opinion in the appealed case.

The judgment is affirmed.

We concur: STURTEVANT, J.; NOURSE, J.

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TULARE COUNTY v. CITY OF DINUBA
et al. (Civ. 6054.)★

District Court of Appeal, First District, Division 2, California. Dec. 28, 1927.

Hearing Granted by Supreme Court Feb. 23, 1928.

1. Costs $\S$ 103—Principle that, where party recovers fund for benefit of many, attorney's fees may be awarded from fund, held inapplicable where other party with conflicting interests prosecuted separate action by own counsel.

Principle that, where party sues for benefit of many and recovers a fund for all, equity may award attorney's fees out of entire fund and thus indirectly charge every interested person with attorney's fees, held inapplicable as between attorney claiming fees and county, where county expressly refused to employ attorney claiming fees and prosecuted actions of its own for same purpose and joined action prosecuted by attorney claiming fees only temporarily and was at all times represented by own counsel and had interest which conflicted with interest of attorney and some of attorney's clients.

2. Attorney and client $\S$ 62—One can employ own attorney.

One has right to employ his own attorney.

Appeal from Superior Court, Fresno County; S. L. Strother, Judge.

Consolidated action by the County of Tulare against the City of Dinuba and others. From a portion of the decree denying an application for attorney's fees, W. W. Middlecoff and others appeal. Affirmed.

J. E. Greene, City Att'y., W. W. Middlecoff, of Los Angeles, H. K. Landram, of Merced, M. E. Power, of Visalia, and Mason A. Bailey, Dist. Att'y., of Madera (H. E. Schmidt, of Bakersfield, of counsel), for appellants.

U. S. Webb, Atty. Gen., and Leroy McCormick, Dist. Att'y., and Frank Lamberson, Dep. Dist. Att'y., both of Visalia, for respondent.

KOFORD, P. J. This is an appeal from a portion of the same decree described in County of Tulare v. City of Dinuba et al. (Cal. App.) 263 P. 249. The portion of the decree appealed from is that portion which denies an application of appellant Middlecoff for attorney fees to be paid and withdrawn from the portion of certain franchise tolls payments awarded to the county of Tulare by the decree.

The subject-matter of this part of the decree was transferred by stipulation into these cases from another action in Merced county. The Merced county action had been commenced by several counties and cities for the purpose of collecting their shares of franchise tolls after the procedure had been first definitely outlined in the opinion of the Supreme Court in an appeal of one of these three consolidated actions originally commenced and prosecuted by Tulare county alone. County of Tulare v. City of Dinuba, 188 Cal. 664, 206 P. 983. In the Merced county case, the court awarded attorney fees to appellant Middlecoff, and ordered a portion deducted from the share of franchise tolls distributed to each claimant in that suit. This award of attorney's fees and the amount thereof was there expressly consented to by each one of the claimants, except Tulare county, which, with the city of Dinuba and all the issues affecting them, had been previously dismissed from the Merced county suit and sent back to the Tulare county suits now here on appeal. These Tulare county suits were tried in Fresno county by stipulation. The court below, dealing with the question of attorney's fees as a part of that corner of the litigation which had been carved out and sent to it from the Merced case, denied appellant Middlecoff's motion to charge Tulare county's share with a part of his attorney fees upon the ground that there was no legal warrant for such order.

[1] Appellant argues for the application of the principle that where one party commences an action for the benefit of many and recovers a fund for all, the court in the exercise of its equity powers will award attorney fees out of the fund and thus indirectly charge every interested person with the attorney fees expended by the one party for the benefit of all. This general principle has been recognized in several other jurisdictions and seems to have been taken for granted in Fox v. Hale & Norcross S. M. Co., 108 Cal. 475, 41 P. 328, although it has several times been said that no attorney's fees can thus be allowed in California in cases not provided for by statute. Los Angeles Trust, etc., Bank v. Ward, 197 Cal. 103, 239 P. 847; Sanger v. Ryan, 122 Cal. 52, 54 P. 522; Miller v. Kehoe, 107 Cal. 340, 40 P. 485.

If we concede the general principle contended for by appellant to be recognized in California, nevertheless there are several reasons why it is not applicable in the instant case. Tulare county expressly refused to employ appellant Middlecoff. It was at all times prosecuting actions of its own for the same purpose and joined the Merced county litigation at the last minute (January, 1924), only to be immediately dismissed and removed back to its own actions by stip-

ulation (February, 1924). It was at all times represented by counsel of its own choice; its district attorneys and special attorneys employed and independently paid by it. There was some conflict of interest between Tulare county and some of the clients of Mr. Middlecoff, particularly the city of Dinuba. See *County of Tulare v. City of Dinuba et al.* (Cal. App.) 263 P. 249. Finally, it is quite doubtful whether the principles of the equitable rule contended for can be applied to any county of the state of California where the Political Code has made a complete scheme providing when and by whom the county shall be represented in its litigation. The scheme includes only the district attorneys, the Attorney General, and special counsel employed in a designated way in certain cases.

[2] One has a right to employ his own attorney, and the equitable rule contended for has never been applied against one appearing by his own attorney. *McCormick v. Elsea*, 107 Va. 472, 59 S. E. 411; *Stuart v. Hoffman & Co.*, 108 Va. 307, 61 S. E. 757; *Dunlop v. McGehee's Ex'r*, 139 Va. 643, 124 S. E. 199.

The mere claim or belief on the part of Tulare county that its interests were adverse to some of the clients of appellant Middlecoff or to Mr. Middlecoff himself would be a sufficient reason, if any were required, for the county to employ its own independent counsel.

Appellant has cited no authority where the rule contended for has been applied in face of any one of the numerous objections raised by respondent under the facts of this case and mentioned above.

The judgment is affirmed.

We concur: NOURSE, J.; STURTEVANT, J.

88 Cal. App. 16

McOMIE v. BOARD OF DIRECTORS OF VETERANS' HOME OF CALIFORNIA
et al. (Civ. 3040.)

District Court of Appeal, Third District, California. Dec. 24, 1927.

1. Descent and distribution §91(1)—Heir may sue board of directors of veterans' home to recover deposit of deceased inmate without administration (Code Civ. Proc. § 690, subd. 20; Veterans' Home Act, § 10, as amended by St. 1921, p. 945).

Action against board of directors of veterans' home to recover sum on deposit by deceased inmate may properly be brought directly in name of heir without obtaining letters of administration, since under Code Civ. Proc. § 690, subd. 20, money is not subject to execution, and particularly since section 10 of the Veterans' Home Act (St. 1897, p. 110), as amended by St. 1921, p. 945, specifically provides that

such moneys may be paid over without probate of estate of deceased inmate.

2. Judgment §120—Clerk of court cannot enter default judgment in action against board of directors of veterans' home to recover deposit of deceased inmate (Code Civ. Proc. § 585, subd. 1).

Action against board of directors of veterans' home to recover deposit of deceased inmate not being within Code Civ. Proc. § 585, subd. 1, providing only conditions under which clerk of court may enter a default judgment, action of clerk in attempting to enter a default judgment without order or direction of court and without taking of testimony was invalid requiring reversal of judgment.

3. Judgment §117—Default judgment against board of directors of veterans' home under complaint asking for direct money judgment held void (Code Civ. Proc. § 580).

Since under Code Civ. Proc. § 580, clerk of court in entering default judgment could not exceed relief demanded by complaint, judgment in action against board of directors of veterans' home to recover deposit of deceased inmate held void, where prayer of complaint was for direct money judgment against trustees and secretary-treasurer without request for examination by board of plaintiff's claims.

4. Mandamus §80—Board of directors and secretary-treasurer of veterans' home may be compelled by mandate to act on claim for deposit of deceased inmate.

Where board of directors of veterans' home and secretary-treasurer thereof refused to act on claim for deposit of deceased inmate after due and proper proofs had been presented to them under their rules governing presentation of such claims, they may be compelled by writ of mandate to act.

Appeal from Superior Court, Napa County; Percy S. King, Judge.

Action by Henry McOmie against the Board of Directors of the Veterans' Home of California and another. Judgment for plaintiff and defendants appeal. Reversed with directions.

See, also, 77 Cal. App. 248, 246 P. 155.

U. S. Webb, Atty. Gen., and Frank L. Gueren and R. L. Chamberlain, Deputy Attys. Gen., for appellants.

E. L. Webber, of Napa, for respondent.

WEYAND, Justice pro tem. By complaint filed in the superior court of Napa county on March 9, 1925, the above-named plaintiff alleged that Samuel W. Backus, Hugh M. Burk, B. A. Forsterer, E. L. Hawk, E. B. Hinman, Harry E. Speas, and Walter D. Wagner were the trustees of the Veterans' Home of California, and that C. de Colmesnil was the secretary-treasurer of said home. Plaintiff further alleged that one Henry McOmie, the father of plaintiff, died in Napa county on or about April 28, 1922, being at the time of his death a resident of Napa county and an

inmate of said Veterans' Home. That at the time of his death McOmie, the deceased, had on deposit with defendants herein the sum of \$794.38. It is further averred that plaintiff herein was the son and only heir of the deceased, and the only person entitled to any share in the estate of said deceased. It is then alleged that said defendants are holding said sum of money "until the same is claimed by any heirs at law of said Henry McOmie, deceased," and, by further allegation, that said plaintiff "demanded of said defendants the payment of all of said moneys to him, * * * but the defendants have refused and still continue to refuse to pay plaintiff said moneys or any part thereof."

The prayer to said complaint is worded as follows:

"Wherefore plaintiff prays judgment against said defendants for the sum of \$794.38, and interest and costs of suit."

To this complaint there was interposed, in due time, a general demurrer. This demurrer came up for hearing, and thereupon the judge of the trial court ordered inserted in said complaint an allegation that plaintiff had "submitted to defendants proper proof of heirship to Henry McOmie, deceased, and his right to be paid said moneys," and then ordered the demurrer overruled and granted defendants 10 days within which to answer said complaint. Defendants did not answer, and upon the entry of their default the clerk of the said court entered a pretended judgment herein without order or direction of or from the judge of said court, and without the taking of any testimony by the court as to the truth of the allegations of the complaint.

Defendants have appealed from said judgment, and the case is presented in this court upon the judgment roll, duly certified by the clerk of the superior court of Napa county.

Appellants assign three reasons why, as they claim, the said judgment should be reversed. We will state these reasons in the order in which we believe they should be arranged, and not in the order presented by appellants.

First. Appellants assert that such an action as this, even if permitted, must be brought and prosecuted by the personal representative of the deceased.

Second. That in no event could a judgment such as this be entered by the clerk without the order of the judge granting the judgment, and upon testimony being taken by the court as to the allegations of the complaint.

Third. Appellants claim that this action is in substance a direct action against the state of California, and that in its present form it is not one of the character that may be prosecuted against the state.

[1] Taking up these objections in the above

order, while this judgment cannot be sustained for reasons hereinafter stated, yet we are of the opinion that it is not a valid objection to this form of action that it is brought directly in the name of the heir, and without obtaining letters of administration upon the estate of the deceased. No purpose can be served by administration of the estate of the deceased who leaves only an estate consisting of pension moneys, or moneys turned over to the trustees of this home. This money is not subject to execution. Subdivision 20, § 690, Code Civ. Proc. Creditors can have no interest therein. A similar situation is provided for by section 1454, Code of Civil Procedure, whereby certain heirs are permitted to collect a bank deposit under certain conditions without probate. Section 10 of the Veterans' Home Act (St. 1897, p. 110), as the same was amended by chapter 573 of the Statutes of 1921, specifically provides that the moneys on deposit, such as this, may be paid over "without probate" of the estate of the deceased inmate.

[2] As to the claim of appellants that this judgment is one that can only be rendered by the court after the taking of testimony upon the matters alleged in the complaint, we must agree with that contention. Subdivision 1 of section 585, Code of Civil Procedure, provides the only conditions under which the clerk of the court may enter a default judgment. This action is not of the kind wherein the clerk, upon application of the plaintiff, may make entry of judgment. We are therefore of the opinion that the action of the clerk herein, in attempting to enter a judgment, was wholly beyond the statutory power of the clerk, and therefore this judgment must be reversed.

[3] The third objection above enumerated is in our judgment not well taken, except in so far as the form of the action is concerned. The prayer to the complaint herein is one for a direct money judgment against the trustees and the secretary-treasurer, and in response to that prayer the clerk entered a pretended judgment herein. Under section 580, Code of Civil Procedure, the clerk could not exceed the relief demanded by the complaint. The prayer of the complaint does not ask for an examination by the board of the claims of plaintiff. Having no right to bring an action in this form, it must follow that the judgment, in its present form, is void.

[4] We are clearly of the opinion that, if the defendants herein have refused to act as required by law upon due and proper proofs being presented to them under their rules governing the presentation of such claims as the instant one, they may have been compelled by writ of mandate to act and order the claim paid, and their secretary-treasurer may be directed to pay the same, and thus any attempted arbitrary action on the part of this board and their secretary-treasurer

could have been subject to control by a proper court.

The judgment herein entered by the clerk is reversed, and the judge of the lower court is hereby directed to permit the plaintiff to amend his present complaint to the end that he may state a cause of action to compel the defendants to allow the claim and to compel said secretary-treasurer to pay the same.

We concur: FINCH, P. J.; PLUMMER, J.

88 Cal. App. 795

Sue CHITTIM. Mrs. W. B. Jewell, Mrs. U. D. Reed, Nellie Bird, W. H. Chittim, L. S. Chittim, Mrs. H. Hendrickson, L. R. Search, Abner Search, Mrs. M. E. Foster, W. T. Pinkson, Jackson W. Search, Mrs. J. J. Prather, Louis Search, James H. Search, John R. Search, Mrs. Effie Wood, John T. Search, Lawrence Search, Florence Cobb, Emily J. Smith, Mary S. Smith, May Heindel and Louis Search, Plaintiffs and Respondents, v. BOARD OF DIRECTORS OF VETERANS' HOME OF CALIFORNIA and C. de Colmesnil, as Secretary-Treasurer thereof, Defendants and Appellants. (Civ. 3041.)

District Court of Appeal, Third District, California. Dec. 24, 1927.

Appeal from Superior Court, Napa County; Percy S. King, Judge.

See, also, 77 Cal. App. 252, 246 P. 157.

U. S. Webb, Atty. Gen., and Frank L. Guereña and R. L. Chamberlain, Deputy Attys. Gen., for appellants.

E. L. Webber, of Napa, for respondents.

PER CURIAM. The facts in this case are in all essential particulars the same as in the case of *McOmie v. Board of Directors of the Veterans' Home of California et al.* (Cal. App.) 263 P. 253, this day decided.

For the reasons stated in the opinion in that case the judgment herein entered by the clerk is reversed, and the judge of the lower court is hereby directed to permit the plaintiffs to amend their present complaint to the end that they may state a cause of action to compel the defendants to allow the claim and to compel said secretary-treasurer to pay the same.

88 Cal. App. 174

SCHLEIF v. GRIGSBY. (Civ. 6022.)★

District Court of Appeal, First District, Division 1, California. Dec. 31, 1927.

Hearing Denied by Supreme Court Feb. 27, 1928.

1. Telegraphs and telephones ⇨20(5)—Evidence held to sustain finding that executrix was in control of telephone line causing injuries to traveler caught by low wire.

In action against executrix of estate of transferee of telephone line for injuries to one coming in contact with low telephone wire strung across highway, evidence held to sustain finding that testator was owner and in control of telephone line at time of his death, and that

such control had been assumed by executrix and those acting under her.

2. Telegraphs and telephones ⇨15(2)—One maintaining telephone line crossing highway is required to exercise ordinary care to maintain line at height sufficient for ordinary travel.

Defendant maintaining telephone line which crossed highway was under duty to exercise ordinary care to maintain line in reasonably safe condition for travel and at height sufficient for ordinary travel such as would pass in locality in which line was constructed.

3. Appeal and error ⇨1008(1)—Trial court's determination on question of fact is conclusive.

Determination of trial court on questions of fact is conclusive on appeal.

4. Telegraphs and telephones ⇨20(7)—Negligence in maintaining telephone wire across road at height of less than 10 feet held for jury.

Issue of negligence of owner of telephone line in maintaining wire across road at height of only 9 feet and 9 inches held for jury, in action for injuries by person standing on truck in process of moving load, who was caught and violently thrown by unseen wire.

5. Telegraphs and telephones ⇨15(2)—Person maintaining telephone line is charged with duty of inspecting wires, and his knowledge of existence of defects may be inferred.

Though one maintaining telephone line is entitled to reasonable time to make repairs after obtaining actual or constructive knowledge of defective condition of wire, such person is charged with duty of inspection, and proof of his knowledge is assumed to follow proof of facts from which knowledge would ordinarily be inferred.

6. Telegraphs and telephones ⇨20(7)—Knowledge of low level of wire crossing highway held for jury.

Where person managing telephone line lived in vicinity and was familiar with line and country through which it was constructed, question of her knowledge of defective condition of wire crossing highway in that it was situated less than 10 feet above ground level held question for jury.

7. Appeal and error ⇨989—Appellate court merely determines sufficiency of facts to warrant findings implied in verdict.

Appellate court merely inquires as to whether facts are sufficient to warrant findings implied in verdict.

8. Master and servant ⇨203(1)—Doctrine of assumption of risk applies to master and servant.

Doctrine of assumption of risk has its general application to the relation of master and servant.

9. Negligence ⇨66(1)—Doctrine of assumption of risk merely places higher duty on injured party if he voluntarily enters position of known danger.

Doctrine of assumption of risk, if applicable to cases not involving relationship of em-

ployment, does not absolve wrongdoer of all blame or remove requirement of ordinary care, but merely places upon party injured higher duty if he voluntarily enters a position of known danger.

- 10. Negligence** ⇨136(27)—Momentary forgetfulness of known danger is not contributory negligence per se, unless circumstances show want of ordinary care.

Momentary forgetfulness of a known danger by person injured does not constitute contributory negligence per se, unless circumstances are sufficient to enable court to determine that forgetfulness showed want of ordinary care.

- 11. Evidence** ⇨14—Court judicially knows that small telephone wire is often difficult to locate.

Court can take judicial notice of the fact that a single telephone wire, small in size, is often difficult to locate under favorable conditions.

- 12. Telegraphs and telephones** ⇨20(7)—Contributory negligence of one standing on truck caught by telephone wire crossing road held for jury.

Issue of contributory negligence of person caught by low telephone wire across road, wire being obscured from view by trees, while he was standing on truck holding load of household goods, held for jury, notwithstanding person injured had observed wire across road several months before under similar circumstances and had cut or separated it in order to pass, since momentary forgetfulness does not constitute contributory negligence per se.

- 13. Telegraphs and telephones** ⇨15(2)—One caught by telephone wire across highway while moving household effects held not trespasser or licensee as to operator of telephone line.

Employee moving away from ranch on truck by which he transported his household effects was neither trespasser nor mere licensee as to one operating low telephone line strung across highway, and who was injured as result of being caught by wire.

- 14. Telegraphs and telephones** ⇨20(5)—Owner of telephone line, sued for injuries, had burden to prove line was not in her control.

Owner of telephone line, to avoid liability for injuries resulting from negligence in permitting line to hang low over roadway, had burden to show that she was not in control of line.

- 15. Telegraphs and telephones** ⇨20(8)—Instruction requiring proof defendant, owner of telephone line, negligently maintained line held not prejudicial as not requiring that owner be in control.

In action for injuries to one caught by low telephone wire across highway, instruction relative to duties of owner of telephone line held not prejudicial for failure to require that owner must have been in control of line, where instruction provided that defendant was not liable unless she negligently maintained line at time of accident.

Appeal from Superior Court, Napa County; Percy S. King, Judge.

Action by A. F. Schleif against Harriet Frances Grigsby. Judgment for plaintiff, and defendant appeals. Affirmed.

H. B. Churchill, of Santa Rosa, and H. L. Johnston and L. E. Johnston, both of Napa (A. W. Hollingsworth, of Santa Rosa, of counsel), for appellant.

Wallace Rutherford, of Napa, for respondent.

PARKER, Justice pro tem. This is an appeal by defendant from a judgment in favor of plaintiff in an action for damages.

The action was tried by the court sitting with a jury, and the judgment followed the verdict returned. Defendant's motion for a new trial was denied.

At the outset a résumé of the facts sufficient to present generally the controversy will be given, and further detail of fact will accompany each point urged. On May 21, 1923, the plaintiff was engaged in moving some furniture and personal effects from a place of previous employment. He had loaded these goods upon a small truck operated by another person. When the truck was in motion plaintiff was standing in the body thereof upon a small trunk and holding in place the small load. While plaintiff was thus riding he came in contact with a telephone wire, which caught him under the chin, throwing his head violently backwards, and causing him to be pitched and thrown from the truck to the ground with some force. These facts seem to be practically admitted.

There are many minor claims of error involved in this appeal, but the disposition of the case centers about two main contentions.

1. Appellant contends there is not sufficient evidence to show that defendant was guilty of any negligence whatsoever, and that she was in no way legally liable.

[1] It appears that at some time previous (1891) a number of people organized a mining corporation known as and called Palisade Mining Company. In the course of its business the company was granted a franchise by the supervisors of Napa county to construct and maintain a telephone line from the property of the company to the town of Calistoga. In the year 1907 by conveyance the company transferred all of its property, including the telephone line, to one R. F. Grigsby, who held the property until the time of his death. He died on January 27, 1923, leaving a will, wherein Harriet Frances Grigsby, defendant herein, was named sole devisee and nominated executrix. Thereafter the said will was admitted to probate and Harriet Frances Grigsby appointed executrix thereof, and at the time of the alleged injury, May 21, 1923, she was the duly appointed, qualified and acting executrix of the last will and testament of R. F. Grigsby, deceased.

It is conceded by appellant that as such

executrix the defendant would be personally liable for damages for torts arising out of property under her control. The appellant, however, claims that the telephone line complained of was not at the time of the alleged accident being maintained by or under the control of the defendant as such executrix or otherwise. It is fairly deducible from the record that the telephone line in question was constructed to afford means of communication between the mining property of Palisades Mining Company and the town of Calistoga and other points beyond, through the central station maintained in said town; that at all times the defendant's testator was a large owner or had a direct interest in the conduct of the said mining company, and there was a telephone connection from said line to the Grigsby home. Prior to the death of Grigsby, to wit, in January, 1921, R. F. Grigsby by agreement leased to one L. A. Thomas certain described real estate for a period of five years upon terms and conditions not necessary to detail here. Out of the fact of this unexpired lease arises appellant's claim that at the time of his death her testator had no dominion or control over the telephone line in question, and that after his death the defendant herein, as executrix, acquired no rights other than as subject to the lease in question. The record before us does not support appellant in this contention. The lease does not disclose, nor is there any other evidence to determine, just what property this lease covered. The description of the property demised does not show that it was the intent thereof to lease all of the property of the Palisades Mining Company, and there is not one word therein concerning the telephone line. The lease standing by itself offers no evidence of any change in the ownership or possession of the line, and particularly would this be true from the fact that the lessor Grigsby did reserve certain rights even under the lease, the extent of these rights being immaterial here. Whatever may be said concerning the rights, if any, that the lessee of the other property may have had in the telephone line generally, it is apparent that no use was made or right claimed by the lessee of that portion of the line running to the Grigsby home.

It is shown by the evidence that on May 18, 1923, prior to the alleged accident, defendant caused to be published in a newspaper of general circulation published at Calistoga the following notice:

"Notice.

"Any one found trespassing upon the property of the late R. F. Grigsby will be punished to the full extent of the law. Any information in regard to cutting my telephone wire will be rewarded. [Signed.] Mrs. R. F. Grigsby."

In addition hereto, there was evidence from which a fair inference could be drawn to

the effect that defendant executrix and those acting for her had assumed possession and control of the telephone line in question.

Concluding, therefore, that possession and control have been sufficiently brought home to the defendant, we pass then to the duty of the defendant in the premises.

[2] Appellant contends that in the absence of any statutory regulation it is the duty of one who maintains telephone wires to exercise ordinary care in their construction and maintenance in a reasonably safe condition to permit of ordinary travel. We may accept this rule and concede for the purposes hereof, and with respect to the particular line in question, that there is no statutory regulation as to the height at which the telephone line in controversy should be constructed. We wish it understood, however, that the concession is made solely for the purposes hereof and with reference only to this particular telephone line. For the purposes of this appeal we accept appellant's theory that the duty resting on her was to maintain the telephone line at a height sufficient for ordinary travel. Naturally the term "ordinary travel" would relate to the locality in which the line was constructed.

[3, 4] Appellant cites the case of *Mayhew v. Yakima Power Co.*, 72 Wash. 431, 130 P. 485, as authority for this statement:

"A person claiming a wire is too low must show that it is usual and customary for vehicles of equal or greater height to pass under it."

In the case cited all that the court actually determined was that in the particular territory involved derricks 45 feet high were not so generally hauled over the road as to constitute usual and ordinary travel. To adopt appellant's contention here we are called upon to determine that a telephone line 9 feet and 9 inches above the ground is, as a matter of law, sufficiently high to permit of ordinary travel in the locality involved. This we decline to do. The terms "ordinary travel" and "daily travel" are not the same. As may be the fact, in the instant case vehicles or loads 10 feet high may not pass under the wire once a month, yet that would in no way determine that a load 10 feet high was unusual or extraordinary. When we consider that 10 feet is but little over 4 feet higher than the height of an average man, it is difficult to hold that height sufficient in law for all ordinary or usual travel. If we cannot hold as a matter of judicial knowledge that vehicles or loads in excess of 9 feet 9 inches are unusual or extraordinary, then the question becomes one of fact, and the determination of the trial court concludes the query. There is also testimony to the effect that at the point where the telephone line crossed the road the line was hidden by the branches of a tree and by the shade. With these facts in mind we think the jury,

had abundant evidence before it from which it might find the defendant negligent.

2. Incidental to this attack upon the verdict the appellant urges that even if it is found that the telephone line in question was negligently maintained, nevertheless there is no evidence of knowledge on the part of defendant.

[5] We do not deem it necessary to review the many authorities cited to the point that one who maintains a telephone wire is entitled to a reasonable time to make repairs after obtaining actual knowledge or constructive notice of a defective condition of the wire. This subject is reviewed in Jones on Telegraph and Telephone Companies (2d Ed.) p. 233 et seq. After citing many authorities, the author concludes the discussion with the statement that in any of these cases the liability is a question of fact to be determined by the jury. This latter statement likewise is supported by much authority. There seem to be no parallel cases in this jurisdiction. But, adopting the doctrine as contended for, we conclude that the rule would be and is that the owner or person in control of a telephone line would be charged, under the duty of maintenance, with the duty of inspection, and that proof of his knowledge would follow proof of facts from which said knowledge would ordinarily be inferred. The authorities cited in the text referred to unqualifiedly support this conclusion.

[6, 7] Coming, then, to the instant case, the question of defendant's knowledge was a question for the jury to determine, and our inquiry goes only to ascertain if there were facts sufficient to warrant an affirmative finding as implied in the verdict. The evidence discloses that defendant prior to the death of her husband had lived many years in the vicinity; that she was familiar with the line and the country through which the same was constructed; that after the death of her husband she was his sole devisee, and likewise executrix of his will; that she had shown some knowledge of the line in general through the advertisement hereinbefore referred to; that a nephew residing with her had made certain repairs on the line preceding the accident. It further appears that the line was in a general condition of dilapidation in various places, and that this condition was observed by her prior to the accident, but, according to her testimony, she gave this no attention because she was of the opinion that the telephone line was out of her possession by reason of the lease referred to hereinbefore. We think this evidence sufficient to support the verdict on this issue.

3. It is next contended by appellant that the evidence shows as a matter of law that plaintiff was guilty of contributory negligence to a degree that precludes any recovery by him. The argument is based upon the following admitted facts: The accident upon

which plaintiff's cause of action rests occurred on May 21, 1923. While plaintiff was leaving the ranch of one Mrs. Fowle and removing his goods therefrom, he encountered the telephone wire as related. The plaintiff had moved onto the Fowle ranch in March, 1923, some two or three months prior to the date of the accident. When he went there he moved his furniture in a truck and encountered the same wire, though with less misfortune. On his trip into the premises in March he saw the wire across the roadway and observed that it hung too low to permit his load to pass thereunder, and he cut or separated the wire and left it in that condition and passed through. The evidence further shows that during the few months he remained on the Fowle ranch he had occasion from time to time to note the presence of the wire, and at one time followed the line to the Grigsby home to learn what line it might be.

[8, 9] The appellant bases his contention first upon the doctrine of assumption of risk. This doctrine has its general application to the relation of master and servant, and the authorities cited cover cases wherein this relationship existed. However, conceding that the theory underlying the doctrine of assumption of risk may have application to cases outside of this particular relationship of employment, it goes no farther than the accepted standard of ordinary care under the circumstances. In other words, the doctrine of assumption of risk in other cases does not absolve the wrongdoer of all blame, but places upon the party injured a higher duty if he voluntarily enters a position of known danger. *Graff v. United R. R.*, 178 Cal. 171, 172 P. 603; *Kelly v. Santa Barbara R. R.*, 171 Cal. 419, 153 P. 903, Ann. Cas. 1917C, 67. Therefore we shall dismiss the question of plaintiff's alleged negligence from the standpoint of his knowledge of the conditions as shown as far as that may be important here.

[10] The evidence here shows that when plaintiff was obliged to cut or take down the wire upon entering the premises in March, some two or three months before the accident, the load of furniture which he was transporting on the road was piled to a height greater than the height of the load carried on the date of the alleged injury. While the record is not clear as to the exact height of the wire on the first occasion, yet it seems to be conceded by respondent that the wire was then strung at a height of 10½ feet. The rule of law contended for is as follows: Momentary forgetfulness of a known danger not induced by a sudden and adequate disturbing cause is contributory negligence, qualifying this by the statement that to forget is not negligence unless it shows a want of ordinary care. The qualification is not absolute, but depends upon the facts of

the particular case. There is a long line of cases holding that forgetfulness is as a matter of law negligence that will defeat recovery. *McGraw v. Friend & Terry Co.*, 120 Cal. 575, 52 P. 1004; *Davis v. Cal. St. R. R. Co.*, 105 Cal. 135, 38 P. 647; *Brett v. S. H. Frank Co.*, 162 Cal. 735, 124 P. 437; *Ergo v. Merced Falls Gas Co.*, 161 Cal. 334, 119 P. 101, 41 L. R. A. (N. S.) 79; *Towne v. Electric Co.*, 146 Cal. 770, 81 P. 124, 70 L. R. A. 214, 2 Ann. Cas. 905. It is upon this theory that appellant bases her claim of contributory negligence chargeable to respondent. However, as is said in *Jacobson v. Oakland Meat Co.*, 161 Cal. 430, 119 P. 653, Ann. Cas. 1913B, 1194, one element in all these cases is the plaintiff's familiarity with the danger he forgot. To arbitrarily adopt as a standard of negligence per se the rule that if one may be charged with a knowledge, past or present, of a danger, he is precluded from recovery for injuries sustained therefrom and let the rule rest there for all cases would be to establish a doctrine dangerous in its application and unsound in principle and one not warranted by the present weight of authority. Courts are unwilling to declare that forgetting a known danger always amounts to negligence. *Jacobson v. Oakland Meat Co.*, 161 Cal. 430, 119 P. 653, Ann. Cas. 1913B, 1194, The true rule to be deducted from the cases cited is that the forgetfulness shown must be under circumstances sufficient to enable a court to determine that such lack of memory constituted negligence per se. In all of the cases cited there appear circumstances showing either an employment connected in some way with the dangerous instrumentality, or an intimacy therewith long continued, and further that the danger was of a nature readily apparent and easily discernible to the extent that injury could result only from a forgetfulness. In the case of *Davis v. California St. R. R. Co.*, 105 Cal. 131, 38 P. 647, which is the strongest case supporting the contention of appellant, the court says:

"Each rests upon its own peculiar circumstances. If the facts are doubtful, as the result of uncertain evidence or conflicting testimony, the question should be submitted to a jury."

In *Giraudi v. Electric Imp. Co.*, 107 Cal. 126, 40 P. 110, 28 L. R. A. 596, 48 Am. St. Rep. 114, we find this statement:

"To forget is not negligence, unless it shows a want of ordinary care, and it is a question for the jury."

The case of *Anderson v. Southern California Edison Co.* (Cal. App.) 246 P. 559, is in line with the foregoing, and is a recent authority for the conclusion hereinbefore reached.

[11, 12] In the case at bar the employment of plaintiff was in no way connected with the telephone line in question. The evidence

shows that some months before he had occasion to observe that it was strung too low to permit a higher load from passing under; that his work on the Fowle ranch was in proximity to the line; and that from time to time he had observed the line, and had opportunity to observe and did observe that it was in a general condition of disorder. However, he had no contact with the operation or maintenance of the line. He did have knowledge that prior to the accident a nephew of appellant had done some work of repair on the line. Further, and of particular importance is the fact that the line at the place in question was not readily observable. The evidence discloses that at the point where the line crossed the road there were trees of heavy foliage through which the line ran. The shade of the trees and the leaves and branches thereof tended to and did obscure and hide the line from view, practically concealing it. We can readily take judicial knowledge of the fact that a single telephone wire, small in size, is often difficult to locate under favorable conditions. We think the question of plaintiff's contributory negligence was one for the jury, and the determination being that no negligence is shown, we hold there was sufficient evidence to sustain the verdict on that issue.

Appellant complains of the action of the trial court in the giving and refusal of certain instructions.

[13] The court refused to instruct the jury on the question of the duties owed to a mere licensee. Appellant contended that she was entitled to show the relation between plaintiff and his employer. We cannot follow this line of argument. As far as the record discloses, the plaintiff was rightfully enjoying the use of a public road or driveway, and what his rights or duties might have been at the point where his journey commenced, or at the point where it might end, can be of no importance here. Concededly, there was no limitation upon his rights as a traveler upon the highway as far as any contractual or other relationship existed between plaintiff and appellant. In any event, the evidence shows clearly that he had completed his employment at the Fowle ranch and was moving out. Obviously he was neither a trespasser nor a mere licensee even with respect to the premises from which he was departing.

[14, 15] The instructions given of which appellant complains had reference to the duties incumbent upon the owner of a telephone line. Appellant insists that the duties of an owner are enforced only when the owner has control of the operation and maintenance of a line, and that when an instrumentality passes out of the control of a person his responsibility for injuries inflicted by it ceases forthwith. While we might concede that the instruction should have been somewhat qualified, we find that the jury was

properly instructed that it must be shown that the line was negligently maintained by appellant at the time of the accident. Appellant was likewise the owner of the line involved, and if responsibility of the owner was to be avoided it was incumbent upon her to set up such facts as would tend to that result. Appellant urges that, under the instruction given, the jury might readily have found that the line was out of her control, and yet found that she was the owner, and applied the rule given as to duties incumbent on the owner irrespective of control.

The instructions as a whole do not warrant such a conclusion. As a whole they sufficiently specify the individual duty resting upon appellant. Analyzing the effect of the claimed error, it might be well argued that if this court placed the duty on the owner rather than the person in control, it would be a favorable instruction as far as the said person in control was concerned and not subject to the complaint offered. On the other hand, if appellant complains that the instruction prejudiced her rights because she was in fact the owner, she nevertheless concedes that had the action been against her as such owner the criticized instruction correctly sets forth the law. In either case, we do not find sufficient error to justify a reversal, and we further find it unnecessary to go to the Constitution for shelter.

Other grounds urged by appellant are as to misconduct of counsel and rejection of testimony. Without detailing these various rulings, or setting out in detail the alleged misconduct, we find upon examination of the record nothing calling for any further action by this court. We are not hurrying over the contentions of appellant on these matters, but these points necessarily are connected up with the main points urged, and while it may be true that in an occasional ruling the trial court would have been warranted in a contrary holding, nevertheless on the whole appellant was in no wise restricted in a full and fair presentation of her case, nor was respondent permitted undue privilege to the prejudice of appellant.

Judgment affirmed.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

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MAHANA et al. v. ALEXANDER. (Civ. 3363.)

District Court of Appeal, Third District, California. Dec. 29, 1927.

1. Guaranty ⇨27—Liability of guarantor cannot be extended beyond express terms of contract (Civ. Code, § 2836).

Liability of a guarantor, as is true as to a surety under Civ. Code, § 2836, cannot be extended beyond express terms of his contract.

2. Principal and surety ⇨6—Fundamental distinction between guaranty and surety is that surety's obligation is original, while guarantor's is collateral; "contract of guaranty"; "contract of surety" (Civ. Code, §§ 2787, 2831, 2845).

Fundamental distinction between contract of "guaranty," defined in Civ. Code, § 2787, and that of a "surety," defined in section 2831, is that, while a surety's obligation is original, that of a guarantor is collateral to, and independent of contract, the performance of which he guarantees, and, though surety may demand that creditor first proceed against principal, or pursue any other remedy which would lighten surety's burden under section 2845, guarantor does not have such right.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Guaranty; Suretyship.]

3. Principal and surety ⇨5—"Contract of indemnity" differs from "contract of surety," in that surety contract involves direct promise to perform obligation (Civ. Code, § 2772).

"Contract of indemnity," defined by Civ. Code, § 2772, resembles that of "contract of suretyship," in that both are original obligations, but they differ, in that contract of surety involves direct promise to perform obligation of principal, while contract of indemnity obligates indemnitor only to reimburse indemnitee for loss suffered or to save him harmless from liability; demand being unnecessary in latter obligation.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Indemnity.]

4. Guaranty ⇨1—"Guaranty" is contract for direct payment of debt or money.

A guaranty is a contract for the direct payment of a debt or of money.

5. Principal and surety ⇨1—"Suretyship" is direct promise to perform principal's obligation in case of default.

"Suretyship" is a direct promise to perform obligation of principal in case of default in performance by principal.

6. Principal and surety ⇨5—Contracts by which principal indemnified obligee against loss arising from principal's failure to perform contract and pay materialmen's and laborers' claims held "contracts of suretyship" (Code Civ. Proc. § 1183; Civ. Code, § 2831).

Contracts providing that, if principal should indemnify obligee against any loss or damage arising from principal's failure to perform work under contract, and pay materialmen's and laborers' liens, obligation should be void, otherwise to remain in full force and effect, purporting to have been executed in pursuance of Code Civ. Proc. § 1183, held to constitute contracts of suretyship, as defined by Civ. Code, § 2831.

7. Principal and surety ⇨145(1)—Judgment against contractor, sued alone for breach of original contract, is not binding on surety (Code Civ. Proc. § 1912).

Judgment obtained in an action on contract, supported by an agreement of suretyship against

the contractor sued alone for a breach of the original contract, is not binding or conclusive on the surety, Code Civ. Proc. § 1912, authorizing binding of principal by judgment against surety, not authorizing binding surety, where principal alone had been sued.

8. Principal and surety ⇨152, 163—Either principal or surety or both may be sued for breach of contract and joint or several, or joint and several, judgment obtained.

On accrual of a right of action on a contract of suretyship which occurs synchronously with breach of original contract, either principal or surety or both may be sued, and a joint or several, or joint and several, judgment secured to enforce liability created by undertaking, obtained.

9. Pleading ⇨364(1)—Trial court, in action against surety, properly struck from complaint matters relative to securing judgment against principal sued alone.

In action against surety to recover under contract of suretyship, trial court properly struck from complaint matters relative to securing judgment against principal, who was sued alone, because of fact that such judgment is not conclusive or binding on surety.

10. Judgment ⇨143(1)—Default judgment may be vacated as obtained through mistake in law on part of moving party or through erroneous advice of attorney.

Judgment by default may be vacated and set aside on ground that such judgment was brought about and entered through a mistake in law on the part of the moving party, or through the erroneous advice given to former by his attorney.

11. Judgment ⇨145(2)—Refusal to set aside order sustaining demurrer to amended complaint and default judgment thereon, without leave to amend, held not error on refusal to plead (Code Civ. Proc. § 473).

Trial court held not to have abused its discretion in denying motion to set aside and vacate order sustaining a demurrer without leave to amend, and default judgment entered thereon, made pursuant to Code Civ. Proc. § 473, and on specific ground that order was taken against plaintiffs through inadvertence and mistake, where plaintiffs' counsel in open court, announced that they did not desire leave to file an amended complaint, and would not do so.

Appeal from Superior Court, Los Angeles County; Frank C. Collier, Judge.

Action by George T. Mahana and others against Cora B. Alexander. From a judgment sustaining a demurrer, and from an order denying plaintiffs' motion to set aside and vacate the order and judgment sustaining the demurrer, plaintiffs appeal. Affirmed.

George W. Seith and Walter W. Little, both of Los Angeles, for appellants.

Fred Horowitz, of Los Angeles, for respondent.

HART, J. The court below, on motion of defendant, struck out certain portions of the second amended complaint, and sustained a demurrer to the remaining averments thereof. This is an appeal from the judgment entered upon the order sustaining the demurrer, and from an order, subsequently made, denying the motion of plaintiffs to set aside and vacate the order and the judgment sustaining the demurrer to said complaint, on the ground that said order and said judgment were brought about through "mistake, inadvertence, surprise, or excusable neglect," on the part of the plaintiffs and their former attorneys of record in said cause. Code Civ. Proc. § 473.

The plaintiffs in their opening brief state the salient allegations of the complaint as follows:

"The second amended complaint alleges, as a first cause of action, that on November 22, 1920, plaintiffs entered into an agreement with the Los Angeles Engineering & Manufacturing Company, a corporation, by the terms of which said company undertook and agreed to manufacture for plaintiffs certain dies, tools, jigs, and electrical flashers, in a first-class, workmanlike manner; that at the same time, and as a part of said agreement, the said company caused to be made, executed, and delivered to plaintiffs the bond, obligation, or agreement of defendant for the sum of \$1,700, by which said defendant undertook and agreed to indemnify plaintiffs against any loss, liability, or damage by reason of the failure of said manufacturing company to perform faithfully the work so contracted to be performed, or by reason of the failure of said company to manufacture said flashers in a first-class, workmanlike manner; that said company paid defendant a premium for said undertaking; that plaintiffs accepted said contract with the company, and entered into the same in consideration of said undertaking. The complaint then sets out the breaches of contract upon the part of said manufacturing company, and that, by reason thereof, the plaintiffs instituted an action against said company in the superior court of Los Angeles county for the recovery of damages because of the failure of said company to perform the contract; that plaintiffs notified defendant of said action, and at the trial thereof defendant appeared in said action, and participated in the defense thereof; that thereafter, to wit, on the 1st day of January, 1923, a judgment was duly made, entered, and given in said action, being case No. B. 9474, in favor of plaintiffs and against said company, for the total sum of \$18,323.15 damages; that thereafter plaintiffs caused an execution to be issued on said judgment, and the same has been returned wholly unsatisfied, and plaintiffs have not been able to find any property of any kind or nature to satisfy said execution, and that no part of said judgment has been paid; further alleges, on information and belief, that said company, at the time of the rendition of said judgment, and continuously ever since, has been insolvent, that is, has not had, at any time since judgment was rendered, any property, money, or

funds of any kind or nature in this state or elsewhere.

"The second cause of action is precisely the same as the first, except that it is upon another bond for a different amount, viz. \$6,000. The prayer asks for \$7,700 on the two bonds, interest and costs."

The condition of the obligation in each of the undertakings is as follows:

"Now, therefore, the condition of this obligation is such, that if the principal shall indemnify the obligee against any loss or damage directly arising by reason of the failure of the principal to faithfully perform the work contracted to be performed under said contract, and shall pay, or cause to be paid, in full the claims of all persons performing labor upon or furnishing materials to be used in such work, then this obligation shall be void; otherwise to remain in full force and effect."

Each of the undertakings purports to have been executed in pursuance of the provisions of section 1183 of the Code of Civil Procedure, which relates to the enforcement of mechanics' and laborers' liens, and, in fact, the instruments expressly so declare.

The motion to strike, and the order striking from said complaint certain of its averments involved all the allegations relative to the institution of the action by the plaintiffs against the principal and the undertakings, including, therefore, the following averments: That, upon the commencement of said action, the surety on the undertakings was given notice of the institution of the action; that the surety appeared and participated in the trial of said action; that judgment was rendered and entered in favor of plaintiffs against the principal (the manufacturing company); that execution issued on said judgment, and was returned "wholly unsatisfied"; and that "plaintiffs have not been able to find any property of any kind or nature to satisfy said execution, or any part thereof, and that no part of said judgment has been paid."

The plaintiffs contend that, where the principal on a surety bond has failed to perform as required by the contract as to which such bond has been given, it is necessary, as a prerequisite to the right of the party for whose benefit the bond has been given to proceed against the surety to enforce the liability he has assumed, first to prosecute to judgment an action against such principal, and thereby cause to be ascertained and liquidated the damages to which the beneficiary under the undertaking may be entitled; that any judgment thus obtained against the principal then becomes, and is conclusive upon, the surety; hence, so the argument proceeds, the plaintiffs in this case having obtained judgment for damages against the principal (manufacturing company) for a breach of the contract, said judgment has established the liability of the sure-

ty (defendant herein), and is necessarily conclusive upon her.

[1, 2] The question whether the surety is conclusively bound by a judgment against the principal alone on an undertaking has occasioned much discussion in the briefs regarding the distinction between the legal status of a guarantor with respect to the obligation he owes to the guarantee and that of a surety to the party for whose benefit the surety undertaking is given. In a general legal aspect there is no ground of distinction between the two classes of undertaking. The ultimate purpose of both is to secure to a party the performance of some act or obligation which another party has agreed to perform. There are, however, certain technical attributes peculiar to each which differentiate them. The Code defines a guaranty to be "a promise to answer for the debt, default, or miscarriage of another" (Civ. Code, § 2787), and a surety to be "one who at the request of another, and for the purpose of securing to him a benefit, becomes responsible for the performance by the latter of some act in favor of a third person, or hypothecates property as security therefor." Civ. Code, § 2831. The liability of a guarantor, as is true as to a surety (Civ. Code, § 2836) cannot be extended beyond the express terms of his contract (13 Cal. Jur. § 21, p. 108, and cases cited in the footnotes). And both a guarantor and a surety are alike exonerated and their obligation discharged for the acts by the creditor specified in sections 2819 and 2840 of the Civil Code. But the fundamental distinction between a contract of guaranty and that of a surety, is that, while a surety's obligation is original, that of a guarantor is collateral to and independent of the contract the performance of which he guarantees. Hence, while, as above stated, a guarantor and a surety are "bound for another person," a surety is usually bound with his principal by the same instrument, executed at the same time, and on the same consideration, and a guarantor is not. 13 Cal. Jur. § 5, p. 89. Another distinction between the two kinds of contracts is that, while a surety has the right to demand that the creditor first proceed against the principal, or pursue any other remedy in his power which the surety cannot himself pursue, and which would lighten his (the surety's) burden (Civ. Code, § 2845), a guarantor does not have that right (13 Cal. Jur. § 6, p. 90, and cases cited in the footnotes). A surety, being, with the principal debtor, primarily liable, may, of course, be joined with the latter in an action to recover on the obligation to the performance of the terms of which the surety by his bond pledges himself. While, at common law, a guarantor could not, for obvious reasons, be joined in an action with the principal debtor, under our system he may be so joined, although such

a joinder is not necessary. 13 Cal. Jur. § 6, p. 90, and section 33, p. 124.

[3] A contract of indemnity is another contractual relation which falls within the general class to which that of a guarantor and of a surety belong. It is defined by the Code as "a contract by which one engages to save another from a legal consequence of the conduct of one of the parties, or of some other person." Civ. Code, § 2772. A contract of indemnity resembles that of a suretyship, in that both are original obligations. They differ, however, in that a contract of surety involves a direct promise to perform the obligation of the principal in the event that the principal fails to perform as required by his contract, while, on the other hand, a contract of indemnity obligates the indemnitor to reimburse his indemnitee for loss suffered, or to save him harmless from liability, but never directly to perform the obligation indemnified. Moreover, while a demand is necessary in the case of a suretyship to pay or otherwise perform the obligation which the surety has agreed shall be performed before a cause of action accrues against the latter, no such demand is necessary in the case of an indemnity contract. 13 Cal. Jur. § 3, pp. 979-980. "The essential distinction between an indemnity contract and a contract of guaranty or suretyship," says the Supreme Court, in *Somers v. U. S. F. & G. Co.*, 191 Cal. 542, 547, 217 P. 746, 749, quoting from 16 Am. & Eng. Ency. of Law, 168, "is that the promisor in any indemnity contract undertakes to protect his promisee against loss or damage through a liability on the part of the latter to a third person, while the undertaking of a guarantor or surety is to protect the promisee against loss or damage through the failure of a third person to carry out his obligations to the promisee." * * * Another distinction between the two," proceeds the court in that case, "is that the promise in an indemnity contract is an original and not a collateral undertaking (22 Cyc. 80), while a contract of guaranty is a secondary and not a primary obligation and can exist only where there is some principal or substantive liability to which it is collateral. 'If,' continues the court, quoting from 28 C. J. 887, "there is no primary liability on the part of the third person, either express or implied, that is if there is no debt, default or miscarriage, present or prospective, there is nothing to guarantee, and hence there can be no contract of guaranty." The distinction pointed out in the first of the above excerpts from 16 Am. & Eng. Ency. of Law applies, of course, as well to a suretyship as to a contract of guaranty, but, as in many of the cases, the two terms, "guaranty" and "suretyship," seem to be synonymously or interchangeably used, and it would seem, in some instances, erroneously so. The second

of the above excerpts from the same authority, however, appears plainly enough to recognize the distinction between the two obligations, as the word "surety" is excluded therefrom, while the word "guaranty" is alone therein mentioned. In this connection, though, it should be stated that in many of the cases dealing with suretyship contracts the word "guarantee" is obviously used in its colloquial, and not in its technical, sense, as, for illustration, "the surety, by his contract, *guarantees*," stating the nature of his obligation or what he has agreed to do.

Sufficiently have we now considered the several contracts mentioned to show that, while in some respects there is a correspondence between them, in others there is a vital technical distinction between them, and, therefore, the several different contractual relations must, to ascertain the respective rights of the parties to such contracts, be viewed according to rules peculiarly applicable to the nature of each.

[4, 5] It is perfectly clear that the undertakings involved herein are not contracts of indemnity. And, keeping in mind the distinction between a contract of guaranty and a suretyship as those contractual relationships are defined by our Code, it becomes equally clear that said undertakings are not guaranties. As seen, a guaranty is a contract for the *direct* payment of a debt or of money (*Tyson v. Reinecke*, 25 Cal. App. 696, 701, 145 P. 153, opinion by Mr. Justice Richards, now of the Supreme Court), while a suretyship is a direct promise to perform the obligation of the principal in case of default in performance by the principal. It is clear that the undertakings concerned here fall within the description of a contract of suretyship as such contract is thus defined. There is no *direct* promise to pay a debt or to pay money for any purpose at all. The real and full purport of those contracts, it is plain, is that the surety will see that the primary contract will faithfully be performed by the principal, or, in case he fails to do so, the surety himself will perform it or cause it to be performed, or, in the event that he likewise defaults, he will pay the person for whose benefit the contract of suretyship has been executed and given for such loss as the latter may suffer from the breach of the primary contract, not, of course, to exceed the amount expressed in money to which the surety's liability is limited by his suretyship agreement. In brief, upon a breach of the principal contract, the surety must perform or pay damages to the injured party for the loss or damage he has thus suffered or sustained, while the guarantor's liability is fixed or liquidated by his contract, and is enforceable the moment that the liability under the contract to which his agreement is collateral matures.

[6] Having thus reached the conclusion

that the undertakings involved herein are contracts of suretyship, as the Code defines such agreements, the proposition next to be considered is, as plaintiffs contend, that the judgment obtained by them against the manufacturing company is conclusive upon the security, the defendant herein. In the outset it is well enough to announce that we have been pointed to, or upon our own initiative found, no California case which supports that proposition. The California cases in which the subject has been presented hold contrary to the position of plaintiffs upon that proposition.

In the very early case of *Pico v. Webster* and the Sureties on His Official Bond as Sheriff of San Joaquin County, 14 Cal. 203, 73 Am. Dec. 647, the precise proposition presented here was submitted and decided. Pico, the plaintiff in that action, had previously brought suit and obtained judgment against Webster for the wrongful levy upon and seizure, under color of process, of certain property which Pico claimed and which it was adjudged belonged to him and not to the defendant in the action in which the levy and seizure was made. In the action against Webster and his sureties, the contention was that the judgment, which had previously been secured against the sheriff alone, was conclusive upon the sureties. The proposition was not sustained. The particular ground of the decision was that the sureties by their undertaking had not bound themselves to the payment of a judgment against the sheriff as such for official misconduct whereby another party has been injured in property or person. The court, among other things, said:

"There can be no doubt, that where a surety undertakes for the principal, that the principal shall do a specific act, to be ascertained in a given way, as that he will pay a judgment, that the judgment is conclusive against the surety; for the obligation is express that the principal will do this thing, and the judgment is conclusive of the fact and extent of the obligation. As the surety in such case stipulates without regard to notice to him of the proceedings to obtain the judgment, his liability is, of course, independent of any such fact. * * * In the case of official bonds, the sureties undertake, in general terms, that the principal will perform his official duties. They do not agree to be absolutely bound by any judgment obtained against" the principal "for official misconduct, nor to pay every such judgment. They are only held for a breach of their own obligations. It is a general principle, that no party can be so held without an opportunity to be heard in defense. This right is not divested by the fact that another party has defended on the cause of action and has been unsuccessful. As the sureties did not stipulate that" he would be absolutely bound "by the judgment against the principal, or permit him to conduct the defense, and be themselves responsible for the result of it, the fact that the principal has unsuccessfully defended, has no effect on their rights. They have a right to contest with the plaintiff the question of their

liability; for, to hold that they are concluded from this contestation by the suit against the sheriff, is to hold that they undertook for him that they would be responsible for any judgment against him, which might be rendered by accident, negligence, or error, instead of merely stipulating that they would be responsible for his official conduct."

It was further said in that case:

"Nor is there anything in the point that these defendants had notice. *They must have had legal notice, which we have held to be that required by statute, or make voluntary appearance as parties to the record.* According to common law rules, a plaintiff cannot bring in parties not sued in an action of trespass by mere notice, when there is no pretense that they were trespassers." (Italics ours.)

Easton v. Boston Investment Co., 51 Cal. App. 246, 250, 196 P. 796, follows the rule as it is stated in *Pico v. Webster*, and which is also approved in *Irwin v. Backus*, 25 Cal. 214, 223, 85 Am. Dec. 125. It has been said that an "exception to the rule" is to be found in those cases, for instance, where the sureties are parties to an injunction bond, and "assume such connection with the suit that they are concluded by a judgment in a suit upon the bond," or "where the sureties have become parties to a bond for the redelivery of property, or the release of attached property," or where the sureties are on "a bond of an executor or administrator or guardian," or have "undertaken to perform a decree or judgment," in all of which cases a judgment against the principal alone is binding upon the sureties, unless they can show that it was obtained by fraud or collusion. *Easton v. Boston Investment Co.*, supra; *Irwin v. Backus*, supra; *Freeman on Judgments* (4th Ed.) § 180; 32 Cyc. 136. The present case does not fall within any of the exceptions mentioned.

[7] The rule above stated accords with the evident view of the Legislature upon the subject of the conclusiveness of judgments obtained in actions against a party upon another connected with contracts in which such judgments are obtained, but not directly connected with the actions in which the judgments have been secured. While there are a number of sections of the Code of Civil Procedure which deal with that subject, there is to be found no provision therein which establishes the rule that a judgment, obtained in an action on a contract supported by an agreement of suretyship against the contractor for a breach of the original contract, is binding or conclusive upon the surety. The sections referred to are 1055 and 1908 to 1912, inclusive, of the Code of Civil Procedure. The only one of said sections relating to a suretyship is section 1912, which reads:

"Whenever, pursuant to the last four sections, a party is bound by a record, and such party stands in the relation of a surety for an-

other, the latter is also bound from the time that he has notice of the action or proceeding, and an opportunity at the surety's request to join in the defense."

It will at once be perceived that the foregoing section points the way in which the principal on a suretyship contract may be bound by a judgment against the surety, but says nothing about binding the surety, where the principal has alone been sued on the contract for the faithful performance of which the surety has executed and given his bond. This situation as to a surety is, however, to be accounted for by the very nature or intrinsic characteristics of a suretyship undertaking. The surety is bound only by the terms of his contract. As some of the cases put it, he is entitled to stand on the letter of his undertaking. The contract, the faithful performance of which he undertakes, becomes, upon the execution and the giving of his undertaking, a part of the latter, and, if by any act of the creditor the terms of the original contract are altered or modified or changed without his consent, or the remedies or rights of the creditor against the principal "in respect thereto" are in any way impaired or suspended, or his (the surety's) security is lessened by any act of the creditor, he is discharged from the obligations of his undertaking. He is therefore entitled to his day in court, and so contest any attempt to fasten upon him an obligation he did not assume. The present case well illustrates the fallacy of the proposition that a surety on a suretyship bond may be bound by a judgment obtained in an action for a breach of the original contract against the principal alone, where the surety himself is not a party to the record in such action. The surety here did not, by her undertaking, agree to pay or become liable for any judgment which might be obtained against the principal. There is no express provision in the undertaking to that effect, nor does the instrument contain any language which may rationally be so construed as to justify importing into it any such provision or agreement or liability.

[8] As has been stated, and as is obviously true, a contract of suretyship is an original obligation, and the obligation is joint and several, and, upon the accrual of a right of action on the undertaking, which occurs synchronously with the breach of the original contract, the plaintiffs could have sued either the principal or the surety, or both, to enforce the liability created by the undertaking and have obtained a joint or several, or a joint and several, judgment against both, assuming, of course, that there was not available to the defendant a defense which would vitiate or destroy any right under the undertaking which the plaintiffs might originally have been entitled to assert.

[9] It follows from the views above ex-

pressed that the trial court made no error in striking from the complaint the matters referred to. Special notice, however, should be given the deleted averments. It is to be noted that said complaint does not disclose the nature or character of the notification to the defendant of the commencement and pendency of the action against the manufacturing company—whether it was a mere written notice prepared and given by the plaintiffs upon their own initiative, or a verbal notice likewise given, or the regular process required to be issued and served to bring a party against whom an action has been instituted into the action or his person under and subject to the jurisdiction of the court in a civil action. Indeed, it is not thus shown that the defendant here was such a party defendant or otherwise a party to the record in the action against the original contractor. The portions of the complaint stricken out, after alleging that an action had been commenced by the plaintiffs against the manufacturing company, and further alleging that a judgment was obtained therein against said company, merely stated that the defendant surety was "notified" by the plaintiffs of the commencement of said action, "and at the trial thereof this defendant appeared in said action, and participated in the defense thereof." That averment hardly goes further than to state that an action had been brought against the manufacturing company on the primary contract, that the defendant had in some way been notified of that fact, and that she appeared at the trial and assisted the company in presenting its defense. A mere general statement that a party "participated" in the trial of an action can convey no definite information as to the particular nature or character of such "participation." At any rate, the portions of the complaint stricken out did not show that the defendant was a party to the record in the action against the manufacturing company. And it is worthy of remark that, if, in fact, she was a party to the record in that action, the complaint fails to divulge what disposition the trial court made of her case—whether it was summarily dismissed or upon a trial on the merits judgment rendered and entered for or against her. We will not review the cases relied upon by the plaintiffs upon the proposition that it is requisite to proceed against the principal before action may be taken against the surety on a suretyship bond to establish the extent of the loss and the precise liability of the latter. In some of the cases language is used which, upon first blush, or without a somewhat critical examination of the facts, may seem to lend support to the proposition. But it is not thought that there was an intention in any of those cases to lay down the rule which counsel seek to invoke and apply herein. In fact, as pointed out above, and as we think is obviously true, such a rule would be whol-

ly inconsistent with the nature of the obligation involved in a contract of suretyship or with its intrinsic legal attributes. It is true, as before declared, that a cause of action accrues against the sureties the instant that the original contract is breached, but this cannot mean that the surety is to be deprived of his right to contest the enforcement of his liability upon any legal ground which he is entitled to invoke. If so, then the rule that he may stand upon the precise terms of his undertaking, and that his liability cannot be extended beyond the exact terms thereof, would, in many cases, be practically meaningless. See, in addition to the authorities above cited, 23 Cal. Juris. p. 1062.

The order sustaining the demurrer to the second amended complaint was proper. The averments remaining after the order striking out was made stated no cause of action against the defendant.

We now reach the question whether the trial court abused its discretion in denying the motion of plaintiffs to set aside and vacate the order sustaining the demurrer to the second amended complaint without leave to amend and the judgment thereupon entered.

The judgment, after stating that the portions of the complaint referred to above were stricken from both counts, and that the demurrer to the remaining portions of that pleading was sustained, recites:

"Counsel for plaintiffs thereupon and in open court announced that plaintiffs did not desire leave to file an amended complaint, and would not file an amended complaint, whereupon the court sustained defendant's general demurrer to said second amended complaint without leave to amend, and ordered that judgment for defendant be given by reason thereof."

The motion was made in pursuance of the provisions of section 473 of the Code of Civil Procedure, and upon the specific ground that the order sustaining the demurrer without leave to amend was "taken against" the plaintiffs "through his inadvertence and mistake." The motion was supported by "the papers and files in this action" and an affidavit of merits by one of the plaintiffs. The salient averments of the affidavit are:

"That, at the time said court sustained the demurrer to plaintiffs' second amended complaint, the former counsel for plaintiffs announced in open court that plaintiffs did not desire to file an amended complaint, whereupon the court, as affiant is informed and believes, solely by reason of said announcement, sustained said demurrer to said second amended complaint without leave to amend, and ordered that judgment be entered for defendant. That, as affiant is informed and believes, his said former counsel were of the opinion that but one ground to recover was available to plaintiffs in the above-entitled action, viz. that the action on the bond was based solely upon a contract of indemnity for liability, and that said counsel were

of the opinion that, under the ruling of the court in striking out certain portions of said second amended complaint, and sustaining a general demurrer to the balance of said complaint, the plaintiffs would be unable to amend their complaint so as to state a cause of action in any other way and protect their interests, and said counsel therefore stated to the court that they did not wish to amend said complaint. That the refusal to file an amended complaint was made through the mistake and inadvertence of said former counsel, and without the knowledge of said plaintiffs or any of them."

The affidavit further states that "plaintiffs are advised by their present counsel of record that they have a good and meritorious cause of action against said defendant, and that said complaint can be amended to contain facts sufficient to constitute a cause of action against said defendant, which will more fully appear in the proposed third amended complaint, which is hereto attached, and which is filed herewith."

The proposed third amended complaint seems to state a good cause of action against the defendant. The respondent, however, as one of the grounds upon which they resist a reversal of the order now under consideration, contends that the bond or undertaking is void for the following reasons: That it purports to be the bond authorized by section 1183 of the Code of Civil Procedure, relating to mechanics' liens; that said section does not have reference to or contemplate contracts of the nature of the one in question here, albeit the parties believed that it did, and therefore so phrased the undertaking as to bring under its protection mechanics and laborers performing labor upon and materialmen furnishing materials for use and used in the manufacture of the articles. But it is not necessary to investigate that question here. Conceding that the undertaking is valid as a common-law bond (and we do not intend to intimate that it is not, or that it falls within the ruling in *Miles v. Baley*, 170 Cal. 151, 149 P. 45), the real question which is presented to us on the appeal from the order denying the motion to vacate the judgment is whether, in denying that motion, the trial court transcended the bounds of a sound judicial discretion.

[10] It has with no infrequency been decided that a judgment by default may be vacated and set aside on the ground that such judgment was brought about and entered through a mistake in law on the part of the moving party or through the erroneous advice given to the former by his attorney. See 14 Cal. Jur. § 99, p. 1044, and cases named in the footnotes. Of course, in such cases whether the court has abused its discretion in making the order is a question which must be determined by the light of the circumstances peculiar to each case. Among the cases which it is claimed present a situation analogous to the instant case, as to the

matter of the facts, and in which relief under section 473 of the Code of Civil Procedure was applied for on the ground of mistake of law on the part of the party seeking such relief or his attorney, are the following: *Douglass v. Todd*, 96 Cal. 655, 31 P. 623, 31 Am. St. Rep. 247; *O'Brien v. Leach*, 139 Cal. 220, 72 P. 1004, 96 Am. St. Rep. 105; *Waite v. S. P. Co.*, 192 Cal. 467, 221 P. 204. The cases of *Douglass v. Todd* and *O'Brien v. Leach* were appeals from orders granting motions to set aside the defaults and vacating the judgments. In the first named of those cases the specific ground upon which the default and the judgment were vacated was that the defendant, upon being served with summons, consulted an attorney at law, and stated his case to said attorney, who erroneously advised him that he (defendant) had no defense, and, believing and relying upon said advice, he filed no answer to the complaint. In the last-named case the defendant, residing in Alameda county, was served with summons in the city and county of San Francisco. He consulted and retained an attorney to represent him in the case without informing him as to the county in which the service was made, there being nothing on or in the papers which he delivered to the attorney indicating the place of service. "From the circumstances under which he received the papers, the attorney naturally supposed that the service was made at the place of residence of the defendant, and therefore, that thirty days would be allowed in which to appear. It was an inadvertence [continued the court] which might occur, even to a reasonably careful man. It was discovered on the day on which the default was taken, and measures to obtain an extension of time, and to vacate the default, were promptly taken and diligently prosecuted." The court also made the following significant observations:

"In matters of this sort the proper decision of the case rests almost entirely in the discretion of the court below, and this court will rarely interfere, and never unless it clearly appears that there has been a plain abuse of discretion. *This court will usually sustain the action of the court below upon the same facts, whether that decision is for or against the motion;* but it is much more disposed to affirm an order when the result is to compel a trial upon the merits than it is when the judgment by default is allowed to stand, and it appears that a substantial defense could be made. *This will explain what would otherwise seem to be a conflict in the decisions.*" (Italics ours.)

In *Waite v. S. P. Co.* the action was for damages for the loss of a quantity of goods delivered to defendant, a common carrier in interstate commerce, to be transported from Portland, Or., to Los Angeles, Cal. The complaint was filed in the superior court of Los Angeles county on January 19, 1921. On January 31, 1921, defendant filed a demurrer

to the complaint, and at the same time filed a petition for the removal of the cause to the United States District Court, on the ground that the action was founded upon a federal law. On February 15, 1921, the demurrer was overruled, and the petition for removal denied, the defendant being given ten days within which to file an answer. On the 2d of March, 1921, the defendant filed in the federal court a transcript of the record and a petition for removal of the cause to said court, and, while the cause was still pending in that court, the petition for removal not then being disposed of, and no answer to the complaint being filed in the state court, the plaintiffs, on March 26, 1921, caused a default to be entered against the defendant for failure to file such answer, and judgment was entered thereon on April 14, 1921. The defendant, in the meantime, filed its answer in the federal court, and on April 11, 1921, the plaintiffs filed a motion to remand the cause to the state court. Said motion was submitted for decision on April 18, 1921, and was granted on August 6, 1921. On September 12, 1921, the defendant filed in the state court a notice of motion to set aside and vacate the judgment taken by default; said motion being denied on September 19, 1921. Defendant appealed from the order denying said motion, and the same was reversed. The court, among other things, said:

"It must be conceded that while the determination by both the federal and state courts was in favor of the jurisdiction of the latter, the defendant was not without plausible grounds for its contention, and the fact that the United States District Court retained the case under advisement for many months would seem to be sufficient indication that the question of law involved was in doubt and was one upon which an attorney might very well be mistaken. In any event, if it be conceded that the defendant's mistake of law was a reasonable one under the facts set forth in the complaint, we believe that its neglect to file an answer because of such belief is at least excusable."

It is clear that the mistake of law for which the defendant was excused in that case occurred under circumstances which strongly called for the relief asked for. There was plausible ground for an honest belief on the part of the defendant that the appropriate forum in which to try the cause was the federal court, for the reason that the action grew out of interstate carriage of freight, which is regulated by rules established by Congress and the Interstate Commerce Commission, and it is therefore quite apparent that, acting under that belief, the defendant seriously felt that it was safe in awaiting the decision of the federal court upon the motion of plaintiff to remand the cause to the state court before filing an answer, which, however, it did do in the federal court while the motion to remand was still pending.

[11] The case before us is entirely different in the facts and circumstances from those just considered. In the first place, it may be repeated that two of those cases involved appeals from orders granting motions to set aside defaults, in one of which (*O'Brien v. Leach*) the court, as seen, declared: "*This court will usually sustain the action of the court below upon the same facts, whether that decision is for or against the motion,*" and that the inclination of appellate courts to affirm rather than reverse an order granting such relief, where it is made to appear that a substantial defense could be made, "will explain what would otherwise seem to be a conflict in the decisions." In the second place, it is to be observed that relief upon the ground of a mistake of law on the part of the moving party will be granted in cases only of peculiar or exceptional circumstances—cases of which *Waite v. S. P. Co.*, supra, may be said to be typical. In the instant case, the whole groundwork of the proceeding and motion to set aside the default was that the attorney originally representing the plaintiffs was incapable of drafting a complaint which would state a cause of action against the defendant because of his alleged inability to grasp and understand the real nature of the obligation assumed by defendant by virtue of her undertaking. That attorney, after a demurrer to the complaint originally filed was sustained, was given by the court, on two different occasions, leave to try his hand at preparing a complaint that might state a cause of action against the defendant, but failed in both those attempts, the last time (the second amended complaint) counsel stating that plaintiffs did not desire to file a third amended complaint, and that they would not do so. It was proper for the trial court to assume from the statement of the attorney that the plaintiffs, speaking through the former, had concluded to abandon any attempt further to proceed against the defendant on her undertaking. The plaintiffs, although, as may be assumed, laymen, and unfamiliar with the rules of pleading, or without a correct understanding of the legal nature of various contractual obligations which may be created or arise between men in the usual course of business, yet were, presumably, of sufficient intelligence to perceive, after the original and the first amended complaint had yielded to the force of a demurrer, that their attorney, having failed in two attempts to prepare a sufficient complaint, was incapable, if such was the fact, of drafting a complaint that would stand against a demurrer or other assault which appropriately, in a technical sense, might be made against it, and, so perceiving, should then have retained another lawyer to

prepare the second amended complaint not subject to the objection that it was bad for want of sufficient facts. But, regardless of these considerations, we think the trial court was more than liberal in the exercise of its discretion favorably to the plaintiffs, to the end that they might in a proper way get into court with their grievance against defendant. Besides, there must be a line drawn somewhere in matters of this kind, so that what would often amount, even in meritorious cases, to mere trifling with the courts, may be prevented. If a litigant may in any case at any time escape the consequences of his attorney's ignorance of the law of his case, there would be no end to the trouble and inconvenience to which the trial courts would be put in such instances. We cannot doubt, however, that, under the circumstances existent here, the trial court was not guilty of an abuse of discretion in denying the application of plaintiffs to set aside the default judgment entered herein. The case here clearly comes within the case of *Porter v. Anderson*, 14 Cal. App. 716, 113 P. 345. In that case, as here, the plaintiff's attorney failed to state a cause of action for the relief sought. The opinion states fully the circumstances under which the question arose in that case. They need not be repeated here; but what is said therein as follows is forcefully pertinent to the situation in the case at bar:

"He merely had an erroneous view of the requisites of a sufficient complaint in this kind of action, and the last ruling of the court upon that question was a disappointment rather than the 'surprise' contemplated by said section. [Citing many cases.] Lawyers are constantly receiving the 'surprises' that counsel complain of here. As well could it be maintained that every ruling of the court upon a question of evidence during the progress of a trial, contrary to counsel's notion of the law of evidence, and which admitted testimony that they had not prepared themselves to meet or overcome, would constitute the 'surprise', which, under section 657 of the Code of Civil Procedure, may be made the basis of a motion for a new trial. * * * The 'surprise' from the effect of which it is within the power of the courts, under our Code sections, upon a satisfactory showing, to relieve a party, is defined to be 'some condition or situation in which a party to a cause is unexpectedly placed, to his injury, without any default or negligence of his own [citing many cases], which ordinary prudence could not have guarded against.' "

It is well to state that a petition to the Supreme Court for a hearing of *Porter v. Anderson* was denied.

The judgment is affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

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MORRICE v. FITCH et al. (Civ. 3318.)★

District Court of Appeal, Third District, California. Dec. 24, 1927.

Opinion Modified Jan. 17, 1928. Rehearing Denied Jan. 23, 1928. Hearing Denied by Supreme Court Feb. 20, 1928.

1. Trial $\S$ 397(5)—Court's failure to find on issue of limitations held not error, where no indebtedness was found.

In suit to recover for services rendered and money advanced at the special instance and request of defendants, in which court found that there was no indebtedness, failure of court to find on issue of statute of limitations pleaded held not error.

2. Trial $\S$ 397(5)—Finding as to nonjoinder of personal representative of husband, in suit against spouses, was rendered unnecessary by finding that plaintiff had no claim against wife.

Where, in suit against husband and wife, plaintiff failed to join husband's personal representative after husband's death, finding that plaintiff had no claim against widow rendered unnecessary finding as to nonjoinder of representative.

3. Husband and wife $\S$ 232(3)—Evidence held to sustain finding that services rendered and moneys advanced husband conducting hotel business, subsequently opening bank account in wife's name, constituted sole liability of husband.

In action against widow for services rendered and amounts advanced to her husband in husband's conduct of hotel, account being subsequently opened with bank in wife's name, evidence held to sustain finding that husband alone was debtor and that wife was not liable, especially in view of plaintiff's entries made solely against husband.

4. Evidence $\S$ 69—Heading of account of person furnishing money and services is presumed to show whom he considered debtors (Code Civ. Proc. $\S$ 1963, subd. 20).

Heading of account of person rendering services and advancing money to hotel keeper, indicating persons to be charged, is presumed to show whom plaintiff considered at the time to be the debtors, under presumption of Code Civ. Proc. $\S$ 1963, subd. 20, that the ordinary course of business has been followed.

Appeal from Superior Court, Tuolumne County; J. T. B. Warne, Judge.

Action by George Morrice against C. S. Fitch and M. Q. Fitch. Judgment for defendant M. Q. Fitch, after the death of defendant C. S. Fitch, and plaintiff appeals. Affirmed.

J. C. Webster, of Sonora, for appellant.

Edwin L. Forster, of San Francisco, for respondent.

WEYAND, Justice pro tem. Plaintiff brought suit in Tuolumne county against C. S. Fitch for \$1,289 upon an alleged account

due plaintiff from defendants, for services rendered and money advanced at the special instance and request of defendants. This complaint was filed July 26, 1920. A demurrer by both defendants was filed July 26, 1923. Defendant M. Q. Fitch answered on June 11, 1926. Said answer denies all the allegations of the complaint. As a separate answer and defense to said complaint, defendant M. Q. Fitch alleged that C. S. Fitch died August 19, 1923, and that the personal representative of the deceased has not been made a party to the action, and that no claim has been presented to the personal representative of the deceased, for the claim of plaintiff, and that, therefore, there is a nonjoinder of parties defendant. For another defense M. Q. Fitch pleaded the bar of section 337, Code of Civil Procedure, and also separately subdivisions 1, 2, and 3 thereof. For still another defense said defendant pleaded section 339, Code of Civil Procedure, and separately specified subdivisions 1 and 2 of said section.

The action was tried without a jury, and on December 31, 1926, findings and judgment were filed and entered against the plaintiff. The plaintiff appeals to this court from said judgment. There are no findings upon the first separate defense, nor upon the defense of the statute of limitations. The findings of the trial court are upon the issue tendered by the denial of all the allegations of the complaint. No findings were made as to the other special defenses. Judgment was for the defendant M. Q. Fitch.

Appellant presents three points upon which he contends the judgment should be reversed: (1) That there was no finding as to the statute of limitations. (2) That the finding that M. Q. Fitch is not indebted to plaintiff is not supported by the evidence. (3) That on the facts disclosed by the evidence plaintiff is entitled to judgment.

[1] We can see no reason for a reversal of this judgment because the trial judge did not find upon the statute of limitations pleaded. In view of the finding of the court that there was no indebtedness, it was unnecessary to find upon the issue tendered by a plea of these statutes.

[2] The same reasoning applies to the first separate defense. The finding that there was no claim whatsoever against M. Q. Fitch rendered unnecessary a finding as to nonjoinder.

The second and third contentions of the appellant are, in substance, but one question; namely, Was there anything due appellant from the defendant M. Q. Fitch?

The facts, briefly stated, were as follows: C. S. Fitch and M. Q. Fitch were husband and wife. Plaintiff began in the year 1908 working for C. S. Fitch, who was then conducting the City Hotel, at the town of Sonora, in Tuolumne county. At about that

time the City Hotel, both the real estate and the personal property used in and about this hotel, belonged to Mrs. Fitch, Sr., the mother of C. S. Fitch. The "business" then being conducted in the hotel property and with the said hotel furniture and fixtures was owned by C. S. Fitch. Some time shortly before plaintiff began working for C. S. Fitch, Mrs. Fitch, Sr., by a deed of trust, conveyed the said hotel and the personal property used therein to Mrs. M. Q. Fitch, in trust for the children of C. S. Fitch and his said wife, Mrs. M. Q. Fitch. The exact terms and conditions of this trust are not made to appear. This trust deed was recorded about July, 1910. At about this last-named date an account was opened in a local bank at Sonora in the name of May Fitch, this being the defendant herein, M. Q. Fitch. Into this bank account there was deposited all the earnings of the hotel venture. Mrs. M. Q. Fitch would draw all checks against this deposit account, both for the maintenance of herself and family and for the conduct of the hotel business. At the time this system of depositing the earnings in the name of May Fitch began there was already owing to plaintiff a sum largely in excess of the sum now sued for. C. S. Fitch continued to run the business down to August 19, 1923, at which time he died. His personal representative was not made a party, and no claim was presented against his estate. Mrs. M. Q. Fitch testified that up to the time of the death of her husband she never had anything whatsoever to do with the hotel business, either as owner or manager. She further testified that she permitted the earnings of the hotel to be deposited in her name, at the request of and for the accommodation of her husband, C. S. Fitch. The record does not disclose any withdrawals of moneys from the bank for her personal use, except for such bills as her husband, C. S. Fitch, would be legally obligated to pay. There was, however, an exception in this way: C. S. Fitch had made some small speculations in mines and in lands; these investments, according to the testimony, yielded no returns, and these properties had been conveyed to Mrs. M. Q. Fitch. After the death of C. S. Fitch, Mrs. M. Q. Fitch continued the business as it had been conducted by C. S. Fitch prior to his death.

Plaintiff contends that M. Q. Fitch and C. S. Fitch were jointly conducting the business at all times. Plaintiff continued as an employee at the hotel until shortly after the death of C. S. Fitch. In the later years of plaintiff's employment he personally took out his wages as they became due, crediting them upon his account; and his present contention is that these several credits last referred to were applicable to the first items of his account against C. S. Fitch, and that since the time of the deposit of funds in the name of May (M. Q.) Fitch, and up to the death of C.

S. Fitch, the later earnings of plaintiff were obligations of M. Q. Fitch jointly with her husband. After this suit was brought, and before the death of C. S. Fitch, the plaintiff upon demand furnished a bill of particulars in this action. This bill of particulars corresponded with an account book of the plaintiff which showed an account of plaintiff against "C. S. Fitch" from July 1, 1908, until January, 1912, at which time his account book was by plaintiff changed to show an account against "C. S. and M. Q. Fitch, trustee, and M. Q. Fitch." In April, 1912, plaintiff again changed his account to read "C. S. Fitch and M. Q. Fitch, trustee, and M. Q. Fitch, successors to C. S. Fitch."

[3, 4] As we view this record it became a question of fact whether Mrs. M. Q. Fitch was a partner in the business from the beginning, or whether Mrs. Fitch, either directly or by implication, gave permission for the application of later payments of salary of the plaintiff as credits to the items of the bill of plaintiff against C. S. Fitch. The trial court heard all the evidence in the case, including the testimony of the plaintiff above referred to, and determined both these disputed points in favor of the defendant.

Appellant has included in his opening brief the opinion of the judge of the trial court, and we quote therefrom the following portion thereof, and we adopt the same as our opinion herein:

"At the time he [the plaintiff] ceased his employment in 1910 there was due him for his services as clerk, according to his book of accounts, the sum of \$1,168.60. During the year he was away from the hotel he paid the following bills for C. S. Fitch and entered said items in his book as a charge against C. S. Fitch, to wit: 'B. Meyers, \$37.75; J. Michel & Co., \$118.29; P. C. C. T. Ass'n, \$22.50; and J. J. Burkett Company, \$19.10; or a total of \$197.64.' * * * At the time Mrs. Fitch opened said bank account and began to have the moneys from the business deposited in her name, there was due and owing to the plaintiff according to his book of accounts, Plaintiff's Exhibit No. 1, the sum of \$1,168.60 as above stated. This balance, together with the \$197.64, is a part of the claim sued upon; in other words, it was carried on in the account against M. Q. Fitch. There is nothing in the evidence to in any way show that Mrs. Fitch ever assumed this liability or ever agreed to do so, nor is any reasonable explanation offered by plaintiff for carrying this item into the latter account other than his conclusion that she was a partner, owner of, or principal in the business from the beginning, a statement which is not supported by the evidence. His own book of accounts, Plaintiff's Exhibit No. 1, would tend to show to the contrary. The account in this exhibit was opened at the time of his entering the employment of C. S. Fitch and is a full and complete account of the entire claim and all the transactions incident thereto. This book is silent evidence of what was truly in the mind of the plaintiff at the time he made the entries, and, I think, reveals the true facts so far as the ownership of the business may

have been concerned. An inspection of this exhibit shows that plaintiff opens his account solely against C. S. Fitch on July 1, 1908, and the account is thereafter carried in that name until the beginning of January, 1912, where the name of the debtor is changed to read 'C. S. and M. Q. Fitch, trustee, and M. Q. Fitch,' and is then carried under that heading until April, 1912, when the account was changed to read 'C. S. Fitch and M. Q. Fitch, trustee, and M. Q. Fitch, successors to C. S. Fitch.' If these headings of the account have any meaning so far as showing whom plaintiff considered at the time to be the debtors, and I presume they do, or it is one of the presumptions of evidence 'That the ordinary course of business has been followed.' Section 1963, subd. 20, Code Civ. Proc. It is reasonable for the court to infer that C. S. Fitch was the true debtor and solely so, at the time prior to the making of the change. There is also a notation in this exhibit, at page 25, that the accounts which he paid for Mr. Fitch, totaling \$197.64, as above mentioned, were paid for C. S. Fitch. Having the above conclusions in mind, let us see if there is anything due plaintiff. The amount of the claim sued for is \$1,282. From this amount we must deduct the \$1,168.60, plus the \$197.64, as these items were carried into the account which the court finds Mrs. Fitch would be liable for, and we have a situation wherein the plaintiff has been paid, so far as any legal liability rests upon the defendant M. Q. Fitch."

The judgment is affirmed.

We concur: FINCH, P. J.; HART, J.

In re WIRT'S ESTATE. ★

HIRAM LODGE NO. 18, FREE AND ACCEPTED MASONS, OF DELAWARE, OHIO, et al. v. COX et al.

(Civ. 5835.)

District Court of Appeal, Second District, Division 2, California. Dec. 22, 1927.

Hearing Granted by Supreme Court Feb. 20, 1928.

1. Charities ☞31—Court will endeavor to carry charitable donations into effect, if consistent with rules of law.

Courts look with favor on all attempted charitable donations, and will endeavor to carry them into effect, if it can be done consistently with the rules of law.

2. Charities ☞10—Reception of profit in connection with its work is factor in determining whether institution is charitable or eleemosynary.

In determining whether or not an institution is charitable or eleemosynary in character, a considerable factor is whether or not it receives any kind of profit in connection with its work.

3. Charities ☞10—Eleemosynary character of institution, whose main purpose is charity, is not lost because some of its objects are not charitable.

That some objects of the institution may not be charitable does not deprive that institution

of its eleemosynary character, providing the main purpose is charity.

4. Charities ☞11—Society does not lose its charitable character because its charitable acts are confined largely to its members.

A corporation or a society is not shorn of its charitable or eleemosynary character because the relief from sickness, suffering, want, and woe which it extends is largely, if not entirely, confined to its members.

5. Charities ☞10—Whether or not it is lessening burdens of government is one of tests in determining charitable character of society.

One of the tests in determining whether or not a society or corporation is of a charitable or eleemosynary character is whether or not it is lessening the burdens of government.

6. Evidence ☞22(2)—It is matter of common knowledge which court may judicially notice that leading object of Masonry is charity.

It is a matter of common knowledge, of which appellate court may take judicial notice, whether the trial court did or not, that the leading object of Masonry and of all Masonic lodges is charity.

7. Perpetuities ☞8(7)—Masonic lodge held "charitable institution or society," and bequest of perpetuity to it was for "eleemosynary purposes," and valid (Const. art. 20, § 9).

A Masonic lodge is a "charitable institution or society," and a bequest of a perpetuity to it, though providing that income of fund was to be used for current expenses of lodge, was for "eleemosynary purposes," within Const. art. 20, § 9, and hence valid.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Charitable Institution; Eleemosynary.]

Appeal from Superior Court, Los Angeles County; Frank R. Willis, Judge.

Petition by Hiram Lodge No. 18, Free and Accepted Masons, of Delaware, Ohio, and another, for the distribution of the estate of Gary Wirt, deceased, to which Charles H. Cox and others filed objections. From the decree of distribution, petitioners appeal. Decree reversed in part, with instructions.

Harry K. Sargent, of Los Angeles, for appellants.

Ford, Johnson & Bourquin, of San Francisco, for respondents.

COLLIER, Justice pro tem. Gary Wirt died, leaving a will, the clauses whereof that are here material are as follows:

"Item 2nd. All the residue of my estate both personal and real, of every kind and nature, wheresoever situate, which I may own or have a right to dispose of at the time of my decease, I give and devise and bequeath to Fred P. Hills, in trust however, for my brother Sam V. Wirt [here follow trust provisions], and at the death of my said brother, Sam V. Wirt, or if he should die before my decease, then all the residue of

shall be equally divided between Hiram Lodge, Number 18, F. & A. M. of Delaware, Ohio, and Jackson Lodge, Number 146, F. & A. M. of Seymour, Indiana, share and share alike, said lodges shall place said place said (sic.) fund in a special funds (sic.) to be known as the Gary Wirt fund, and only the income of of (sic.) said funds shall be used for current expenses, and in case my brother shall live longer than I do then at his death I direct that said trustee shall [after paying certain expenses] distribute said fund as directed above, and shall pay an equal amount to each of said lodges as aforesaid, but in case that my brother shall die before my decease then my executor shall, after paying my debts and expenses as aforesaid, distribute the residue of my estate equally between the above mentioned lodges as aforesaid."

From the above quotations it will be observed that the will was prepared by a novice, and not by an expert scrivener.

The brother, Sam V. Wirt, predeceased the testator. Upon the death of the latter the will was admitted to probate by the superior court of Los Angeles county.

Thereafter, and in due course of probate, the administrator filed his first and final account, and petitioned for distribution, showing that he had on hand \$3,274.51 in cash and securities.

Thereupon respondents filed objections to distribution upon the ground that the bequests to the two Masonic lodges were void under article 20, § 9, of the Constitution of the state of California, which reads as follows:

"No perpetuities shall be allowed except for eleemosynary purposes."

In its decree of distribution, among other things, the court found that "the bequest to Hiram Lodge No. 18, Free and Accepted Masons, of Delaware, Ohio, and Jackson Lodge No. 146, Free and Accepted Masons, of Seymour, Ind., was void under the provisions of article 2 (evidently meaning article 20), § 9, of the Constitution of the state of California," and ordered distribution of the estate of the respondents. The two Masonic lodges appeal from said order.

A reading of the will "from its four corners" makes it certain that a perpetuity was intended by the testator. His first statement is that the residue of his estate should be equally divided between "the two Masonic lodges"; "said lodges shall place said fund in the special funds, * * * and only the income of said funds shall be used for current expenses." The next reference to the lodges is in the phrase, "my trustees shall * * * distribute said fund as directed above, and shall pay an equal amount to each of said lodges as aforesaid"; and finally directs his trustee to "distribute the residue of my estate equally between the above mentioned lodges as aforesaid."

We think that by the use of the words "as aforesaid" the testator referred to the estab-

lishment of said "Gary Wirt fund," only the income whereof was to be used for current expenses.

The main question is thus presented: "Is such a perpetuity one for eleemosynary purposes?" This, in turn, offers two correlated questions: (a) Are the lodges receiving said bequests eleemosynary institutions? and (b) if they are, does the limiting of the expenditure of income to "current expenses" impair the eleemosynary character of the perpetuity so as to render it void within the provision of the Constitution?

[1] The canons of construction in matters such as these are the following:

Courts look with favor upon all attempted charitable donations, and will endeavor to carry them into effect, if it can be done consistently with the rules of law. "*A bequest intended for charity is not void, and there is no authority to construe it to be legally void, if it can possibly be made good.*" Estate of Hinkley, 58 Cal. 457, 513; Estate of Willey, 128 Cal. 1, 12, 60 P. 471; Estate of Merchant, 143 Cal. 540, 77 P. 475; Estate of Dwyer, 159 Cal. 687, 115 P. 242; Estate of Peabody, 154 Cal. 178, 97 P. 184; Fay v. Howe, 136 Cal. 602, 69 P. 423; Estate of Goodfellow, 166 Cal. 412, 137 P. 12; Ould v. Washington Hospital, etc., 95 U. S. 303, 24 L. Ed. 450.

"The instruments creating them [charities] should be so construed as to give them effect, if possible, and to carry out the general intention of the donor, when clearly manifested, even if the particular form or manner pointed out by him cannot be followed." Estate of Upham, 127 Cal. 95, 59 P. 317.

What is an eleemosynary purpose? "The word 'eleemosynary' in article 20, § 9, of the Constitution, 'is synonymous with 'charitable' as the latter word is used and understood in treatises and decisions upon the subject of trusts." Estate of Sutro, 155 Cal. 727, 734, 102 P. 920, 922.

"A charity, in the legal sense, may be more fully defined as a gift to be applied, consistently with existing laws, for the benefit of an indefinite number of persons either by bringing their hearts under the influence of education or religion, by relieving their bodies from disease, suffering or constraint, by assisting them to establish themselves for life, or by erecting or maintaining public buildings or works, or otherwise lessening the burdens of government.' This definition, as applied to charitable perpetuities, must be read with the opening phrase constantly in mind that the benefit is for 'an indefinite number of persons,' and not for any particular person or persons, and it must be for all persons falling within a described class indefinite in number." Estate of Sutro, 155 Cal. 727, 736, 102 P. 920, 923.

"Eleemosynary has come in the law to be interchangeable with the word 'charitable.'"

A charitable trust or a charity is a donation in trust for promoting the welfare of mankind at large, or of a community, or of some class forming a part of it, indefinite as to numbers and individuals. It may, but it need not, confer a gratuitous benefit upon the poor. It may, but it need not, look to the care of the sick or insane. It may, but it need not, seek to spread religion or piety. Schools and libraries, equally with asylums, hospitals, and religious institutions, are included within its scope. It is impossible to enumerate specifically all purposes for which an eleemosynary trust may be created. The difficulty is inherent in the subject-matter itself. With the progress of civilization new needs are developed, new vices spring up, new forms of human activity manifest themselves, any or all of which, for their advancement or suppression, may become the proper objects of an eleemosynary trust. As was said by this court in *People v. Dashaway Ass'n*, 84 Cal. 114, [24 P. 277, 12 L. R. A. 117]: "The enforcement of charitable uses cannot be limited to any narrow and stated formula. As has been well said, it must expand with the advancement of civilization and the daily increasing needs of men. New discoveries in science, new fields and opportunities for human action, the differing condition, character, and wants of communities and nations, change and enlarge the scope of charity, and where new necessities are created new charitable uses must be established. The underlying principle is the same; its application is as varying as the wants of humanity." *People v. Cogswell*, 113 Cal. 129, 138, 45 P. 270, 271 (35 L. R. A. 269). See, also, *Fay v. Howe*, 136 Cal. 600, 69 P. 423; *Estate of Dol*, 186 Cal. 65, 198 P. 1039; *City of Petersburg v. Petersburg Benefit Assn.*, 78 Va. 431, 436; *Ould v. Washington Hospital etc.*, supra.

Charity, particularly with reference to fraternal orders, has been defined as follows:

"* * * It is a matter of common knowledge that the charity dispensed by fraternal orders and societies and other like charitable institutions does not consist alone of the material assistance, represented by dollars and cents, they give to the orphan, indigent poor, the sick and afflicted who may be in need of help, by furnishing them with food, clothing, shelter, and medical aid, but that they also bestow other kinds of charity which in many cases are just as essential and just as potent in their effect for doing good and in relieving distress as is the material assistance rendered by them. We refer to the charity which is the embodiment of sympathy and kindness; charity which causes

"Me to feel another's woe,
To hide the fault I see,"

—and which comes of the spirit of brotherhood, good fellowship and benevolence generally found to exist in these fraternal orders and societies, and which actuates the members thereof to take an interest in the general welfare of each other, and which by words and acts of kindness and moral suasion, guides, cheers, and encourages

those who, because of misfortune and trouble, have become discouraged and depressed in spirit, and who are thereby impelled and urged on to renewed effort. The uniting and blending of the two kinds of assistance mentioned, namely, the moral with the material, is charity in its highest and most perfect form.

"As suggested, it is a matter of common knowledge that it is the aim of fraternal orders generally to teach, foster, and encourage this kind of charity as one of their cardinal principles." *Salt Lake Lodge No. 85, B. P. O. E., v. Groesbeck*, 40 Utah, 1, 18, 120 P. 192, 197, (Ann. Cas. 1914C, 940).

[2] A considerable factor in determining whether or not an institution is "charitable" or "eleemosynary" in character is whether or not it receives any kind of profit in connection with its work.

"The test which determines whether such an enterprise is charitable or otherwise is its purpose. If its purpose is to make profit, it is not a charitable enterprise. If it is to heal the sick and relieve the suffering, without hope or purpose of getting gain from its operation, it is charitable." *Union Pac. Ry. Co. v. Artist*, 9 C. C. A. 14, 18, 60 F. 365, 368 (23 L. R. A. 581).

"When the charity is public, the exclusion of all idea of private gain or profit is equivalent, in effect, to the force of 'purely' as applied to public charity in the Constitution." *Gerke v. Purcell*, 25 Ohio St. 229, 247.

And, in discussing a certain charitable trust, our Supreme Court states, among other qualities, to show its charitable character:

"Nothing is reserved for profit or gain." *People v. Cogswell*, 113 Cal. 139, 45 P. 270, 35 L. R. A. 269.

To the same effect see, also, *Morrow v. Smith*, 145 Iowa, 514, 124 N. W. 316, 318, 25 L. R. A. (N. S.) 384; *Plattsmouth Lodge, F. & A. M., v. Cass Co.*, 79 Neb. 463, 113 N. W. 167, 170; *Fitterer v. Crawford*, 157 Mo. 51, 57 S. W. 532, 50 L. R. A. 191.

[3] That some objects of the institution may not be "charitable" does not deprive that institution of its eleemosynary character, providing the main purpose is "charity." In discussing the character of the "Los Angeles Pioneer Society," and holding it to be a "charitable" society, our Supreme Court, in *Estate of Dol*, 186 Cal. 64, 67, 198 P. 1039, 1040, says:

"It may be urged that the articles contain no provision whereby any person not a member thereof may receive any benefit from the carrying out of its corporate purposes. This may be true as to the cultivation of social intercourse and friendship among its members, although as there is no limit as to the number of members, or as to the conditions of admission, the membership may embrace a large and indefinite portion of the public. But a reading of the article on the subject shows that the carrying out of the purposes defined will in the

main benefit the general public as much as the members."

See, also, *City of Petersburg v. Petersburg Benefit Ass'n*, 78 Va. 431; *Church M. E. South v. Hinton*, 92 Tenn. 188, 21 S. W. 321, 19 L. R. A. 289.

That charity as hereinabove defined predominates in Masonry and in Masonic lodges has been held in numerous cases. In *King v. Parker and others*, 9 Cush. (63 Mass.) 71, 82, it is said:

"It appears by evidence, as well as by general notoriety, that a Masonic lodge is a voluntary association of persons, closely united by rules, usages, and ceremonies, maintaining a perpetual succession, by the admission of new members; and, whatever other objects they may have, *one leading one is that of charity*, supporting the poor and indigent members, their widows, and orphans. This object is essentially perpetual, for 'the poor ye have always with you.'"

To the same effect see *Fitterer v. Crawford*, supra; *Morrow v. Smith*, supra; *Burdine v. Grand Lodge*, 37 Ala. 478; *Mason v. Zimmerman*, 81 Kan. 891, 106 P. 1005.

[4] Neither is a corporation or society shorn of its charitable or eleemosynary character because the relief from sickness, suffering, want, and woe which it extends is largely, if not entirely, confined to its members. The Supreme Court of Kentucky in *Widows' & Orphans' Home of O. F. v. Commonwealth*, 126 Ky. 386, 397, 103 S. W. 354, 358 (16 L. R. A. [N. S.] 829) says:

"The convention meant by the word 'purely' to describe the quality of the charity, rather than the means by which it is administered, that it should be wholly altruistic in the end to be attained, and that no private or selfish interest should be fostered under the guise of charity; but it was never meant that, because a charity was limited by its terms to objects belonging to a certain sect or fraternal order, or color or class, it was a private, and not a public, charity. The members of the convention were wise and practical, and knew that men, as a rule, administer their charity through the organization or organizations to which they belong. Thus, Catholics will naturally distribute their charity through the organization of the Catholic church; Presbyterians through those of the Presbyterian church; *Masons through the organization of the Masonic order*, etc., etc. But, while each is discharging for the state a particular and limited part of its duty to the objects of the public's bounty, together they are fulfilling the state's whole duty far more completely and efficiently than could be done by means of a system of involuntary taxation administered through the hands of hired officialism. The difference between these two systems—the one actuated by love, and the other serving for pay—is as marked as the difference between the ministrations of a mother at the bedside of her sick child and that of a hired nurse. If one fixes his eye narrowly on the work of only one of the various bodies and organizations engaged in relieving the necessities of misfortune, he might reach the conclusion that it was not a

public charity, because limited (in theory, never in actuality) to the members of the particular order or body; but he would make the mistake of one who would conclude that, because a regiment of a battle line had a flag bearing a name or number different from the other flags in the line, it was not a part of the army as a whole, and was not engaged with the other regiments in the mutual purpose of resisting the common enemy. The charities of the various religious and fraternal organizations we are contemplating may seem, when viewed separately and with a narrow and atrabilious vision, to be too limited in their ministrations to be called public; but, when viewed as a whole, the compass of their good work is as wide as the circle of human suffering, and as universal as the love of the heart of man.

"Seeing, then, that the various charities, which the generous portion of the community administer through the separate organizations to which the donors belong, as a practical proposition cover the whole field of the state's duty to her indigent and helpless citizens, and that they together contribute to the whole public burden, where would be the wisdom in discouraging such charity? And what good purpose can be subserved by indulging in a strained construction of a phrase in order to reach the conclusion that the members of the constitutional convention meant to throw away as useless the powerful aid which the state could otherwise enjoy in the contributions of charitable men? What good purpose is subserved in attaching the word 'private' to the charity of Catholics for Catholics, Presbyterians for Presbyterians, Masons for Masons, or Odd Fellows for Odd Fellows? Are the poor and helpless of these various bodies and organizations any less worthy, or any less a part of the public, because they are also members of the particular church or society to which they belong? Are not all charitable institutions necessarily limited to the relief of only a small part of the destitute public? Can any one institution administer to the wants of all? And, if this be true, is it necessary to brand as 'private' a charity which, by its terms, marks out a particular part of the public field in which it is to be administered? Who would say that an orphan asylum endowed for the benefit of colored children only was a private charity, or that an orphanage for destitute white children only was not public? And yet the operation of each would be exclusive of a large portion of the community. Who would say that a home for poor and aged men was a private charity, or a home for poor and aged women was not a public charity, although manifestly excluding, the one the female, and the other the male, indigent from participation in the bounty?" (Italics ours.)

See, also, *Indianapolis v. Grand Master*, etc., 25 Ind. 518, 522; *City of Petersburg v. Petersburg Benefit Ass'n*, supra; *Hibernian Society v. Kelley*, 28 Or. 173, 42 P. 3, 30 L. R. A. 167, 52 Am. St. Rep. 769; *Burd Orphan Asylum v. School Dist.*, 90 Pa. 21; *Estate of Lubin*, 186 Cal. 326, 199 Pac. 15.

The *Burd Case* is in a sense overruled by *City of Philadelphia v. Masonic Home*, 160 Pa. 572, 28 A. 954, but the reasoning in *Burd v. School District* is so far superior to that in *Philadelphia v. Masonic Home* that we

adopt it here without quoting it at length. Suffice it to say that it coincides with that in *Widows' & Orphans' Home of O. F. v. Commonwealth*, 126 Ky. 386, 103 S. W. 354, 16 L. R. A. (N. S.) 829. But even in *City of Philadelphia v. Masonic Home*, the court there says:

"The legal definition of the word 'charity' has been the subject of much discussion in the courts, especially in those of England, but its meaning here, discarding all technical sense, is 'a gift to promote the welfare of others.' The appellee clearly is a charity. It provides for and maintains in the 'Masonic Home' indigent, afflicted, and aged freemasons. This, too, from voluntary contributions, without charge to the beneficiaries, and with no profit either to the corporation or to its officers. Not one of the corporate officers receives a cent of compensation for administering its affairs. *Such unselfishness excites* the admiration and approval of all friends of humanity. Gen. Wagner, president of the home, testified: 'The number of inmates at present is thirty. Their average age is 72 years. All are decrepit. If they could support themselves, they would not be admitted. The money to support them is contributed by different Masonic lodges, individuals, Masons, men and women. The receipts are always less than the expenses, and a deficit has to be made up at the end of the year. No one is benefited except the inmates. They are fed, clothed, and lodged during life, and buried at death, at the expense of the home.' *Of course, if this be not purely charity, nothing is.* But is it a public charity?" (Italics ours.)

After lengthy reasoning, too narrow for us to follow, the court, with two justices dissenting, arrived at the conclusion that such an institution, although based on "such unselfishness" that it "excited the admiration and approval of all friends of humanity," was not a "purely public charity," within the meaning of the tax-exemption statutes. The reasoning and construction set forth in *Widows' & Orphans' Home of O. F. v. Commonwealth*, supra, far more nearly follows the canons of construction announced in the earlier part of this opinion.

[5] Another of the tests to determine whether or not a society or corporation is of a charitable or eleemosynary character is whether or not it is "lessening the burdens of government." *Estate of Sutro*, 155 Cal. 727, 736, 102 P. 920.

In *Molly Varnum Chapter, D. A. R., v. City of Lowell*, 204 Mass. 487, 494, 90 N. E. 893, 895 (26 L. R. A. [N. S.] 707), it is said:

"The diffusion of knowledge, the relief of the poor, the fostering of love of country and of respect for our civil institutions, all tend to raise the standard and improve the quality of citizenship, and not only relieve the burdens of government but advance the public good. *Donahugh's Appeal*, 86 Pa. 306; *Ould v. Washington Hospital for Foundlings*, 95 U. S. 303, 311, 24 L. Ed. 450. The gratuitous benefit thus conferred serves only charitable purposes and entitles the plaintiff to the statutory exemption."

The above case received approval of our Supreme Court in *Estate of Dol*, 186 Cal. 64, 66, 198 P. 1039. See, also, *Widows' & Orphans' Home of O. F. v. Commonwealth*, supra, where the court said:

"Without undertaking to be technically accurate, a "purely public charity" may be defined as one which discharges, in whole or in part, a duty which the commonwealth owes to its indigent and helpless citizens. Undoubtedly, it is the duty of the state to educate its poor children, and thus fit them for discharging the duties of citizenship; to care for the indigent, insane, its helpless orphans, and its poor who are sick and afflicted; and therefore any institution which, serving no selfish interest discharges, in whole or in part, any such duty, is a "purely public charity.""

[6] That the leading object of Masonry and of all Masonic lodges is charity as hereinabove defined is, in this jurisdiction, and throughout the United States, a matter of common everyday knowledge, and such fact is certain and indisputable, about which there is no reasonable question. That fact is as certain and as well known as are the general doctrines of any religious denomination in this jurisdiction. Hence this court may take judicial notice thereof, whether the trial court did or not. *Varcoe v. Lee*, 180 Cal. 338, 243, et seq., 181 P. 223, 225.

Other courts in the Union have taken judicial notice of the charitable character of Masonry and Masonic lodges:

"The society known as Free Masons has long existed in this country, and in almost or quite every part of it. The purpose and objects of the society have been made public in numerous books, periodicals, and public addresses. From all of these sources of information, and from the generally received and accredited judgment of the public, the sole purpose and object with which Masonic institutions acquire money and property, beyond their current expenses as a society (furniture, lights, fuel, stationery, and the like), are for the bestowal of reliefs and charities to the needy. In addition, the 3d and 4th sections of the act to incorporate Masonic lodges in the state of Alabama, tend to confirm the belief that the society is eleemosynary in its aims. Under these circumstances, we hold, that we will take judicial notice, that the grand and subordinate lodges of Free Masons within the state of Alabama constitute a charitable or eleemosynary corporation." (Italics ours.) *Burdine v. Grand Lodge of Alabama*, supra.

"The order of Ancient, Free and Accepted Masons is an association of persons that has existed for several hundred years, and exists generally in all civilized countries. In the state of Kansas there are 379 local, or subordinate, lodges, organized under the supervision and direction of said Grand Lodge, and subject to its jurisdiction. The lodges of this state are independent and separate from those of any other state or county, except that all Masonic lodges are bound by certain ancient landmarks and principles, which are not subject to change by either a subordinate or grand lodge. The objects and purposes of the Masonic order and of the

Masonic lodges of Kansas are to inculcate in their members the principles of morality, temperance, benevolence and charity, and teach them their duty to one another and to all mankind; to care for the sick and afflicted, to relieve the wants of the needy and destitute, and to promote the general good and welfare of their members and their families, or the widows and orphans of such members." *Mason v. Zimmerman*, 81 Kan. 799, 106 P. 1005.

Many courts of the United States have held, after a more or less extensive review of the authorities, that Masonry and Masonic lodges are charitable institutions.

"Our conclusion is that *Masonic lodges are organized for charitable and benevolent purposes*, with no incentive to private or corporate gain, but whose revenues, derived from whatever sources they may be, are applied to the payment of their current expenses, and the relief of their afflicted and needy members and their families; and, although their charity is restricted to such use, *they are charitable institutions.*" *Fitterer v. Crawford*, supra. See also, *Mason v. Zimmerman*, 81 Kan. 799, 106 P. 1005; *Burdine v. Grand Lodge*, supra; *King v. Parker* (Mass.) supra; *Morrow v. Smith* (Iowa) supra; *Plattsouth Lodge v. Cass Co.* (Neb.) supra; *State v. Board of Assessors*, 34 La. Ann. 574; *Duke v. Fuller*, 9 N. H. 536, 32 Am. Dec. 392; *Masonic Education, etc., v. Boston*, 201 Mass. 320, 87 N. E. 602; *Mayor, etc., v. Solomon's Lodge*, 53 Ga. 93; *Mayor, etc., v. Grand Lodge*, 60 Md. 280; *State v. Grand Lodge*, 2 S. C. 499; *Grand Lodge v. New Orleans*, 44 La. Ann. 659, 11 So. 148, 153.

Even in tax-exemption cases, where relief has been denied for reasons appearing in the opinions, nevertheless the charitable nature of Masonry and Masonic lodges has been recognized. *City of Philadelphia v. Masonic Home*, supra; *City of Newport v. Masonic Temple Ass'n*, 108 Ky. 333, 56 S. W. 405, 49 L. R. A. 252; *Bangor v. Rising Virtue Lodge*, 73 Me. 428, 40 Am. Rep. 369. (But later the same exemptions denied to *Rising Virtue Masonic Lodge* were granted to an *Odd Fellows lodge*.) *Curtis v. Androscoggin Lodge No. 24*, I. O. O. F., 99 Me. 356, 59 A. 518; *Morning Star Lodge v. Hayslip*, 23 Ohio St. 144; *Fitterer v. Crawford*, supra; *Morris v. Lone Star Lodge*, 68 Tex. 693, 5 S. W. 519. And our appellate court has held that a Masonic lodge was a charitable institution. *Kauffman v. Foster*, 3 Cal. App. 741, 86 P. 1108. And our Supreme Court has held that a Masonic lodge could act as trustee for funds left to it for use of widows and orphans of its members. *Estate of Wiley*, 138 Cal. 301, 71 P. 441.

[7] In view of the foregoing, we hold that a Masonic lodge is a charitable institution or society, and that the bequests in this case were for "eleemosynary purposes," unless that purpose is destroyed by the provision that the income of the fund was to be used for

current expenses of the lodges. We do not think that such was its effect. Every charitable society, corporation, or institution must have funds with which to defray its expenses before it can legitimately expend anything for charity. How can the charitable purpose of the society or institution be destroyed because some one assists in defraying its expenses? Can it be said that money paid for expenses of a charitable institution or society is not expended for charitable or eleemosynary purposes? We think not. Suppose the gift had been in a lump sum without any "strings," and the lodges should expend a portion thereof for expenses—could it be said that such payments were not for eleemosynary purposes? Again we think not. A clause very similar to the one here in question was before our Supreme Court in *Estate of Peabody*, 154 Cal. 173, 176, 97 P. 184. It is as follows (italics by the court):

"Ninthly. All the residue of my property, now in bonds, a list of which will be enclosed with this document, together with real estate which may be sold at any time it is my wish to have invested (after paying all debts) as a permanent fund, allowing the *income only* to be used in aiding to meet the expenses of "The House of Rest.""

The clause (with others) was upheld.

In *The Estate of Royer*, 123 Cal. 615, 56 P. 461, 44 L. R. A. 364, the gift was to the University of California, "for the sole purpose of founding a professorship," thus entailing an expense on the university in the form of the professor's salary, yet the gift was upheld as a charity.

In *Estate of Coleman*, 167 Cal. 212, 138 P. 992, Ann. Cas. 1915C, 682, a fund was left "to be used in erecting a suitable fountain for the benefit of thirsty animals and birds," and it was upheld, although there would be considerable expense in erecting the fountain.

In *Estate of Dwyer*, 159 Cal. 680, 115 P. 242, a fund was left to "found and maintain" (i. e., "to keep up, to support"—*Standard Dictionary*) "a home for aged persons."

In *People v. Cogswell*, 113 Cal. 129, 138, 45 P. 270, 272 (35 L. R. A. 269), the trust provided for the erection and maintenance of a polytechnic college, "the salaries of the professors, teachers and instructors are to be paid out of the trust funds. Suitable college buildings are to be erected." The trust was upheld, the Supreme Court saying:

"The objects and purposes of the present trust are purely charitable. The mode of effectuating the charity by the erection and maintenance of a polytechnic college is clearly set forth. The salaries of the professors, teachers, and instructors are to be paid out of the trust funds. Suitable college buildings are to be provided. Tuition is to be absolutely free so long as the resources of the trust will permit, and when a tuition fee is charged it is only to aid in maintaining the institution. Nothing is reserved for profit or gain."

In *Fitterer v. Crawford* (Mo.) *supra*, Masonic lodges were held to be charitable institutions, although it was said:

"Revenues, derived from whatever sources they may be, are applied to the payment of their *current expenses*, and the relief of their afflicted," etc.

In *Burdine v. Grand Lodge, etc.* (Ala.) *supra*, it was stated:

"The sole purpose and object with which Masonic institutions acquire money and property, *beyond their current expenses* as a society * * * are for the bestowal of reliefs and charities," etc.,

—and it was held that they were charitable, or eleemosynary, institutions.

In *City of Petersburg v. Petersburg Benefit Ass'n, supra*, the court said:

"Its revenues * * * are wholly applied to the payment of its *current expenses*, the assistance of its indigent members, and the families of such" members "as may have died in needy circumstances. *These are charitable purposes.*"

Therefore we hold that the bequests to *Hiram Lodge No. 18, Free and Accepted Masons of Delaware, Ohio, and of Jackson Lodge No. 146, Free and Accepted Masons of Seymour, Ind.*, are for eleemosynary purposes, and are not void under article 20, § 9, of the California Constitution.

The decree of distribution, in so far as it declares said bequests void, is reversed, with instructions to the trial court to distribute said estate in accordance with the will of the deceased.

We concur: WORKS, P. J.; THOMPSON, J.

88 Cal. App. 250

DILLER v. SCHINDLER et al. (Civ. 6001.)★

District Court of Appeal, First District,
Division 1, California. Jan. 6, 1928.

Rehearing Denied Feb. 3, 1928. Hearing Denied by Supreme Court March 5, 1928.

1. Evidence ⇨441(9)—Written contract of sale not restricting seller's right to re-engage in similar business, may not be altered by oral evidence showing contrary.

Where duly executed, formal, written contract of sale of business contains no question on right of seller to re-engage business of same character, oral evidence that he agreed not to do so is inadmissible as varying terms of written instrument.

2. Evidence ⇨441(1)—Rights under contract in writing depend on its terms, irrespective of prior parol agreements.

Where parties have reduced their contract to writing, their rights under it must depend on the true interpretation of its terms, irrespective of any parol evidence of what took place previously to or at time of making of agreement.

3. Good will ⇨6(4)—Sale of good will does not furnish grounds for implying that seller will not re-engage in same business.

In contract for sale of business, clause in bill of sale by which seller conveyed good will is no ground for implying that seller will not re-engage in same business.

4. Contracts ⇨116(1)—Agreement of seller not to re-engage in same business is valid, if not in undue restraint of trade.

Agreements restricting seller of business from re-engaging in business of same character, if not in undue restraint of trade, may be valid and binding when expressly made.

5. Evidence ⇨441(9)—Oral evidence that seller would not engage in similar business held inadmissible to vary written bill of sale for "Kosher" restaurant, in absence of claim of fraud.

Where bill of sale of "Kosher" restaurant did not contain any provision against seller's re-engaging in same business, but where it was attempted to be shown by parol that seller had so agreed, held that to permit proof of such agreement was to prove contract different from that contained in written agreement, which law will not allow in absence of claim of fraud.

6. Good will ⇨6(4)—Seller can re-engage in same business, in absence of contrary agreement.

Seller of restaurant business has right to re-engage in same line of business, in absence of such agreement with buyer to the contrary.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by B. Diller against Charles Schindler and another for damages for breach of contract in sale of business. Judgment for plaintiff, and named defendant appeals. Reversed, with directions.

William Klein, of San Francisco (Arthur H. Barendt, of San Francisco, of counsel), for appellant.

Walter McGovern, of San Francisco, for respondent.

TYLER, P. J. [1] Action for damages for breach of contract in the sale of a business. In January, 1924, Diller, the plaintiff and respondent herein, purchased from defendant and appellant Charles Schindler, a "Kosher" restaurant on Golden Gate avenue, San Francisco, for the sum of \$1,500. A bill of sale was executed in an attorney's office and delivered by Schindler to Diller. The instrument disposed of the going business, the good will, cash register, furnishings and cooking utensils. Some six months later Schindler purchased a going restaurant of the same character, which was situated on an upper floor two doors from the restaurant he had sold to Diller. The latter thereupon brought this action, praying for damages and an injunction restraining defendant from con-

ing and carrying on his newly acquired business. The action was based upon an alleged collateral agreement made at the time of the sale by Schindler to plaintiff of the business above referred to, under which Schindler was said to have promised and agreed that he would not at any time conduct any restaurant in the neighborhood of the business he had sold. Defendant Schindler by answer denied *inter alia* the making of any such agreement and as a further and separate defense set up the plea of the statute of frauds, claiming that an agreement of the character relied upon by plaintiff should be in writing. It was stipulated at the trial that if any such agreement was made by Schindler, it was a verbal one between the parties. There was offered by the plaintiff and received oral evidence to the effect that at the time of the sale Schindler had agreed not to open a restaurant within ten blocks from the place he was selling. Defendant admitted that the subject of incorporating a clause of this character in the bill of sale was discussed just before the instrument was executed, as plaintiff wanted it in writing, but defendant claimed that he refused to enter into any such agreement. Defendant's view would seem to be confirmed by the evidence, which shows that the subject was brought up by the attorney who drew the bill of sale, but, as stated, no mention of the matter appeared in that instrument. However this may be, judgment went for plaintiff for a permanent injunction and damages were assessed in the sum of \$1,000. From this judgment defendant Schindler appeals. Under plaintiff's pleadings and the proof adduced to support them it is clear that the judgment rests on the breach of the parol agreement. This being so, we are of the opinion that the judgment cannot be sustained without doing violence to the parol evidence rule. While counsel have not favored us with any direct authority upon the subject, the law seems to be settled that where a duly executed, formal, written contract of sale of a business contains no restriction on the right of the seller to re-engage in the same character of business, oral evidence that he agreed not to do so is inadmissible as varying the terms of the written instrument.

[2-5] As was said in *Bassett v. Percival*, 5 Allen (Mass.) 345, the parties having reduced their contract to writing, their rights under it must depend on the true interpretation of its terms, irrespective of any parol evidence of what took place previously to or at the

time of the making of the agreement. No such agreement can be implied from the clause in the bill of sale by which the vendor conveyed the good will of the business. Agreements of this character, if not in undue restraint of trade, may be valid and binding when expressly made, but they cannot be implied from the sale of the good will, nor can oral evidence be introduced to establish them. 28 Corpus Juris, p. 739; *Smith v. Gibbs*, 44 N. H. 335; *Costello v. Eddy*, 12 N. Y. S. 236,¹ affirmed in 128 N. Y. 650, 29 N. E. 146; *Wessell v. Havens*, 91 Neb. 426, 136 N. W. 70, Ann. Cas. 1913C, 1377. To permit plaintiff to prove that the contract was something different from that contained in the bill of sale would be to permit a written agreement to be added to or varied by parol, which the law will not allow. Even conceding, therefore, that the findings of the court are fully supported by the evidence that Schindler did orally agree not to re-engage in said business, so long as this stipulation was not incorporated in the written agreement which was subsequently made, and so long also that no claim is made that any fraud was practiced in connection with the making and execution of the written contract in question, plaintiff has failed to show a case that entitles him to relief. *Zanturjian v. Boornazian*, 25 R. I. 151, 55 A. 199. In case of a mistake or omission in this respect, doubtless the contract could be reformed in equity, but this is not such a proceeding. In an action at law the terms of the contract in such a case must prevail and the legal rule that all agreements of parties are merged in their writings must also control.

[6] We conclude therefore that the trial court erred in receiving parol evidence to establish the limitation in question and ingrafting it on the bill of sale, as it is inconsistent with the written instrument. In the absence of such an agreement the seller of a business has a right to re-engage in the same line of business. This is a valuable right, and to prevent him from so doing in the manner indicated is in effect making a new contract between the parties and one which contains more onerous terms than those agreed upon under the written contract.

The judgment is reversed, with directions to the trial court to enter judgment for defendant.

We concur: KNIGHT, J.; CASHIN, J.

¹ Reported in full in the New York Supplement; not reported in full in 68 Hun, 605.

OCEAN ACCIDENT & GUARANTEE CORPORATION, LIMITED, OF LONDON, ENGLAND, v. JOHNSON et al. (Civ. 4490.)★

District Court of Appeal, Second District, Division 2, California. Dec. 23, 1927.

Hearing Granted by Supreme Court Feb. 20, 1928.

Insurance — 188(2)—Testimony of witness, based on general recollection relating to matters assured was required to keep records of under policy, held properly excluded.

In suit for premiums under employers' liability policy, basing premium upon entire remuneration earned during policy period by all assured's employees, and making assured's failure to keep records of remuneration earned by employees classified according to kind of work performed cause for insurer to apply to entire remuneration earned premium rate applicable to most hazardous work performed, testimony of assured's witness seeking to show segregation of employees so as to secure lower rate based on witness' general recollection, assured having failed to keep books to supply the proper information, held properly excluded.

Collier, Justice pro tem., dissenting.

Appeal from Superior Court, Imperial County; M. W. Conkling, Judge.

Action by the Ocean Accident & Guarantee Corporation, Limited, of London, England, against Henrietta Johnson and another, doing business under the firm name and style of the Pioneer Transfer Company, to recover unpaid premiums for employer's liability insurance. Judgment for plaintiff, and defendants appeal. Affirmed.

A. L. Hubbell, of Escondido, for appellants.

George H. Moore and Hubert Starr, both of Los Angeles, and Dorsey Whitelaw, of El Centro, for respondent.

CRAIG, Acting P. J. The transaction out of which this action arose is one of employer's liability insurance. The suit is for unpaid premium thereon. The counts are contained in the complaint. The first count alleges that the defendants became indebted to the plaintiff in the sum of \$1,113.77 on account of premiums earned on a written policy of workmen's compensation insurance covering a period of one year, of which only \$591.89 had been paid, and \$521.79 was due and unpaid. The second count alleges an account stated upon the same transaction by which the defendants agreed to pay the plaintiff \$1,113.77, and had paid \$591.89. From the bill of exceptions it appears that at the trial plaintiff introduced evidence to show that it issued a policy as alleged, that the work covered by it as stated in the contract was "truckmen, general trucking (not otherwise classified), classification No. 7208, premium rate \$3.77. Pay roll to include all such employees as drivers, drivers' helpers,

chauffeurs, chauffeurs' helpers, stablemen, blacksmiths, repairmen, and riggers, excluding only clerical office employees and storage warehouse employees." Also, that the place stipulated as that where the work was to be done was "Calexico, Imperial county, Cal." Section H of the policy is one over which the controversy principally arose. It reads, in part, as follows:

"The premium is based upon the entire remuneration earned during the policy period by all employees of the assured, and all employees of any contractor or subcontractor of the assured, engaged in the trade, business, or work described in said declarations. * * * The assured shall keep complete and accurate record of the remuneration earned by employees classified according to the kind of work performed, and shall cause contractors and subcontractors to do likewise by inserting in all contract agreements entered into a provision requiring such records to be kept for examination by the assured and the corporation. Failure to keep such records on the part of the assured shall entitle the corporation to apply to the entire remuneration earned the premium rate applicable to the most hazardous work performed."

Evidence was introduced sufficiently establishing the account stated as alleged in the complaint, by which the defendants agreed to pay the plaintiff's bill of \$1,021.79, and that of this only \$591.89 was paid. The prima facie case was also proved on the other count.

Both sides rely upon Frankfort Marine Accident & Plate Glass Ins. Co. v. California Artistic Metal & Wire Co., 28 Cal. App. 74, 151 P. 176, to sustain their respective contentions as to the law bearing upon the issues presented by the first count. The facts of the case are similar to those in the one before us. The policy there construed contained a provision similar to section H of the contract here presented, but counsel construe the language of the opinion differently.

It was sought by testimony of the secretary of the defendant company to segregate the pay roll, but the evidence offered was simply the "general recollection" of the witness, and this was founded upon no substantial data. The ruling of the trial court refusing admission of such testimony was sustained. The principles upon which the decision was based are, we think, applicable here. They are most clearly expressed in the opinion of the court in denying the application for rehearing. One reason which is indicated as sufficient to uphold the ruling of the superior court is:

"That the proposal to prove the fact by the 'general recollection' of an officer of the defendant, after the latter had said that there were available to him no data upon which an estimate could be made, was properly rejected by the court as involving proof incompetent for that purpose.

"We do not hold that a witness, in some in-

stances, may not properly be permitted to give his 'best recollection' as to the existence or non-existence of a particular fact relevant and material to some ultimate issue, in cases where the issue thus sought to be proved is not required to depend wholly for its establishment upon that character of proof and where there exists possible opportunity for the party against whom it is received to offer adversary proof upon the point to which it is addressed. In the case at bar, however, the ultimate question to be affected by the proposed proof, based entirely upon the 'general recollection' of the witness, is the most vital in the case to the plaintiff. And, it is to be said, equally vital to the defendant; yet readily it can be perceived how impossible it would have been for the plaintiff to have met or attempted to overcome the force and the possible effect of testimony of so dubious an evidentiary nature and how easily thus its rights might be wholly destroyed. Through no fault of its own, the plaintiff was wholly without means of knowing, or the ability even to approximate (not even enjoying the doubtful advantage of general or the best recollection) how much of the total compensation paid to its employees by the defendant was received by the 'outside employees,' and, manifestly, had the defendant been allowed to make proof of that fact by a witness upon his mere 'general recollection' thereof, based upon no data of a substantial character, the plaintiff's rights would have been placed at the mercy of testimony possessing little or no probative value and as to which an adversary showing was wholly impossible."

This quotation is most apt in its application to the facts of the instant case. While it is claimed here that the rejected testimony was the definite recollection of the witness as to employment of particular employees, it was based upon no "substantial data," and in fact upon no data of the character required by the contract of the parties. In the Frankfort Case the books included a record of all time spent by the employees whether within or without the shop. The issue was upon the segregation on that basis, and the books failed to supply the information. In the instant case it appears that the books are in identically the same condition. They show all of the time spent, but do not segregate it as to the character of work done or place of its performance. As to the lack, all data capable of being used for segregation purposes, the situations are the same. In the absence of such data stipulated by the parties as thus necessary, it is of no moment that here a witness stated that he knew the employees, nor would it meet the stipulations agreed upon by the parties themselves as to data required to show such segregation if he could tell what each did and where each worked. As in the opinion quoted, such testimony would have been determinative of the most vital issue in the case. The insurer would have been utterly at a loss to have secured or produced adversary proof. The insured had full opportunity to have kept and preserved competent evidence, and its fail-

ure to do so was not only neglect of its own interests, but a clear disregard and dereliction of a duty owed the insurer in a confidential relation of agency for the latter; and, finally, the injury which the appellants may sustain by being refused permission to use the evidence offered is the natural result of their own neglect, and to permit them now to foreclose the respondent from its day in court (which would be the practical result of allowing the issues in question to be established by the mere unsubstantiated recollection of the witness) would violate the maxim which forbids a party taking advantage of his own wrongful act.

Appellants further contend that there was testimony to the effect that \$2,500 of the pay roll was paid to warehousemen, and that their work is not covered by the policy. The most that can be said to sustain this claim is that some conflict in the testimony appears to exist, but the only evidence to be found in the bill of exceptions indicating that any of the pay roll covered work of warehousemen is the statement of the witness Hill, based merely upon his general recollection, as to the competency of which evidence we have stated our views.

Finally, appellants make the contention that a part of the pay roll as reported by respondent's auditor was for work in Mexicali, whereas the policy provided that it should cover work only in Calexico, Imperial county, Cal. The only place where the word "Mexicali" occurs is in a statement rendered by the company to defendants which was introduced in evidence as a part of the proof of the alleged account stated. The bill of exceptions does not contain the entire statement. It merely quotes the summary of which all that is germane to the question here under consideration is, "Total \$31,547.36; Mexicali \$1,093.88." With no more of the context than this from which to judge, it would be mere speculation to conclude that the word "Mexicali" as here used indicates that any work was performed outside of Calexico. On the other hand, the bill of exceptions contains the statement, which, of course, we must accept as true, that:

"On the trial evidence was introduced by plaintiff in support of all findings of fact made by the court."

One of the findings to which reference is made is that all of the allegations in paragraph 3 of the plaintiff's first cause of action are true. These allegations contained one to the effect that the defendants became indebted to the plaintiff in this transaction in the sum of \$1,113.77, which, according to the statement above mentioned, rendered by the plaintiff, includes the item, "Mexicali, \$1,093.88"; hence the necessary inference that the work was done in Calexico. Upon the meager information contained in the bill of exceptions bearing upon this point we are

not in a position to say that the trial court's finding in this behalf is unsupported by the evidence.

In view of our decision concerning the issues presented in the first count, it is unnecessary to pass upon appellants' contention concerning the court's rulings to do with the alleged account stated as set forth in the second cause of action.

The judgment is affirmed.

THOMPSON, J. (concurring). I concur in the affirmance of the judgment, but attach more importance to the stipulation of the parties than appears to me to be made manifest in the prepared opinion. Very substantial rights and liabilities of the parties were largely dependent upon the proper segregation and classification of the pay roll by the defendants during the period in which the premium was being earned. For the very reason that the only parties who could have knowledge sufficient to make the classification were the defendants, that duty was made to rest upon their shoulders, with this contractual proviso that "failure to keep such records" (that is, classified according to the kind of work performed) "on the part of the assured shall entitle the corporation to apply to the entire remuneration earned the premium rate applicable to the most hazardous work performed." Having made the assured its agent for the purpose of segregation and classification, it is readily discernible that liability for compensation might depend upon the acts of defendants in making the classification. It ill becomes the assured, after the premium has been earned and the liabilities determined, to attempt to avoid the controlling force of the contractual obligation, and this is especially true after a lapse of time when presumably it would be extremely difficult for the insurance carrier to controvert the "personal knowledge" of the bookkeeper. I am not suggesting that instances of specific and unquestioned errors of bookkeeping may not be corrected by proof as has been suggested in the authorities mentioned, but rather that a failure as extensive in its character as the one here involved to comply with the requirements of the written agreement should not be permitted to be proved in the manner here attempted, in contravention of the stipulation of the parties thereto.

COLLIER, Justice pro tem. (dissenting). I dissent. I cannot agree with the main opinion for the following reasons:

In the first place, the testimony is undisputed that a set of books was kept by the defendants which showed the entire pay roll of all of the activities of the defendants, which included a contracting and other businesses not covered by the policy. Neither is it claimed that the books of account were

incomplete in any particular. The whole difficulty was that the defendants did not keep a "record of the remuneration earned by the employees, *classified according to the work performed.*" The record of remuneration was kept, but it was not classified.

The witness B. Hill testified that he was employed as bookkeeper for the defendants from the date of the issuance of the policy until he entered the military service in September, 1918, which was after the termination of the insurance period. He further testified that defendants were in businesses not covered by the policy, to wit, contracting, excavating, buying and selling hay and fertilizer, renting of live stock, etc.; that he had checked over the pay roll; that approximately \$2,500 of the pay roll covered work of warehousemen (who were not covered by the policy); that he arrived at the figures from a *personal knowledge of the employees*; that the pay roll was not segregated so as to show the class of work performed by the employees, but was together in one book: *that it could be segregated by the recollection of himself and Mr. Isom (one of the defendants), and would take one or two days to segregate the several amounts earned by the various employees.* The witness was then directed to take the next item in the segregation, whereupon the objection was sustained that the same was incompetent, irrelevant, and immaterial and not tending to prove or disprove any of the issues in the case; that it appeared, from the undisputed evidence, that an account or statement had been made by the defendants showing their entire pay roll, and showing the classification of their employees and the rate at which said employees were paid; and that under paragraph H of the policy the assured was required to keep an accurate and exact record of the pay roll of all employees and of the kind of work they were engaged in. Whereupon the following colloquy took place:

"Mr. Hubbell (Attorney for Defendants): Do I understand, your honor, that we cannot show any of the other items [meaning items not included in the work as a transfer and dray company] because we have not kept the books right?"

"The Court: Absolutely. He must keep it and must cause all subcontractors to keep it."

Defendants then offered to prove, by competent testimony other than the books and records, that one-half of the money spent for the pay roll was for contract work in Mexico. This offer was refused by the court.

I have set these matters forth in detail for the reason that one or more of them will be material in the following discussion:

First. I disagree with the statement in the main opinion that the testimony of the witness Hill was based upon "no substantial data and in fact upon no data." The Stand-

and Dictionary defines "data" as the plural of "datum," which it defines as:

"Something assumed, known, or conceded, as the basis of an argument, or a ground for a conclusion, or as material for an investigation or statement; a premise, a starting point, or a given fact."

Webster gives this definition:

"Something given or admitted; a fact or principle granted or presented; that upon which an inference or an argument is based; or from which an ideal system of any sort is constructed."

The books as kept by the defendant certainly contained "something * * * known * * * as the basis of an argument, or a ground for a conclusion." They certainly were sufficient "as material for an investigation," and were even more surely a "starting point" from which to proceed. With the pay roll, that is to say, "a list of those entitled to pay, together with the amount due them" (Standard Dictionary) before him, and a "personal knowledge of the employees," the witness Hill certainly had a "starting point" and "material for an investigation," as well as "a ground for a conclusion," to wit, that some of those employees whom he could segregate and designate by name labored as warehousemen, or in the contracting business, or in Mexico, etc., all of whom were specifically excluded from the policy.

I further take exception to the statement that Hill's testimony was based upon his "general recollection"; for he testified without contradiction that he had a "personal knowledge of the employees," which is entirely different from a "general recollection."

This brings us to the case of Frankfort Marine Accident & Plate Glass Ins. Co. v. California Artistic Metal & Wire Co., 28 Cal. App. 74, 151 P. 176. It is true that the clause in the policy in the instant case is obviously similar to the one considered in the Frankfort Case so as to make the reasoning in the latter case applicable here. The difficulty arises in agreeing as to what the case decides. In the Frankfort Case the secretary of the defendant testified that the only way by which he could determine the amount that was expended for labor on the outside would be from an *estimate*, but that:

There "would be no data for such an estimate, except my general recollection of what it has been. * * * As far as I know, there would not be any way of determining by examination of the books, or by questioning the bookkeeper, the exact amount that was expended for labor outside of the shop," etc.

In the instant case we have the witness Hill, who was the bookkeeper and who did testify, and testified *from personal knowledge of the employees*. Based on that personal knowledge, he testified that he could segregate the employees named on the pay roll into their

proper classifications. When that was done the men could be summoned before the court to testify for the plaintiff, if there were any doubts as to the correctness of the segregation. Hence the question of "adversary proof," so fully discussed in the Frankfort Case, is disposed of; and it is not reasonable to presume that all of the men on the pay roll had died or vanished at the time the trial was had. Furthermore, the plaintiff would not be combating a mere "estimate" or "general recollection," but would be presented with a list of names which could be carefully checked against.

Again, in the Frankfort Case there were 50 men employed part of the time "inside" and part of the time "outside." Here it was proposed to prove that one-half of the pay roll was for work in Mexico, and \$2,500 thereof was for wages paid to warehousemen. Any of these men would have no difficulty in answering a question as to whether or not he had ever worked in Mexico for the defendants, or whether he had ever worked for them in any other capacity than as warehouseman, etc.

I think the true rule is set forth in the main opinion in the Frankfort Case, as follows:

"In a sense, as before suggested, the defendant, by the provision requiring it to keep an accurate account of the pay roll to which the policies related was to that extent impressed with the character of agent of the plaintiff. It imposed upon the defendant the performance of a certain duty to the plaintiff involving the latter's rights under the contracts. At any rate, the defendant, as shown, was the only party to the contract authorized to keep a record of its pay roll for the purposes of the contracts. Indeed, as is plainly manifest, it was the only one in a position to do so. The plaintiff was not authorized to perform that duty, and had it been it would have been impracticable for it to have done so, or, indeed, as was the case when ultimately it sought to inspect the defendant's books, it might have been met with a refusal of the privilege of performing that duty. *It was, therefore, up to the defendant to discover to the plaintiff the pay roll affected by the contracts.* And if, as the defendant contends, the compensation paid to outside employees was intended to constitute the exclusive basis of the amount to be paid to the plaintiff as premiums, *the burden was upon the defendant to show what proportion of the total amount paid as compensation to all its employees was paid to the inside employees* [citing cases]. This proposition follows from the rule, *which we think applies to this case, that where offsets to an account upon which a party sues exist in favor of the defendant, the burden is upon the latter at the trial to specifically point out and prove such offsets.* Or, as has been elsewhere said, so it is correct to say here: 'The plaintiff having established a *prima facie* case by introducing the account kept by the defendants, it was incumbent upon the defendants, if they desired to show that they had not kept the accounts as required by the contract, but had confused other matters therewith, to point out

such matters specifically. They cannot be permitted to destroy the plaintiff's claim by vaguely impeaching in general terms accounts which it was their duty to keep for the benefit of the plaintiff, and, *if there are specific items which properly should be excluded, it was the duty of the defendants to point them out specifically.*" *Gilbane v. Fidelity & Casualty Co.*, 163 F. 673, 678, 90 C. C. A. 265." (Italics mine.)

In the instant case, "at the trial," the defendants desired to show "that they had not kept the books as required by the contract, but had confused other matters therewith," and "to point out such matters specifically." They tried and offered to "specifically point out in the proof such offsets," but were not allowed to do so. The evidence of the witness Hill, coming as it did from "personal knowledge," was competent to supplement the pay roll account. The pay roll account of the defendants was no more sacred than any other books of account, and the relation between the plaintiff and defendants in the instant case was no more of a fiduciary character than that of the partnership which existed in *Schurtz v. Kerkow*, 85 Cal. 277, 279, 24 P. 609, 610, where the court said:

"While the books were admissible evidence on the issue of profits they did not exclude other evidence. If the defendant or any other witness *knew* anything about those profits he should have been allowed to tell it. Of course, mere conclusions or opinions should be excluded." (Italics quoted.)

See, also, *Shields v. Rancho Buena Ventura*, 187 Cal. 569, 574, 203 P. 114, 117, where the court said:

"The books of account being properly admitted, it was not error to permit the plaintiff to read in evidence summaries of the accounts therein, for the purpose of avoiding delay. Code Civ. Proc. § 1855, subd. 5. Nor was error committed in admitting, in addition to these accounts, the testimony of the plaintiff concerning the transactions on the ranch during each of the years mentioned. If plaintiff was able to corroborate the accounts by testifying to facts from his own *personal knowledge*, certainly the admission of this testimony furnishes the defendant no ground of complaint." (Italics mine.)

The defendant Isom would also have been a competent witness as to those matters in his own knowledge, independent of the bookkeeper, Hill. See *Globe Mfg. Co. v. Harvey*, 185 Cal. 255, 261, 196 P. 261, 264, where it is said:

"An itemized summary of the expenditures of defendant under the contract was admitted in evidence under the issue of damages. Plaintiff assigns this as error, for the reason that the person who kept defendant's books did not testify to their correctness. The statement, or summary, was admitted under subdivision 5 of section 1855 of the Code of Civil Procedure, because the original consisted of 'numerous accounts or other documents, which cannot be examined in court without great loss of time.' Defendant maintains a card system of bookkeep-

ing and testified that he personally made up the statement in question by going over the cards and checking up the entries thereon with the original bills which he retained and which he knew had been paid. Therefore, the statement was, in fact, made from the original bills, of the payment of which defendant *had personal knowledge*, and defendant was competent to testify to the correctness of the items thereof upon his own knowledge, which he did. For this reason, testimony by the bookkeeper as to the correctness of the books of defendant was unnecessary and the statement was properly received in evidence." (Italics mine.)

Indeed, it has been held that in such cases evidence based on personal knowledge is not only admissible but "is of the highest character." *Whitcomb v. Oller*, 41 Okl. 331, 137 P. 709. Or, as another court has said:

"But, if we concede they [the books of account] were evidence, they constituted no higher evidence of the sale and delivery of the goods, than the positive proof of the witness, who testifies to their sale and delivery." *Godbold v. Blair*, 27 Ala. 595.

To the same effect see *Hetzfeld v. Walsh*, 55 Tex. Civ. App. 573, 120 S. W. 525, 526; *Keene v. Meade*, 3 Pet. (28 U. S.) 1, 7 L. Ed. 581; *Crosland Co. v. Pearson*, 86 S. C. 313, 68 S. E. 625, 626.

With the Appellate Court of Illinois (New *Amsterdam Casualty Co. v. Saloman*, 165 Ill. App. 264, 273), I "express the hope that if there be another trial of the case no obstructions will be placed in the way of an ascertainment of the truth concerning the number of persons and their compensation employed by the defendant during any policy period and purporting to be covered by a policy. The object of a trial on the facts is to ascertain the facts. That, and not any effort to conceal them, ought to be the end to which all efforts of counsel should tend. No competent evidence throwing light on the actual number and compensation of persons employed and covered by the policies should be excluded in this case. We deem it one in which the rulings of the trial court should be liberal in this regard."

Furthermore, the insurance policy was a "specialty." "A specialty is any sealed contract or obligation; a special contract as distinguished from an oral or verbal contract, a parol or unsealed contract, and a contract or obligation of record." *Anderson's Law Dictionary*. The distinction between sealed and unsealed instruments has been abolished in this state. Section 1629, Civ. Code. "An account stated" cannot "become a substitute for an action * * * upon a specialty, such as a promissory note or a bond for money. In such cases no subsequent statement of the amount due thereon, although agreed to by the payer, could supersede the special promise so as to form the basis of an action * * * upon an ac-

count stated to recover the original debt. * * * The action in such a case must be upon the original promise in writing *and not upon account stated.*" Bennett v. Potter, 180 Cal. 736, 745, 183 P. 156, 160. In the instant case the court has found upon *both* the "original promise in writing" and upon the account stated. Hence the judgment, if based on the findings as to an account stated, is erroneous. There is and can be no evidence to support it.

Again, if plaintiff relies upon an account stated, the court committed error in admitting any testimony regarding the items of the original account, except in case of fraud, mistake, omission, etc. "The action upon an account stated is not upon the original dealings and transactions of the parties. *Inquiry may not be had into those matters at all.* It is upon the new contract by and under which the parties have adjusted their differences and reached an agreement. * * * As has been said, the original transactions between the parties are not the subject of inquiry and may not be made the subject of inquiry except *upon such equitable considerations as fraud, duress, or mistake.* And if it be sought to avoid the legal effect of the account stated upon any of these grounds, they must be pleaded." Gardner v. Watson, 170 Cal. 570, 574, 150 P. 994, 995. See, also, Klein-Simpson Fruit Co. v. Hunt, Hatch & Co., 65 Cal. App. 625, 633, 225 P. 14, and McLellan Co. v. East San Mateo Land Co., 166 Cal. 736, 740, 137 P. 1145. And the court refused to allow the defendants to prove mistakes and/or to amend their answer.

Should it be held that an account stated was before the court, then we are faced with the dilemma that the defendants asked leave to amend their answer to plaintiff's second cause of action (account stated) to allege as follows:

"As a further and separate answer to the complaint defendants allege that at the time of the account stated as alleged in paragraph 2 of plaintiff's second cause of action defendants acknowledged said account through a mistake of fact, believing that they were indebted to plaintiff and later discovered that they were not."

To which the court replied:

"I will allow the amendment to conform to the proof, whatever the proof shows, but I think you will want to make your answer a little more elaborate than that."

At the conclusion of defendants' case they offered to prove:

"That defendants' acknowledgment of the account stated by plaintiff was made through mistake of fact."

This offer was refused by the court, and such refusal was assigned as error by defendants. If the account stated was before the court, this last ruling was erroneous.

An account stated "does not * * * operate as an estoppel, and it may be impeached for fraud or mistake." Judge Story says: 'If there has been any *mistake, or omission, or accident, or fraud, or undue advantage, by which the account * * * is in truth vitiated, and the balance is incorrectly fixed, a court of equity will not suffer it to be conclusive upon the parties, but will allow it to be opened and re-examined.*' 1 Story, Eq. Juris. § 523." Green v. Thornton, 96 Cal. 67, 72, 30 P. 965, 966; Union Lumber Co. v. J. W. Schouten & Co., 25 Cal. App. 80, 83, 142 P. 910; White v. Thompson. 40 Cal. App. 447, 450, 180 P. 953. "Where an account has been adjusted by the parties, if *any mistake* is subsequently discovered, the whole account need not be opened and readjusted but *the mistake may be corrected* and the rights of the parties readjusted as to such mistake. * * * In such actions, *the court may allow evidence of omissions and errors therein* and find in accordance with the developed facts." White v. Thompson, supra; Adams v. Gerig, 25 Cal. App. 638, 145 P. 106. (Italics mine.) Furthermore, an account stated "may be impeached for fraud or mistake either at law or in equity whenever it is brought forward as a defense or cause of action." White v. Thompson, supra, page 449 (180 P. 954).

Neither can I agree with Justice THOMPSON in his conclusions. Let us suppose that the defendants had segregated the pay roll as required. Further, let us suppose that the witness Hill, the bookkeeper, made the segregation at the time it should have been done. Would he not have made it then, as at the time of the trial, from his "personal knowledge" of the men and the work they did? In what manner would the plaintiff have been worse off than if the segregation was made at the time of trial? In either event, plaintiff would have either relied on defendants' records as kept by Hill, or made a check. And what prevented them from making the same check at the time of trial? And what would have prevented the court from finding that certain men did or did not work as warehousemen, or in Mexico, or elsewhere? The burden was on defendants to establish by competent proof the errors claimed by them, and the court could have compelled them to bring in the various workmen that they might be examined and cross-examined.

Again, I do not read the contractual proviso as does Justice THOMPSON. The penalty for not classifying the pay roll is not that the defendants shall be charged a premium based on their entire pay roll, whether covered by the policy or not, but that the plaintiff might apply "the premium rate applicable to the most hazardous work performed" to the "entire premium earned." But the plaintiff did not and could not earn any

premium on the pay roll of defendants' employees who worked anywhere outside of Calexico, or as warehouse employees, or as clerical office employees. The very issue in this case was to determine the "premium earned." This the defendants were not allowed to show. Had they been allowed to show that fact, then unquestionably it would bear "the premium rate applicable to the most hazardous work performed."

From the foregoing it seems to me that the judgment must be reversed because:

(1) The judgment on the account stated is erroneous, as there cannot be an account stated on a specialty.

(2) As there was an account stated before the court, the defendants should have been allowed to amend their answer and set up errors and mistakes. This right was denied them in two ways: (a) The court said it would allow the amendment to conform to the proof, which it did not do; and (b) the court refused to allow defendants to make the proof upon which to base an amendment to conform thereto.

(3) The evidence offered and rejected was competent and should have been admitted, *either to correct the account stated or as matters going very materially to the defense on the contract itself.*

88 Cal. App. 34

TATTERSON et al. v. KEHRLEIN et al.★
(Civ. 6040.)

District Court of Appeal, First District, Division 1, California. Dec. 28, 1927.

Hearing Denied by Supreme Court Feb. 23, 1928.

1. Corporations ⇨121(5)—Evidence held to sustain finding that sellers of all the stock of theater corporation acquiesced in buyers' rescission by attempting to sell property.

In action for rescission of contract for sale of all the stock of a theater corporation, evidence that defendants assumed possession of all property and right to possession of all of the stock held sufficient to support finding that defendants accepted and acquiesced in plaintiff's rescission by attempting to sell the property of the theater as their own.

2. Appeal and error ⇨1071(3)—That finding is not sustained by evidence is immaterial, where remaining findings are sustained and are sufficient to support judgment.

The fact that a finding is not sustained by the evidence is immaterial, where remaining findings are sustained and are sufficient to support judgment.

3. Corporations ⇨117—On mutual rescission of contract of sale, note given by buyers must be returned.

On mutual rescission of contract for sale of all the stock of a theater corporation, note given by buyer to seller must be returned.

4. Sales ⇨92—Offer and acceptance of rescission of sale are governed by rules governing inception of contracts generally.

Though offer of rescission of contract of sale on one side must be accepted on other, such offer and acceptance are governed by same rules as govern inception of contract generally.

5. Sales ⇨92—Seller's assumption of ownership of subject-matter of sale ratifies rescission of sale contract.

Seller's assumption of ownership of the subject-matter of a sale, such as selling it, is a ratification of the rescission of the contract of sale.

6. Sales ⇨92—Rescission of sale contract by consent may be implied from acts of parties.

A rescission of a contract of sale by consent may be implied from the acts of the parties.

7. Licenses ⇨39—Evidence held to sustain finding that theater corporation stock was issued in violation of statute, entitling buyers to rescind (Corporate Securities Act, as amended by St. 1919, p. 231, St. 1921, pp. 1008, 1114, and St. 1923, p. 87).

In action for damages and rescission of contract of sale of theater corporation stock on ground of fraudulent representations, evidence held to sustain finding that sellers issued stock in violation of Corporate Securities Act (St. 1917, p. 673) as amended by St. 1919, p. 231, St. 1921, pp. 1008, 1114, and St. 1923, p. 87; and hence, contract being illegal and void, buyers were privileged to repudiate it and reclaim money.

8. Licenses ⇨39—Buyer of stock issued in violation of Corporate Securities Act may recover money paid and have contract, stock certificates, and promissory notes canceled (St. 1917, p. 673).

The penalties prescribed by the Corporate Securities Act (St. 1917, p. 673) being all laid on seller and none on buyer, and statute being for benefit and protection of buyers, parties are not in pari delicto, and buyer of stock issued in violation of the statute may have judgment for money paid out and cancellation of contract, stock certificates, and promissory note.

9. Licenses ⇨39—Buyers, induced to enter into contract violating Corporate Securities Act by fraud of sellers and withdrawing while contract was still executory, are not in pari delicto (St. 1917, p. 673).

Buyers under contract for sale of theater corporation stock which was illegal because stock was issued in violation of Corporate Securities Act (St. 1917, p. 673) are not deemed in pari delicto, where contract was induced through fraud of sellers and buyers withdrew while contract was still executory.

10. Licenses ⇨39—That transfer of portion of stock under contract involving illegal issuance of stock did not violate Corporate Securities Act does not render contract only partially illegal (St. 1917, p. 673).

That portion of stock transferred under contract for sale of all the issued stock of a theater corporation was not in violation of Cor-

porate Securities Act (St. 1917, p. 673) does not render contract only partially illegal, where issuance of other stock transferred was illegal, since if any part of consideration of contract is illegal the contract is wholly void.

11. Corporations ⚡121(5)—Evidence held to sustain finding that one of buyers seeking rescission of contract of sale was secretly agent of sellers.

In action by buyers for damages and rescission of contract for sale of theater corporation stock for fraudulent representations, evidence held to sustain finding that one of buyers who acted for others in the purchase was secretly the agent of the sellers.

12. Corporations ⚡121(5)—Evidence held to sustain finding of fraud and misrepresentations in sale of theater corporation stock.

In action by buyers for damages and rescission of contract for sale of all the issued stock of a theater corporation for fraudulent representations, evidence held to sustain finding of fraud and misrepresentation in stating to purchasers that theater had always been a paying business, that a good deal of money had been made, and that corporation was free from all debt, when, as matter of fact, theater had been losing venture and was not free from debt.

13. Corporations ⚡117—Buyers held not to have waived right of rescission of contract for sale of theater stock by operating theater for 20 weeks.

Buyers seeking rescission of contract for sale of theater stock for false representation did not waive their right of rescission by operating theater for period of 20 weeks, where true records of theater were withheld from them, since it would require averaging over a period of number of weeks' operation to determine whether theater was a paying proposition.

Appeal from Superior Court, Alameda County; J. D. Murphey, Judge.

Action by George W. Tatterson and others against Oliver Kehrlein and others. Judgment for plaintiffs, and defendants appeal. Affirmed.

See, also, 263 P. 295; 262 P. 295.

Jesse Robinson, of Oakland, for appellants.

Crosby, Naus & Crosby and Daniel Rygel, all of Oakland, for respondents.

CAMPBELL, Justice pro tem. On November 4, 1916, the "Franklin Amusement Corporation" was incorporated under the laws of the state of California, and two years later certain issued stock was purchased by appellants. On September 28, 1923, the agreement, which is the foundation of this litigation, was entered into between appellants and respondents.

The agreement is very lengthy and need not be set out in *hæc verba*. We summarize it, setting forth merely such portions as are necessary to an understanding of the questions involved in this appeal: Preamble: "This

memorandum of agreement made and entered into on the 28th day of September, 1923, by and between Oliver Kehrlein, Emil Kehrlein and Emil Kehrlein, Jr., hereinafter known and referred to as parties of the first part, and George W. Tatterson, J. M. Maurer and L. B. Gross, hereinafter known and referred to as parties of the second part, witnesseth: That whereas the parties of the first part are the owners of all of the issued and outstanding stock of the Franklin Amusement Corporation, a California corporation, and whereas, said parties of the first part are desirous of selling to parties of the second part said stock in said corporation under the terms and conditions hereinafter set forth and the parties of the second part are desirous of buying said stock upon said conditions." Article I: The parties agree respectively to sell and buy 2,800 shares, "being all of the issued stock of said corporation." Price \$90,000, payable in installments as follows: \$250 down; \$450 on November 14, 1923; \$700 on December 14, 1923, and \$700 on the 14th day of each and every month thereafter until the whole sum of \$90,000 shall have been paid. There shall be deposited and paid on or before October 14, 1923, the sum of \$10,000 as security for the payment of the sums to be paid monthly and of the performance of the terms and conditions of the agreement. Article II: "All of the stock of the Franklin Amusement Corporation mentioned in paragraph I herein and in the preamble hereto, together with a certificate or certificates issued to the parties of the second part jointly covering the treasury stock of the Franklin Amusement Corporation now and hereafter issued, shall be deposited in the Trust Department of the Central National Bank of Oakland under written escrow instructions hereto attached and made a part of this agreement," etc. Article III provides for contingency of default in payment of installments. Article IV provides that the corporation at the time of the transfer of the stock shall be free and clear of all debts and liabilities other than those arising under the lease now covering the property and provides further remedies in case of default by the buyers. Article V provides that on or before October 14, 1923, the corporation shall execute a sublease of the stores in the theater building to parties of the first part at a yearly rental of \$1. Article VI: "It is mutually agreed by and between the parties hereto that the parties of the first part will upon the due execution of this agreement and the payment of the sum of \$10,000.00 herein mentioned and the opening of the escrow with the Central National Bank of Oakland as per the terms of Exhibit A attached hereto, deliver to the parties of the second part five shares of the capital common stock of the said Franklin Amusement Corporation to qualify as directors in the said Franklin Amusement

Corporation. The said five shares shall not become a part of the escrow under Exhibit A herein, but shall be in absolute ownership in parties of the second part herein," etc.

Exhibit A attached to the agreement is entitled "Escrow Instructions" and is directed to Central Bank of Oakland, trust department, and is signed by all the parties to the agreement and reads in part:

"The undersigned herewith hand you in escrow certificates Nos. 30, 31, 29 and 37, the same constituting all but three shares of the capital stock of the Franklin Amusement Corporation, a California corporation, the said stock being indorsed to Oliver Kehrlein, Emil Kehrlein and Emil Kehrlein, Jr. This stock you are to hold subject to the following instruction, to wit: If there shall be paid to you to the order of Oliver Kehrlein, Emil Kehrlein and Emil Kehrlein, Jr., the sum of \$450.00 on the 14th day of November, 1923, \$700.00 on the 14th day of December, 1923, and \$700.00 on the 14th day of each and every month thereafter until the entire sum of \$79,950.00 shall have been paid, then and in that event all of said certificates of stock hereinabove enumerated shall be delivered by you to the order of George W. Tatterson, J. M. Maurer and L. B. Gross, administrators, successors or assigns."

Then follow provisions in case of default in payments.

On a strip of paper which was glued to the margin of article VI of the agreement is the following paragraph:

"It is further agreed that for the purpose of conducting the affairs of the Franklin Amusement Corporation that the capital stock now issued and placed in escrow as a pledge with the Central National Bank of Oakland shall be and is owned by the parties of the second part, and may be voted by them for all purposes in conformity with this agreement and not contrary thereto."

The agreement we have summarized is the basis of three suits: This one in which George W. Tatterson, J. M. Maurer, and L. B. Gross are plaintiffs and Oliver Kehrlein, Emil Kehrlein, and Emil Kehrlein, Jr., are defendants, in which plaintiffs allege fraud on the part of defendants and seek to recover \$31,030 damages and in which judgment was entered in favor of plaintiffs in the sum of \$12,071.86; the second suit in which Oliver Kehrlein is plaintiff and George W. Tatterson is defendant, wherein plaintiff seeks to recover the sum of \$1,500 on a promissory note executed by George W. Tatterson, the defendant in the action, and in which judgment was entered for defendant; and the third suit wherein Oliver Kehrlein, Emil Kehrlein, and Emil Kehrlein, Jr., are plaintiffs and the Franklin Amusement Corporation (a corporation), George W. Tatterson, J. M. Maurer, and L. B. Gross are defendants, in which plaintiffs seek damages for breach of covenant to keep the rental paid, with consequent damages arising

from loss of rent from subtenants, in which judgment was entered for defendants.

This appeal is prosecuted by appellants herein, who are also appellants in the other two actions mentioned. The three actions were consolidated in the trial court, and the appeals are presented upon one set of briefs. Should the case under consideration be affirmed, in view of the fact that the two other actions are based upon the same transaction, a similar order must be entered in each of the other two cases.

Appellants urge the following points on this appeal: (1) Insufficient evidence to support certain findings. (2) Certain findings are outside the issues of the case. (3) The judgment is erroneous in point of law.

Under the heading "Insufficient Evidence to Support Certain Findings," appellants complain of the following facts found by the court which they assert there is insufficient evidence to support:

Finding I: "On February 29, 1924, these defendants became and ever since have been indebted to these plaintiffs George W. Tatterson and J. M. Maurer in the sum of \$10,907.50 for money had and received by these defendants to and for the use and benefit of said plaintiffs, no part of which sum, nor any interest thereon, has been paid." Finding II that "the said 2,204 shares were issued, as hereinafter set forth, without any permit or certificate or authority from said commissioner and/or said department, and in violation of the Corporation Securities Act." Finding IV: "That continuously and for several weeks to and including the 28th day of September, 1923, the plaintiff Gross was, without the knowledge of his coplaintiffs Tatterson and Maurer, secretly the agent of, and in the employ of, the defendants for the purpose of selling the capital stock and/or the assets of said Franklin Amusement Corporation to the said Tatterson and Maurer, and the efforts and negotiations and representations of the said Gross were the procuring cause of the execution by said Tatterson and Maurer, and each of them, of the contract hereafter referred to" (contract hereinabove summarized). Finding V: "The plaintiffs Tatterson and Maurer relied upon the judgment and discretion of their coplaintiff Gross in fixing the terms of said contract, and relied upon the said Gross to obtain the most favorable terms possible in buying said stock from the defendants; and the price of \$90,000, together with the amounts and times of payment of installments thereof, were first fixed and suggested by Gross to the defendants, then assented to by the latter, whereupon said Gross represented that price to said Tatterson and Maurer, as and because thereof the plaintiffs Tatterson and Maurer believed it to be, the lowest price at which defendants would sell to the plaintiffs." And finally finding VI: "And prior to the time of making said contract, the defendants, with intent to deceive and defraud the plaintiffs Tatterson and Maurer, falsely and fraudulently represented to them and each of them that the theater business of said corporation had always been profitable and paid well. Neither of said plaintiffs knew that said representation was false and untrue, and the said

plaintiffs, believing in and relying on the truth of said representations, executed said contract."

Appellants concede the following facts found in finding II:

"Franklin Amusement Corporation was incorporated under the laws of the state of California on November 4, 1916, and not earlier, with an authorized capital stock of \$50,000, divided into 5,000 shares of the par value of \$10 each; and on November 15, 1916, received from the commissioner of corporations of California a certificate or permit authorizing it to sell and issue 2,800 shares of said stock, and no more, said certificate or permit being the only certificate or permit of authority ever received by said corporation from, or issued or given to it by the commissioner of corporations and/or the State Corporation Department of California. The said corporation issued the said 2,800 shares in November, 1916, and the remaining 2,200 shares of the capital stock remained in the treasury of said corporation unissued, until September 28, 1923,"—but do not concede the remainder of the finding—"when the said 2,200 shares were issued, as hereinafter set forth, without any permit or certificate of authority from said commissioner and/or said department, and in violation of the Corporate Securities Act."

Under the escrow instructions addressed and delivered to Central National Bank of Oakland, four certificates of stock were deposited with the bank, being certificates Nos. 30, 31, 29, and 37. The old certificates for 2,800 shares of the issued and outstanding stock were transferred into three new certificates as follows: Certificate No. 29 for 933 $\frac{1}{3}$ shares to George W. Tatterson; certificate No. 30 for 933 $\frac{1}{3}$ shares to J. M. Maurer; and certificate No. 31 for 933 $\frac{1}{3}$ shares to L. B. Gross.

The 2,200 shares of treasury stock were issued simultaneously to respondents as follows: Five shares as qualifying shares and the remaining 2,195 shares were issued under certificate No. 37 jointly in the names of George W. Tatterson, L. B. Gross, and J. M. Maurer. The certificates thus aggregating 4,995 shares out of the total capitalization of 5,000 shares, were indorsed in blank and went into escrow, and as thus indorsed, were held by Central National Bank of Oakland, pursuant to the escrow instructions.

As between themselves, Tatterson and Maurer arranged that each should pay half of the payment of \$10,000 required to be made on or before October 14, 1923. Maurer paid his \$5,000. Tatterson paid \$3,000 of his half on October 8, 1923, and \$500 on October 17, 1923, leaving a balance of \$1,500 for which the sellers accepted his note, which note is the basis of the suit brought by Oliver Kehrlein against George W. Tatterson hereinbefore mentioned. The \$10,000 thus being taken care of, the buyers were let into possession of the property of the corporation on October 14, 1923, and operated the theater at a loss for 20 weeks, when they surrendered the

property to the sellers and served the following notice of rescission, which notice bears date February 29, 1924, and is signed by respondents George W. Tatterson, J. M. Maurer, and L. B. Gross, and addressed to appellants Oliver Kehrlein, Emil Kehrlein, and Emil Kehrlein, Jr.:

"Take Notice. That that certain agreement made and entered into by and between you and the undersigned on the 20th day of September, 1923, for the mutual purchase and sale of all of the stock of the Franklin Amusement Company, together with the personal property and lease owned by said company and the business of the Franklin Theater, is hereby rescinded for and upon the grounds of the fraud and misrepresentations practiced upon the undersigned by you, and further performance of said agreement is refused and the lease to said building and property, together with the modification thereof, the possession thereof and of the personal property therein, together with five shares of stock of said corporation, in the possession of the undersigned, the stock certificate book, the stock ledger, the stock journal, the by-laws of said corporation and any and all other things of value received from you by the undersigned are hereby tendered to you and offer of the delivery thereof is made to you and consent is hereby given you to withdraw from the escrow of the Central National Bank of Oakland all of the stock of said Franklin Amusement Corporation on deposit in said bank.

"And demand is hereby made upon you for the repayment to the undersigned of the sum of \$12,000.00 paid upon said contract by us, and the further sum of \$5,555.94 paid under the terms of said lease by the undersigned, and the further sum of \$13,074.12 losses caused the undersigned by the said fraudulent representations made by you in inducing the undersigned to enter into said agreement, to wit: That said business was a paying business, paying large profits; that said corporation was free of debts and all of the other representations made by you to the undersigned for the purpose of inducing the undersigned to enter into said agreement, all of which were false and untrue, and for which reasons the said agreement is hereby rescinded."

Thereafter, on March 1, 1924, the Kehrleins resumed possession of the corporation's property and operated the theater until April 22, 1924, when they abandoned it, the lease being then forfeited by them to the landlord in unlawful detainer, and the corporation went into involuntary bankruptcy.

The evidence shows that appellants are indebted to respondents George W. Tatterson and J. M. Maurer in the sum of \$10,907.50, with interest from February 29, 1924, which in equity and good conscience ought to be paid, because at approximately that date the parties mutually rescinded the agreement of September 28, 1923. The respondents rescinded the agreement by the notice of rescission and tendering to appellants the five shares of qualifying stock, the personal property in their possession, the stock certificate

book, the stock ledger, the stock journal, the by-laws of the corporation, and every other thing of value, together with consent that appellants might withdraw from escrow all of the stock of the Franklin Amusement Corporation on deposit in Central National Bank, and as the theater had been run at a loss there were no profits to return or offer to return, and as stated, appellants resumed possession of the property of the corporation on March 1, 1924.

Appellant Oliver Kehrlein testified that he was the manager of the Franklin Amusement Corporation up to the time of the sale to Tatterson, Maurer, and Gross, approximately five years; that the theater was taken back and he assumed the management of it about February 29, 1924.

The witness Carl H. Nieper testified:

"I had a conversation with Mr. Oliver Kehrlein regarding the Franklin Theater about the time he took it over from Tatterson, Maurer and Gross. It was not very long after March 1, 1924. Nobody present but Mr. Kehrlein and myself in his office in the Tribune Building. I approached Mr. Kehrlein regarding the sale of the lease of the Franklin Theater, and I ask Mr. Kehrlein for a price. At that time Mr. Kehrlein quoted me a price of \$30,000, but I said that I had approached with the idea of giving \$25,000. Those figures at that time did not seem to interest Mr. Kehrlein, because he thought he ought to get more than \$25,000. I was then in the real estate business, a broker. I knew that the landlord was Williams, and there was a lease from him to the Franklin Amusement Corporation, and I was after that lease. Afterwards I came back—quite regularly afterwards—because I was interested in getting that lease, and I kept on. I saw Mr. Kehrlein a half dozen times or so. In the two months following the time in which he took the theater over, I saw him sometimes twice a day. I know I made a call twice a day possibly the first week, and every other day after that, because I was very anxious at that time to get hold of the lease. I came back again and asked him if he would not take \$25,000, and he asked me who my people were. I did not tell him who they were because I thought it was my personal business, and he said the reason he asked me was that these people, whoever they were, should be expert show people, in other words, they should know the business in order to run the theater, because the people who were handling it knew nothing about it, and didn't make any money for the reason they didn't know their business. I said my people qualified, and then near the close of the meeting he referred to Mr. Jesse Robinson, to confirm the price that he quoted me. Mr. Kehrlein quoted me a price. He wanted \$30,000, and I offered him \$25,000, and he says: 'You take it up with my attorney, Mr. Jesse Robinson.' I called on Mr. Robinson personally. Nobody present but Mr. Robinson and myself. Mr. Robinson came out of his office and talked to me in the ante-room, and he asked me what I wanted. I told him, and he said: 'Make a price.' He didn't make any price. He said: 'Get a deposit and bring it in, and we will take it up.' Later Mr. Kehrlein called me up. He said if my party was

still interested to get busy, he could not let that lease go, and I went back and saw Mr. Kehrlein and talked it over with him, and asked him if he could give me 30 days I might be able to put it over. He said, no, he wanted to give it up. He said, 'there is a time to give it up, and it is now,' but he would give me a little time to go and see my man. Later, after the lease was up, I met Oliver on the street a couple of times, and he said he was sorry he did not take me up on my \$25,000. Kehrlein did not explain to me in any of those conversations that he was running the theater for the account of Tatterson, Maurer, and Gross. Mr. Robinson said for me to bring in a deposit, and that he would take it up with his client, but nothing was ever mentioned regarding Mr. Tatterson or Mr. Maurer. Mr. Robinson said something about some trouble that Mr. Kehrlein was having, but no names were mentioned. I am positive that Mr. Robinson did not say that Mr. Kehrlein was not in any legal position to make any agreement."

[1] This evidence is sufficient to support finding XII:

"Subsequently to March 1, 1924, these defendants accepted and acquiesced in said rescission by attempting to sell the property of said theater as their own."

They assumed possession of all of the property and were armed with a written authorization contained in the notice of rescission to withdraw all of the stock from escrow, which stock was properly indorsed by respondents—being indorsed in blank and appellants could at their pleasure have the shares of stock issued to them by the corporation and make a transfer of the stock to the purchaser.

[2, 3] If this finding is supported by sufficient evidence, and we think it is, even assuming the findings complained of to be erroneous—which, however, we do not concede—it would in no way affect the judgment or be ground for reversal, for the fact that a finding is not sustained by the evidence is immaterial, where the remaining findings are sustained and are sufficient to support the judgment. As was said in *Moore v. Copp*, 119 Cal. 429, 436, 51 P. 630, 633:

"It is not necessary to consider whether objections to these findings are well taken or not, for, however erroneous, the judgment cannot be set aside inasmuch as it may rest upon finding 'F'—here finding XII.

See, also, *Ehat v. Scheidt*, 17 Cal. App. 430, 438, 120 P. 49; *Lovell v. Frost*, 44 Cal. 471, 475.

Therefore, if the contract was rescinded, the note given by Tatterson to Kehrlein must be returned. "Upon a mutual rescission of a contract the law requires each party to restore whatever he has received under it" *Dugan v. Phillips*, 77 Cal. App. 268, 278, 246 P. 566, 569; *Green v. Darling*, 73 Cal. App. 700, 239 P. 70. "If the minds of the parties met

on the proposition that they would rescind, it was not necessary that the defendant stipulate to return to the plaintiff the money which he had received, for the law requires him to do this as a consequence of having agreed that the contract be abrogated" *Green v. Darling*, supra.

[4-6] In the present case the corporation owned the theater, and only the corporation could sell it. At the time the witness Nieper testified that appellants offered to sell the theater for \$30,000, appellants could act for the corporation only through acceptance of the indorsed stock certificates restored to appellants when they were served with the notice of rescission. The notice of rescission was an offer of rescission; Nieper's testimony supports a finding of acceptance of that offer, thus creating a mutual rescission. While the offer of rescission on the one side must be accepted on the other, such offer and acceptance are governed by the same rules as govern the inception of contracts generally. Assumption of ownership of the subject-matter of a sale, such as selling it, is a ratification of the rescission of the contract. *Sauble v. Gary S. C. Agency*, 56 Cal. App. 606, 611, 206 P. 141. A rescission by consent may be implied from the acts of the parties. *Hogan v. Anthony*, 40 Cal. App. 679, 684, 182 P. 52; *Tomkins v. Davidow*, 27 Cal. App. 327, 335, 149 P. 788.

[7] While discussion of the remaining objections urged by appellants is not necessary to an affirmance of the judgment, it may be said that the finding that the "2,200 shares were issued as herein set forth without any permit or certificate or authority from said commissioner or said department and in violation of the Corporate Securities Act" is supported by the evidence. Five of these shares were issued and delivered to respondents as qualifying shares, and the remaining 2,195 shares were issued and deposited with the bank to be delivered to respondents upon making certain payments. Respondents contend that while the stock under the escrow instructions given to the bank was evidently intended originally as an escrow, the last-minute change in the contract at the foot of article VI "that the capital stock now issued and placed in escrow as a pledge with the Central National Bank of Oakland shall be and is owned by the parties of the second part, and may be voted by them for all purposes in conformity with this agreement and not contrary thereto," changed the character of the stock from an escrow to a pledge as security for the payments due under the contract. While we think this is true, it would make no difference, as the issuing of the stock and placing it in escrow is as much a violation of the Corporate Securities Act as though the stock had been sold outright.

The Corporate Securities Act, chapter 532, Statutes 1917, as amended by chapter 148,

Statutes 1919, chapters 597 and 658, Statutes 1921, and chapter 50, Statutes 1923, defines in section 2, subdivision 7, the term "sale" as including "issue." Section 3 prohibits "sale" (which includes "issue") without securing a permit from the commissioner of corporations; section 12 makes security issued without a permit void; section 13 makes the "issuing" corporation guilty of a public offense; and section 14 makes the officers, agents and employees of the corporation guilty of a public offense.

The contract of September 28, 1923, being prohibited and the making thereof subject to a penalty, the contract is illegal and void; the penalty implies a prohibition (*Levinson v. Boas*, 150 Cal. 185, 88 P. 825, 12 L. R. A. [N. S.] 575, 11 Ann. Cas. 661; *Smith v. Bach*, 183 Cal. 259, 191 P. 14; *Reno v. American Ice Machine Co.*, 72 Cal. App. 409, 237 P. 784; *Napa Valley E. Co. v. Calistoga E. Co.*, 38 Cal. App. 477, 176 P. 699), and respondents, having paid money in consideration of an executory contract which is illegal, were privileged to repudiate the agreement and reclaim the money (*Smith v. Bach*, supra). In *Smith v. Bach* at pages 262, 263 (191 P. 15), the court uses this language:

"Here it is manifest from a reading of the entire act that the statute in question was passed for the protection of the public and not as a revenue measure. * * * In such a case a contract made in violation of its terms should be held to be void. * * * The general rule controlling in cases of this character is that where a statute prohibits or attaches a penalty to the doing of an act, the act is void, and this, notwithstanding that the statute does not expressly pronounce it so, and it is immaterial whether the thing forbidden is malum in se or merely malum prohibitum. A statute of this character prohibiting the making of contracts, except in a certain manner, ipso facto makes them void if made in any other way. * * * The imposition by statute of a penalty implies a prohibition of the act to which the penalty is attached, and a contract founded upon such act is void."

The Corporate Securities Act was passed for the protection of the public and "every case from every court recognizes that when a statute has been made for the protection of the public a contract in violation of its provisions is void." *Payne v. De Vaughn*, 77 Cal. App. 399, 403, 246 P. 1069, 1071. As it was illegal for the corporation to issue the 2,200 shares of treasury stock without a permit from the commissioner of corporations, it was likewise illegal for the Kehrleins, as agents, officers or representatives of the corporation, to join with it, or aid or abet or assist it in committing the illegal act, or to commit the act for the corporation. *King v. Johnson*, 30 Cal. App. 63, 157 P. 531.

Appellants contend that respondents were buying the theater and not the stock of the Franklin Amusement Corporation except as

a means to that end, and that if respondents received what they bargained for and wanted, they should not be permitted to contend that what they were buying was stock which meant nothing and represented nothing. What respondents sought was the property of the corporation which was represented by the stock, and it was this stock they were buying so that they could control the corporation, and which was so expressed in the contract. To hold otherwise would require the court to change or modify the express terms of the agreement of the parties. The defenses of estoppel, waiver, and ratification are not available in the case of an illegal contract. "This is one of the distinctions between void and voidable contracts. The doctrines of estoppel by contract and ratification have no application to a contract which is void because it violates an express mandate of the law or the dictates of public policy. Such a contract has no legal existence for any purpose and neither action nor inaction of a party to it can validate it and no conduct of a party to it can be invoked as an estoppel against asserting its invalidity." *Reno v. American Ice Machine Co.*, supra. See, also, *Colby v. Title Ins. Co.*, 160 Cal. 632, 117 P. 913, 35 L. R. A. (N. S.) 813, Ann. Cas. 1913A, 515; *MacRae v. Heath*, 60 Cal. App. 64, 72, 212 P. 228; *Reilly v. Clyne*, 27 Ariz. 432, 234 P. 35, 39, 40 A. L. R. 1005.

[8] The penalties prescribed by the Corporate Securities Act being all laid on the seller and none on the buyer, and the statute being for the benefit and protection of buyers, the parties are not in *pari delicto*, and the buyer may have judgment for the money paid out by him under the illegal contract, and may have the contract, the stock certificates and promissory note given in payment of such stock canceled. *Reilly v. Clyne*, 27 Ariz. 432, 234 P. 35, 40, A. L. R. 1005; *Karamanou v. Green Co.*, 80 N. H. 420, 124 A. 373; *Vercellini v. U. S. I. Realty Co.*, 158 Minn. 72, 196 N. W. 672; *Edward v. Ioor*, 205 Mich. 617, 172 N. W. 620, 15 A. L. R. 256; *Landwehr v. Lingenfelder* (Mo. App.) 249 S. W. 723; *Reno v. Am. Ice Machine Co.*, supra. The foundation of the right of the plaintiff to recover in these cases, although a party to the illegal contract, is the rule of the common law declared by Lord Mansfield in *Browning v. Morris*, 2 Cowp. 790, 98 Eng. Reprint 1364 (quoted from in the Arizona and New Hampshire cases, supra), as follows:

"The rule is, in *pari delicto* potior est conditio defendantis. * * * Where the contract is executed, and the money paid in *pari delicto*, this rule * * * certainly holds * * * and the party who has paid it cannot recover it. * * * For instance, in bribery, if a man pays a sum of money by way of a bribe, he can never recover it in an action; because both plaintiff and defendant are equally criminal. But, where contracts or transactions are prohibited by positive statutes, for the sake of protecting one set

of men from another set of men; the one from their situation and condition, being liable to be oppressed or imposed upon by the other; there, the parties are not in *pari delicto*; and in furtherance of these statutes, the person injured, after the transaction is finished and completed, may bring his action and defeat the contract."

In *Reilly v. Clyne*, supra, it is said:

"The complaining party is especially protected by the law where the agreement is not illegal *per se* but is merely prohibited. * * * The purpose of the Blue Sky Laws is to protect the public against imposition. The defendant was one of the public for whose benefit the law was enacted."

And in *Irwin v. Curie*, 171 N. Y. 409, 64 N. E. 161, 58 L. R. A. 830, the court says:

"It is safe to assume that whenever the statute imposes a penalty upon one party and none upon the other, they are not to be regarded as *pari delictum*."

And in *Edward v. Ioor*, supra, the court uses this language:

"It is very material that the statute itself, by the distinction it makes, has marked the criminal; for the penalties are all on one side."

In contravention of the rule announced in the authorities quoted, appellants have cited us to *Domenigoni v. Imperial Live Stock Co.*, 189 Cal. 475, 209 P. 36, as holding that a buyer of stock sold in violation of the Blue Sky Law (St. 1917, p. 673) is in *pari delicto* with the seller. That case is not authority for such a broad rule, and the law therein stated is confined to the facts of that case and is therefore distinguishable from the present case. That it was not understood as laying down such a broad rule is apparent, for subsequent to the decision in the *Domenigoni* Case, which was decided in 1922, the Supreme Court in 1925 denied a petition for a transfer in *Reno v. American Ice Machine Co.*, supra. In the *Domenigoni* Case the record shows that the corporation was organized for the purpose of lending money upon the security of live stock as an instrument of mutual aid among stock men, and by selling 190,000 shares of its capital stock at \$10 per share, as permitted by the corporation commissioner, a fund of approximately \$1,900,000 would be created for lending purposes. *Domenigoni's* acquiring stock through the medium of his "myself" notes instead of cash was in the nature of a fraud upon the other purchasers of stock who paid cash. *Domenigoni* conspired with the corporation to do a wrong to the other buyers—the very class of persons the Blue Sky Law was designed to protect.

[9] But even though respondents had been in *pari delicto*, as they withdrew from the illegal contract while it was still executory, they were in a position to reclaim the money paid (*Smith v. Bach*, supra), and further,

even though the locus poenitentiae had gone, nevertheless the respondents having, as found by the court, been induced to contract through the fraud of appellants, they are not deemed in *pari delicto*. *Webb v. Fulchire*, 25 N. C. 485, 40 Am. Dec. 419; *Woodward Quasi Contracts*, § 141.

Appellants urge that the 2,200 shares of treasury stock had no value. Whether a covenant is of value or is valueless is to be determined by the appetite of the contracting parties. 6 Eng. Rul. Cas. 19. "The slightest consideration is sufficient to support the most onerous obligation; the inadequacy, as has been well said, is for the parties to consider at the time of making the agreement, and not for the court when it is sought to be enforced. It is competent for the parties to make whatever contracts they please." 13 C. J. 365, and cases cited. Here the testimony of Tatterson, Maurer, and Gross is direct to the effect that if the treasury stock had not been included they would not have signed the contract with the Kehrleins, and appellant Oliver Kehrlein in his testimony admitted that the issuance of the treasury stock was indispensable to the signing of the contract.

[10] There is no merit in appellants' contention that, although the issuances of the 2,200 shares of treasury stock might be bad, yet the transfer of the 2,800 shares of outstanding stock was good, and that the bad can be severed from the good—that the contract is only partially illegal.

There is a distinction between partially illegal contracts and partially unenforceable contracts. This distinction is noted in *Nicholson v. Ellis*, 110 Md. 322, 73 A. 17, 24 L. R. A. (N. S.) 942, 132 Am. St. Rep. 445, in a case involving a covenant in restraint of trade. There the court says:

"Contracts in" undue "restraint of trade are loosely spoken of as 'illegal contracts.' It would be more accurate to style them 'unenforceable contracts.' * * * Even if it [the trade restraint covenant] be illegal as against public policy, it contains nothing contrary to good morals, and *nothing for which a legal penalty is incurred* [italics ours], and therefore it does not taint the whole agreement so as to render it void in toto. As was said by Chief Baron Pollock in *Green v. Price*, 13 Mees & W. 695: 'It is not like a contract to do an illegal act. It is merely a covenant which the law will not enforce, but the party may perform if it chooses.'"

In this state it is the rule that if any part of the consideration of a contract is illegal, the contract is wholly void. In *Teachout v. Bogy*, 175 Cal. 481, 166 P. 319, the court uses this language:

"If any part of a single consideration for one or more promises be illegal, or if there are several considerations for one promise, some of which are legal and others illegal, the promise is wholly void, as it is impossible to say which part or which one of the considerations induced the promise. Thus if the consideration for a

note or other promise to pay a certain sum of money be the sale of goods, some of which it is legal and some which it is illegal to sell, the note or promise cannot be enforced." 9 Cyc. 566. See, also, 1 Elliott on Contracts, § 248; *Moffatt v. Bulson*, 96 Cal. 112, 30 P. 1022, 31 Am. St. Rep. 192; *Vulcan Powder Co. v. Hercules Powder Co.*, 96 Cal. 510, 31 P. 581, 31 Am. St. Rep. 242; *Humboldt Co. v. Stern*, 136 Cal. 63, 68 P. 324.)"

In the present case "every part of the consideration goes * * * to the whole promise and therefore, if any part of it is contrary to public policy, the whole promise falls." *Hazelton v. Shekells*, 202 U. S. 71, 26 S. Ct. 567, 50 L. Ed. 939, 6 Ann. Cas. 217. See, also, *Prost v. More*, 40 Cal. 347; *Mission Brewing Co. v. Rickert*, 39 Cal. App. 668, 179 P. 720; *Teachout v. Bogy*, supra.

[11] As to the findings of fraud and the dual secret agency of Gross, the evidence shows that Gross had been in the employ of appellants almost continuously from July 1, 1921, until the purchase contract of September, 1923, in charge of the exploitation and promotion work of the Franklin Amusement Corporation in the operation of the Franklin Theater. The appellants were experienced theater operators, a dozen theaters having been bought and sold by them. Oliver Kehrlein managed the Franklin Theater from the time that the Kehrleins bought the corporation stock in September, 1918, until September, 1923. Tatterson and Maurer were in the automobile stage business, wholly inexperienced in the theater business, and Gross first met Tatterson in May, 1923, and Maurer in July, 1923; the meeting with Tatterson occurring through the solicitation of theater screen advertising from him by Gross. During the time of Gross' employment, appellants had changed managers of the theater, and Gross had complained to Oliver Kehrlein because the latter had not given the former the appointment; Kehrlein testified that in his opinion Gross was a good publicity and exploitation man, but not competent to manage the theater. Gross conceived the idea of finding a buyer of the corporation, and becoming manager for the new owner. Gross asked Oliver Kehrlein if he would sell, and the latter said he would. Kehrlein testified:

"The idea of selling stock to Tatterson, Maurer, and Gross first came to me in June, 1923, when Gross came to me. I knew that Gross was seeking to buy from me on behalf of Tatterson and Maurer when he first informed me before I went to Alaska."

When Gross learned that Kehrlein would sell, he began endeavors to sell to Tatterson. A few weeks prior to the time that Gross first broached the subject of sale, the appellants had optioned "all of the capital stock" of the corporation to one Eckstein, at a price of \$52,500. Eckstein did not go through with the deal. It was a few weeks later that

Gross approached Kehrlein. Kehrlein testified:

"Gross asked me how much do you want for your theater, and I said I would like to get about \$55,000 for it."

Gross stated that he would expect a selling commission from appellants. Gross testified:

"I asked Kehrlein what I was going to get out of the transaction, and he told me that he would not name any specific sum, because he did not know how the deal would work out, and on what terms the deal would be consummated, and how much cash he would get, and therefore he was not in any position to state any definite sum, but to go ahead and do my best and he would take care of me in the end."

Gross then fixed the price terms on which the sale was ultimately made—\$10,000 down and \$700 a month until \$90,000 was paid, with interest at 7 per cent. on deferred payments.

Hence the situation was that Gross was "to go ahead and do his best" for the Kehrleins and receive a commission, the size of which depended on how good a deal he made for the Kehrleins. Upon being named a selling price of \$55,000, he proposed and induced respondents, with whom he was to be associated in the business and who were to give him a third interest because of his experience and who reposed confidence in him and trusted him, to contract to pay for the stock \$90,000. Oliver Kehrlein also testified that "he (Gross) conveyed the impression to me that I was to retain the stores." These were the two stores that ultimately under the contract of sale the buyers caused the corporation to sublet to the Kehrleins for \$1 per year, and which Kehrlein testified: "I was planning to get \$250 or \$300 a month for 10 years in exchange for a dollar a year." Adding the profit to the Kehrleins of these stores at Oliver Kehrlein's lowest estimate of \$3,000 per year to the contract, Gross secured for them considerably in excess of \$100,000 for the corporation stock which they were willing to sell and had shortly before contracted to sell for \$52,500. This evidence is sufficient to support the finding that Gross was secretly the agent of appellants.

[12] In support of their contention that the evidence does not support the finding of fraud and misrepresentation as inducing respondents to enter into the contract, appellants cite *Southern Development Co. v. Silva*, 125 U. S. 250, 8 S. Ct. 882, 31 L. Ed. 678, quoted approvingly in *Oppenheimer v. Clunie*, 142 Cal. 318, 75 P. 901, holding that to justify a court of equity in setting aside a contract on the ground of fraud "the complainant must show by clear and decisive proof: First, that the defendant has made a representation in regard to a material fact; secondly, that such representation is false; thirdly, that such representation was not actually believed by the defendant; * * * fourthly,

that it was made with intent that it should be acted on; fifthly, that it was acted on by complainant to his damage; and, sixthly, that in so acting on it the complainant was ignorant of its falsity, and reasonably believed it to be true."

Without further lengthening this already lengthy discussion of the numerous questions presented, it may be said that the facts in the record showing fraud and misrepresentation measure up to the standard quoted from *Southern Development Co. v. Silva*. Aside from the testimony set out, the record shows that appellants represented to respondents Tatterson and Maurer through Gross, whom the court found to be the secret agent of appellants, that the theater of the Franklin Amusement Corporation had always been a paying business, that they had made a great deal of money out of moving pictures, and that the corporation was free of all debt, when as a matter of fact the theater had been a losing venture during all of the time appellants had conducted it and was not free from debt. This the books of the company disclosed when produced at the trial, which books appellants refused to permit respondents to inspect until they were produced in court, as also is this loss disclosed by the income tax returns made for the corporation by appellants as its officers. These misrepresentations respondents testified were not discovered by them until the date of serving the notice of rescission.

[13] Appellants, however, urge that respondents have not acted promptly upon discovering the misrepresentations, and that therefore the notice of rescission was too late, and point to *Gratz v. Schuler*, 25 Cal. App. 117, 142 P. 899, as laying down a rule of law which, if applicable to the facts in the present case, would require a holding here that the notice of rescission was not served with sufficient promptness. In *Gratz v. Schuler*, the representation was that a certain business (the exhibition of a panorama) had been earning \$20 a day, while the first exhibition by the buyers brought in receipts of only \$12.50, the second exhibition brought in but 75 cents, and the third but 15 cents. While the court did say, "The result of the single exhibition given by the plaintiff prior to the payment of the purchase price should have been sufficient, we think, to put him upon further inquiry concerning the past earning capacity of the Panorama," the court, however, further says: "The evidence clearly and without conflict shows that the plaintiff did not rely upon and was not deceived by the statement that the panorama had been earning twenty dollars per day while owned and operated by the defendants," and the fact that he was not deceived by the misrepresentation was the basis for the decision in that case. There the facts are not analogous to the facts here. The policy of the theater in the present case was changed to a second-

run house to handle it more economically and with less capital, which change was known to appellants.

When Gross first approached Oliver Kehrlein in the original negotiations, he went to Kehrlein with a slip of paper containing an estimate of expense for running the house on a second-run principle and went over the figures with him.

Oliver Kehrlein testified that it takes a certain length of time to initiate the patrons of a theater in a change of policy, and that the Franklin Theater covered a certain particular area; that it was not a neighborhood theater. The operation of the theater by respondents resulted in losses week by week for nearly the whole of the twenty weeks from October 14, 1923, to March 1, 1924. Oliver Kehrlein gave plausible explanations to Tatterson and Maurer concerning the losses. Maurer testified:

"I used to meet Mr. Kehrlein in the office in the mornings, and we discussed with him why the business was falling off, and he said, 'You know that the street is being torn up, and the building on the other corner is being erected,' and he says, 'The sidewalk is blocked.' He says: 'You have got to just keep up. You will come out all right. Just sit pretty.'"

Tatterson testified:

"Mr. Kehrlein explained that the excavation across the street and the opening of 15th street, and the fact of the building on the Alameda County Title Insurance Company building, and other obstructions, were responsible for the losses."

Tatterson further testified:

"I said nothing to Kehrlein or any one representing him, and did not intimate to him that I had been defrauded, because the things that were brought to my attention about the street opening and the building at the other corner seemed to be plausible reasons. I had been in business before when things were not always rosy, and I was hopeful that the excuses that were given was the real trouble, and that the people would come, but they never came and that is all there is to it."

The losses continuing, Oliver Kehrlein advised respondents to change the theater back to a first-run house. This change back to a first-run house was made after four weeks of losses as a second-run house. When appellants took the theater back on March 1, 1924, they changed it to a third-run house.

Under these circumstances, *Gratz v. Schuler*, supra, is inapplicable. Respondents lost no rights in the operation of the Franklin Theater for a period of 20 weeks, inasmuch as it would require an averaging over a period of a number of weeks' operation

to determine what a motion picture house would do under the change of policy, and Oliver Kehrlein kept constantly in touch with the buyers and continually gave what, to the buyers, were plausible reasons for the continuance of the losses week after week. Of course, if respondents had had access to the true records of Franklin Amusement Corporation, the truth would have been disclosed to them at once, but the court found, and the evidence supports the finding, that those records were withheld from respondents for the purpose of concealing information from them.

Respondents were never fully or at all apprised of their rights, nor did they have sufficient or any knowledge of the truth constituting their title to relief prior to the time they served their notice of rescission on February 29, 1924. Tatterson testified:

"After me and my associates took possession of the Franklin Theater, we lost money at once during the first four weeks of our operation but no suspicion entered my mind that the business was not as it had been represented."

Maurer testified:

"I first discovered that we had been defrauded about the last part of February, 1924—February 29th. I had no suspicion prior to that time that we had been defrauded. We weren't in the theater long enough to find out, we hadn't run it long enough and could not tell whether the business paid."

Tatterson thus described now the conclusion finally formed in his mind that he had been defrauded:

"I first discovered that I had been defrauded some time in the latter part of February—I should say about the 27th or 28th. I had not discovered it prior to that time. We needed the books in order to make tax returns to the Government and had been asking for the books so we could make proper report, and the place had been represented as free and clear and we had just been attached for a bill for the Kehrleins, and when the books were again refused I concluded there was something rotten in Denmark and declined to go any further. It was about the 27th or 28th of February, or the 26th, that I last asked for the books so we could make up the tax reports."

This evidence supports the finding that plaintiffs Tatterson and Maurer did not discover the falsity of the representations until after February 25, 1924, and never waived their right to rescind the contract.

This disposes of the questions raised, and from what has been said it follows that we find no error in the record.

The judgment is affirmed.

We concur: TYLER, P. J.; CASHIN, J.

88 Cal. App. 796

Oliver KEHRLEIN, Plaintiff and Appellant, v. George W. TATTERSON, Defendant and Respondent. (Civ. 6041.)★

District Court of Appeal, First District, Division 1, California. Dec. 28, 1927.

Hearing Denied by Supreme Court Feb. 23, 1928.

Appeal from Superior Court, Alameda County; J. D. Murphey, Judge.

Jesse Robinson, of Oakland, for appellant.

Crosby, Naus & Crosby and Daniel Rygel, all of Oakland, for respondent.

CAMPBELL, Justice pro tem. This is an appeal from a judgment entered in favor of defendant in a suit brought by plaintiff to recover the sum of \$1,500, together with interest alleged to be due and owing on a promissory note. The note in question was given as a part of the consideration of a contract entered into between Oliver Kehrlein, Emil Kehrlein, and Emil Kehrlein, Jr., on the one hand, and George W. Tatterson, J. M. Maurer, and L. B. Gross, on the other, dated September 28, 1923, concerning the sale and purchase of stock of the Franklin Amusement Corporation.

The questions presented here are passed upon in the action in which George W. Tatterson et al. are plaintiffs and respondents and Oliver Kehrlein et al. are defendants and appellants, No. 6040, 263 P. 285, this day decided by this court, and on the authority of that case the judgment is affirmed.

We concur: TYLER, P. J.; CASHIN, J.

88 Cal. App. 797

Oliver KEHRLEIN, Emil Kehrlein, and Emil Kehrlein, Jr., Plaintiffs and Appellants, v. FRANKLIN AMUSEMENT CORPORATION (a Corporation), George W. Tatterson, J. M. Maurer, and L. B. Gross, Defendants and Respondents. (Civ. 6042.)★

District Court of Appeal, First District, Division 1, California. Dec. 28, 1927.

Hearing Denied by Supreme Court Feb. 23, 1928.

Appeal from Superior Court, Alameda County; J. D. Murphey, Judge.

Jesse Robinson, of Oakland, for appellants.

Crosby, Naus & Crosby and Daniel Rygel, all of Oakland, for respondents.

CAMPBELL, Justice pro tem. This is an appeal from a judgment entered in favor of defendants in an action brought by plaintiffs to recover damages for an alleged breach of contract to keep the rental for certain premises paid to the landlord, with consequent damages arising from loss of rent from subtenants. The action has for its basis a certain contract entered into between Oliver Kehrlein, Emil Kehrlein, and Emil Kehrlein, Jr., on the one hand, and George W. Tatterson, J. M. Maurer, and L. B. Gross, on the other, dated September 28, 1923, concerning the sale and purchase of stock in the Franklin Amusement Corporation.

The questions presented here are passed upon in the action in which George W. Tatterson et al. are plaintiffs and respondents and Oliver

Kehrlein et al. are defendants and appellants, No. 6040, 263 P. 285, this day decided by this court, and on the authority of that case the judgment is affirmed.

We concur: TYLER, P. J.; CASHIN, J.

88 Cal. App. 212

Ex parte HALL. (Cr. 1553.)

District Court of Appeal, Second District, Division 1, California. Dec. 31, 1927.

1. Indictment and information $\S$ 114—Prior conviction for same offense in police court held to authorize punishment for second offense, though conviction was in municipal court supplanting police court.

In complaint in municipal court charging violation of Wright Act (St. 1921, p. 79), allegation of prior conviction in "police court of the city of Los Angeles" held to justify imposition of penalty as for a second offense, though police court had ceased to exist on day previous to former conviction, which actually took place in municipal court.

2. Courts $\S$ 118—Jurisdiction and functions of court rather than its name determine its character.

Character of court is determined by its jurisdiction and functions rather than by its name.

3. Criminal law $\S$ 1202(5)—Verdicts submitted in prosecution for second offense, held insufficient in failing to require jury to determine truth of charge (Pen. Code, $\S$ 1158).

In prosecution for second offense under Wright Act (St. 1921, p. 79), form of verdicts submitted, reciting "Verdict as to judgment in complaint No. 03016" and in "complaint No. 05923" held insufficient for failure to require jury to find that charge of former conviction is "true" or "not true" as required by Pen. Code, $\S$ 1158.

4. Criminal law $\S$ 1202(5)—Form of verdict in prosecution for second offense should require direct answer as to truth of charge of former conviction (Pen. Code, $\S$ 1158).

Verdict in prosecution for second offense should be in such form as to provide for direct answer as to whether charge of former conviction is true or untrue under Pen. Code, $\S$ 1158.

5. Habeas corpus $\S$ 92(1)—Evidence at trial may not be considered in proceeding for habeas corpus after conviction.

In habeas corpus proceeding to secure petitioner's release from custody after conviction, court may not go into evidence introduced before trial court.

6. Criminal law $\S$ 1202(5)—Verdict of guilty as to alleged previous offense does not support conviction as second offense (Pen. Code, $\S$ 1158).

In prosecution for second offense under Pen. Code, $\S$ 1158, defendant's guilt as to previous offense of which he was charged to have been convicted is immaterial, only issue being his conviction of such offense, and verdict of

guilty as to previous offense does not support conviction as for second offense.

7. Criminal law §1202(5)—Verdicts in prosecution for second offense, entitled "Verdict Possession," held sufficient to permit conviction as for first offense; verdicts as to prior conviction being insufficient (Wright Act).

In prosecution for second offense under Wright Act (St. 1921, p. 79), verdict rendered bearing caption "Verdict Possession" held sufficient to enable court to render judgment as for a first offense, where verdicts on question of prior conviction were insufficient to sustain conviction as for second offense.

Application by Frank Hall for writ of habeas corpus, to be directed to the Chief of Police of the City of Los Angeles, to secure petitioner's release from custody after a conviction for violation of the Wright Act. Petitioner remanded to custody, with directions.

A. T. Folsom, of Los Angeles, for petitioner.

E. J. Lickley, City Prosecutor, and Joe W. Matherly and F. W. Fellows, Dep. City Prosecutors, all of Los Angeles, for respondent.

YORK, J. Hearing on writ of habeas corpus. There are but two issues involved. The first point is whether an allegation in a complaint in the municipal court, alleging a prior conviction in the "police court of the city of Los Angeles" on a day after such police court had ceased to exist, is a sufficient allegation of a judgment of prior conviction in the municipal court of said city to justify the court in imposing a penalty as for a second offense; and, second, Are the verdicts rendered in the form "guilty of the offense charged" a sufficient finding of the truth of the allegation of a prior conviction, when the former action is referred to in the verdicts only by the number of each case, and the judgment in each former case is before the jury as an exhibit, but in the complaint in the action in which the petitioner is being now held in custody is referred to only by date of convictions and not by number?

[1, 2] As to the first issue, the fact is that the municipal court has and had at the dates alleged in the complaint all the powers of the former police court of the city of Los Angeles, and in addition thereto other powers granted by the Constitution. The allegation that there had been a conviction of the defendant in the "police court of the city of Los Angeles" was, to say the least, a careless way of making the allegation, but we have concluded that it is legally sufficient. The jurisdiction and functions rather than the name of the court determine its character. *City of Colton v. Superior Court* (Cal. App.) 257 P. 909.

[3-5] Referring now to the point that a verdict, "guilty of the offense charged," is not a sufficient finding of the truth of the allega-

tion of a prior conviction, the amended minutes of the municipal court, as shown by the return to the writ herein, together with the forms of verdict which on their face contain the words, "Verdict as to judgment in complaint No. 03016" in one instance, and, in the other instance, "Verdict as to judgment in complaint No. 05923," are not sufficient, in substance, to show that the jury intended to find that former conviction was an established fact. The requirement of the Penal Code, § 1158, on such an issue, is that the jury shall find that the charge of former conviction is "true" or that it is "not true."

The form of these verdicts should have provided a direct answer to the question. But the complaint in this action does not mention action No. 03016 or No. 05923. We would have to examine the evidence before we could ascertain whether those are the actions as to which former convictions are alleged in the complaint. But we are precluded upon a hearing of this kind from going into the evidence introduced before the trial court. In *re Jacobs*, 175 Cal. 661, 166 P. 801; In *re Horr*, 177 Cal. 721, 171 P. 801; In *re Williams*, 183 Cal. 11, 190 P. 163. We cannot say that there has been any finding by the jury as required by section 1158 of the Penal Code.

[6] Even if we were allowed to examine the evidence and exhibits filed herein, we could not say from an inspection of the two verdicts which bear the words, "Verdict as to judgment in complaint No. 03016," and "Verdict as to judgment in complaint No. 05923," that the jury had found that the defendant had suffered a prior conviction, as such verdicts on their face only show that the defendant was guilty of the offense charged in those two complaints, and the jury failed, and apparently refused, to find whether he had ever been found guilty of the crimes which they say he committed. In other words, it is immaterial to any issue in the instant case whether he was guilty or not guilty of the crimes charged in those other complaints, but only is it material herein whether or not he suffered a conviction therein. The absence of any finding of prior conviction leaves the principal verdict standing alone as a conviction upon a first offense.

[7] In case of a conviction under the Wright Act (St. 1921, p. 79) of a first offense, the court is prevented from ordering any imprisonment except only as an alternative for payment of a fine. Therefore the judgment rendered herein for straight imprisonment was a judgment fixing a penalty which was beyond the power of the court to invoke. The verdict rendered in the instant case, known as verdict No. 08393, which bears the caption, "Verdict Possession," is a sufficient verdict for the court to render a judgment as for a first offense.

Therefore the prisoner is ordered remanded to custody, and it is directed that he be returned into the trial court in order that proper judgment may be rendered.

We concur: CONREY, P. J.; HOUSER, J.

88 Cal. App. 300

AMERICAN MUT. LIABILITY INS. CO. v. CHICAGO-LOS ANGELES BLDG. CORPORATION. (Civ. 4644.)

District Court of Appeal, Second District, Division 2, California. Jan. 11, 1928.

1. Account stated ⇐1—Account stated presupposes absolute acknowledgment or admission of certain sum due or adjustment of accounts, striking of balance, or assent to correctness thereof.

An "account stated" presupposes an absolute acknowledgment or admission of certain sum due or adjustment of accounts between parties, striking of balance, or assent, express or implied, to correctness of balance.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Account Stated.]

2. Account stated ⇐5—Definite acknowledgment of debt in amount specified or definitely ascertainable by reference to something is prerequisite to account stated.

To constitute account stated, there must be a clear and definite acknowledgment of debt and a specification of amount due or reference to something by which amount can be definitely and certainly ascertained.

3. Account stated ⇐5—Stipulation that plaintiff demanded payment of sum claimed and that defendant disputed, refused to pay, and did not acknowledge claim disproved account stated.

Stipulation that demand was made by plaintiff on defendant for payment of sum claimed, that such claim was disputed by defendant, and that defendant refused to pay it and did not acknowledge claim, clearly showed that no account was stated.

Appeal from Superior Court, Los Angeles County; John M. York, Judge.

Action by the American Mutual Liability Insurance Company against the Chicago-Los Angeles Building Corporation. Judgment for plaintiff, and defendant appeals. Reversed.

Ray Howard, of Los Angeles, for appellant.

John D. Home, of Los Angeles, for respondent.

HAZLETT, Justice pro tem. This was an action on an alleged account stated in the sum of \$655.67. The answer denied that defendant, the appellant herein, became indebted to plaintiff on an account stated or other-

wise in said or any sum, or that any sum was owing or unpaid from defendant to plaintiff. No other issue was presented by the pleadings.

A stipulation of facts was made by the parties and was considered by the lower court, in which stipulation the parties agreed, among other things, that plaintiff "had demanded of the defendant the sum of \$655.67, claiming the same was due upon a policy * * * of compensation insurance issued by plaintiff, as insurer, to defendant, as insured, under which plaintiff insured defendant as employer against liability under the Workmen's Compensation Law, and that at all times after the making of such demand, defendant had refused to pay the same, or acknowledge liability therefor; * * * that the said amount of \$655.67 was the correct amount * * * without having deducted the dividend which defendant claimed on account of the participating clause (in the policy); that defendant had notified plaintiff that it was entitled to an accounting under the clause of said policy providing for participation by the insured in the earnings of the insurer, but that such right to an accounting had been at all times disputed by plaintiff on the ground that it was not permitted to allow any such participation on account of said policy, by reason of the provisions of section 602b of the Political Code of the state of California."

The facts that demand was made by plaintiff upon defendant for the payment of the sum claimed, that the claim was disputed by defendant, that defendant refused to pay it, and that there was no acknowledgment by defendant of the claim are established by the stipulation.

Defendant (appellant) contends that "the court erred in making its finding that the defendant accepted and acquiesced in the demand or account stated sued upon," and that "the court erred in finding that the sum of \$655.67 became due, owing and unpaid." The question to be determined is whether an account was stated between the parties.

[1-3] Our courts have uniformly held that:

"An account stated presupposes an absolute acknowledgment or admission of a certain sum due or adjustment of accounts between the parties, the striking of a balance, or an assent, express or implied, to the correctness of the balance. If the acknowledgment or admission is qualified and not absolute, or if there is but an admission that something is due without specifying how much, there is no account stated, nor does an account stated exist if there is but a partial settlement of accounts without arriving at a balance, or if there is a dissent from the balance as struck." 1 Corpus Juris, p. 695, par. 287; *Coffee v. Williams*, 103 Cal. 556 [37 P. 504]. *Craig v. Lee*, 36 Cal. App. 335, 171 P. 1089.

"There must be a clear and definite acknowledgment of the debt, a specification of the

amount due, or a reference to something by which such amount can be definitely and certainly ascertained." [Citing cases.] *Outwaters v. Brownlee*, 22 Cal. App. 535, at page 539, 135 P. 300; *Merchants' National Bank v. Carmichael*, 178 Cal. 446, at page 448, 173 P. 999; *Ah Tong v. Earle Fruit Co.*, 112 Cal. 679, at page 682, 45 P. 7; *Auzerais v. Naglee*, 74 Cal. 60, at page 63, 15 P. 371.

It clearly appears that no account was stated.

The judgment is reversed.

We concur: WORKS, P. J.; CRAIG, J.

88 Cal. App. 296

AZADIAN v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al.
(Civ. 5862.)

District Court of Appeal, Second District, Division 1, California. Jan. 11, 1928.

1. Divorce $\hookrightarrow$ 150(2)—Where divorce judgment is granted by default, findings of fact are unnecessary.

Where defendant in divorce action neither answers complaint nor appears in the action, on the granting of an interlocutory decree no findings of fact are necessary.

2. Judgment $\hookrightarrow$ 153(1)—"Rendition of judgment," within statute relating to vacation thereof, occurred when court's order for judgment was entered in official minutes (Code Civ. Proc. § 473).

"Rendition of judgment," within Code Civ. Proc. § 473, providing that the lower court may relieve a party from a judgment taken against him through his mistake, inadvertence, surprise, or excusable neglect, and that, if summons was not served on defendant, court may allow defendant to answer it at any time within one year after the rendition of judgment, held to be when court's order for judgment was entered in official minutes, and not when judgment was finally entered.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Rendition of Judgment.]

3. Divorce $\hookrightarrow$ 161—Superior Court held without jurisdiction to vacate default and set aside divorce judgment on motion made more than year from rendition, though within year from entry of judgment (Code Civ. Proc. § 473).

Under Code Civ. Proc. § 473, superior court held without jurisdiction to vacate default and set aside divorce judgment on motion made over a year from the rendition of the judgment though the motion was made within a year from the date judgment was entered.

Application for certiorari by Henry Azadian against the Superior Court of the State of California in and for the County of Los Angeles, and H. S. Gans, a Judge thereof, to review an order vacating default and set-

ting aside an interlocutory decree of divorce obtained in an action between petitioner and Alma Azadian. Order annulled.

Charles G. Young, of Los Angeles, for petitioner.

Charles L. Nichols and R. H. Purdue, both of Los Angeles, for respondents.

HOUSER, Acting P. J. Certiorari. The salient facts upon which the temporary writ herein was issued appear to be that on August 18, 1926, in an action for divorce pending between petitioner and his wife, Alma Azadian, wherein the default of said defendant for her failure to answer the complaint, or to appear therein, had been entered, the superior court caused to be entered on its official minutes an order granting to petitioner an interlocutory judgment of divorce from said Alma Azadian; that on August 24, 1926, such interlocutory judgment was entered; and that more than one year after the order for judgment, to wit, on the 23d day of August, 1927, on a motion made by the defendant, based upon the grounds of her surprise and excusable neglect, the superior court made an order vacating the default of the defendant and setting aside said interlocutory decree of divorce between said parties.

Among other things, section 473 of the Code of Civil Procedure contains a provision that the lower court may relieve a party from a judgment taken against him through his mistake, inadvertence, surprise, or excusable neglect, provided that application therefor be made within a reasonable time, but in no case exceeding six months after such judgment was rendered; but that —

"* * * When from any cause the summons in an action has not been personally served on the defendant, the court may allow, on such terms as may be just, such defendant or his legal representative, at any time within one year after the rendition of any judgment in such action, to answer to the merits of the original action."

It appearing that the summons in the divorce action was not "personally served on the defendant," the precise point presented to this court for its determination is whether the lower court had jurisdiction to vacate the default of the defendant and to set aside its judgment more than one year after the order for such judgment was entered on its official minutes.

It will be noted that the statute provides, in substance, that such an order may be made at any time within one year after the rendition of the judgment. In that connection, respondents concede that ordinarily the rendition of a judgment occurs when it is entered in the minutes of the court, and that the time for seeking relief under the statute (section 473, Code Civ. Proc.) begins to run from the time when the judgment was so entered.

In the Estate of Wood, 137 Cal. 129, 133, 69 P. 900, 901, the court had occasion to consider the meaning of the word "rendered" as used in another section of the Code of Civil Procedure, and, in passing upon the matter, used the following language:

"* * * The meaning of the word 'rendered' as applied to decrees and judgments is well settled, and when a decree or judgment is rendered it has full force and effect. Even the entry of it does not go to its validity. It has full force and effect regardless of the mere ministerial act of entering it upon the judgment book. Mr. Freeman in his work on Judgments declares (volume 1, § 38): 'Expressions occasionally find their way into reports and text-books indicating that the entry is essential to the existence and force of the judgment. These expressions have escaped from their authors when writing of matters of evidence, etc. * * * The rendition of a judgment is a judicial act; its entry upon the record is merely ministerial. A judgment is not what is entered, but what is ordered and considered. The entry may express more or less than what was ordered by the court, or it may be neglected altogether, yet in neither of these cases is the judgment of the court any less its judgment than though it were accurately entered. * * * It is therefore not indispensable to the validity of an execution, and a sale made thereunder, that a judgment should have been actually entered before the writ issued.' See, also, Estate of Hughston, 133 Cal. 321 [65 P. 742, 1039]. This principle of law applies even with more force to decrees in probate and equity. And this court has held more than once that when a decree of divorce is rendered that decree is of full force and effect. In re Newman, 75 Cal. 221 [16 P. 887, 7 Am. St. Rep. 146]; In re Cook, 77 Cal. 232 [17 P. 923, 19 P. 431, 1 L. R. A. 567, 11 Am. St. Rep. 267]; In re Cook, 83 Cal. 417 [23 P. 392]."

In the case entitled *In re Cook*, 83 Cal. 415, 23 P. 392, it is held that a judgment of divorce is effective to dissolve the marital tie when the order for judgment is rendered and entered upon the minutes. In the case of *Brownell v. Superior Court*, 157 Cal. 703, 109 P. 91, the authorities are reviewed and in effect it is held that the judgment is rendered when it is entered in the official minutes of the court; and the same declaration of the law is to be found in the language of the opinion in the case of *Aspegren & Co. v. Sherwood, Swan & Co.*, 199 Cal. 532, 537, 250 P. 400, 402, as follows:

"These several authorities indicate the rule to be that whenever findings are required the judgment is not rendered until they are signed and filed. But, whenever findings are waived or are not required the judgment is rendered when entered in the minutes of the court. With this rule we are in accord."

[1] In accordance with part of the law as announced in the *Aspegren Case*, 199 Cal. 532, 537, 250 P. 400, it is urged by respondents that the principle to which reference has been had applies in those cases only where no

findings of fact are required. But, conceding the existence of such an exception to the rule, the result would be unaffected thereby. *Waldecker v. Waldecker*, 178 Cal. 566, 174 P. 36, is authority to the effect that in an action for divorce, where it appears that the defendant neither answered the complaint, nor appeared in the action, on the denial of a decree no findings of fact are necessary. To the same effect, see Cal. Jur. vol. 24, p. 950, and cases cited; *Hamblin v. Superior Court*, 195 Cal. 364, 370, 233 P. 337, 43 A. L. R. 1509; *Shepard v. Shepard*, 65 Cal. App. 310, 314, 223 P. 1012; *Hittson v. Stanich* (Cal. App.) 258 P. 405.

[2, 3] In the instant case it becomes clear that when the order of the court for judgment was entered in its official minutes the decree was rendered; and as more than one year elapsed after such rendition of the judgment before the motion was made by the defendant in the action to vacate the default and to set aside the interlocutory decree, it follows that the court was without jurisdiction in the premises; from which it finally results that the order of the lower court should be annulled.

So ordered.

We concur: YORK, J.; SHAW, Justice pro tem.

88 Cal. App. 284

SENEY v. PICKWICK STAGES, NORTH-
ERN DIVISION, Inc. (Civ. 5738.) ★

District Court of Appeal, Second District, Division 1, California. Jan. 10, 1928.

Hearing Denied by Supreme Court March 8, 1928.

1. Appeal and error ⇐800—Failure to file transcript in time held not ground for dismissing appeal, where transcript was on file at time of notice to dismiss (Rules of Supreme Court and District Courts of Appeal rule 5).

Failure of appellant to file transcript within time required by law held not available as ground for dismissal of appeal, where transcript was actually on file at time notice to dismiss was given under Rules of Supreme Court and District Courts of Appeal rule 5.

2. Appeal and error ⇐653(1)—Appellate court may direct amendment of record to show true situation.

Appellate court has inherent power to direct lower court to so amend its certificate or settlement of the record on appeal as to make it speak the truth.

3. Appeal and error ⇐640—Failure to secure certificate and settlement of transcript of testimony on first trial, which counsel stipulated might be annexed to record on second trial, held not to require dismissal of appeal.

Where second trial of action was had partly on basis of testimony introduced at first trial, transcript of which counsel stipulated could be introduced in evidence and annexed to transcript of testimony taken at second trial and settled

as transcript on appeal, omission of counsel to procure reporter's certificate or settlement of transcript of testimony on first trial held not to require dismissal of appeal, since appellate court, under circumstances, could direct an amendment of the record to have such testimony certified to, and settled by, the trial judge.

Action by Hattie L. Seney against the Pickwick Stages, Northern Division, Inc., for personal injuries. Judgment for defendant, and plaintiff appeals. On defendant's motions to dismiss the appeal and affirm the judgment. Motions denied.

See, also, 255 P. 279.

Edwin S. Earhart, of Los Angeles, for appellant.

Warren E. Libby, of Los Angeles, for respondent.

HOUSER, J. This matter involves two separate motions; the first of which being a motion to dismiss an appeal, and the second being a motion to affirm the judgment rendered in the lower court.

In part, the ground specified in each of such motions is identical with the other, and consists of a contention on the part of respondent to the effect that the record on appeal was not certified by the shorthand reporter, or settled by the judge before whom the cause was tried. In the motion to dismiss the appeal, the additional ground is specified that the reporter's transcript was not filed "within the time required by law."

[1] As affecting the ground last stated, rule 5 of the Supreme Court and District Courts of Appeal contains the following:

"If the transcript of the record or appellant's points and authorities be not filed within the time prescribed, the appeal may be dismissed on motion, upon notice given. If the transcript, or the points and authorities, though not filed within the time prescribed, be on file at the time such notice is given, that fact shall be sufficient answer to the motion. * * *

Although the register in the clerk's office discloses facts from which it may be concluded that the reporter's transcript was not originally filed "within the time required by law," it appears that the transcript was on file at the time the notice to dismiss the appeal was given. It follows that respondent may not avail itself of appellant's dereliction in the first instance.

[2, 3] With reference to the grounds that the reporter's transcript was not properly certified by the shorthand reporter who transcribed the testimony given at the trial, nor settled by the judge before whom the cause was tried, it appears that two cases were pending between the same parties; that, the first case having been tried, it was stipulated by respective counsel in substance that, so far as applicable on the trial of the second case, the transcript of the evidence produced in the first case might be used on the trial of

the second case. It is also shown that other evidence, in addition to that produced on the trial of the first case, was introduced on the trial of the second case; that, in making up the record on appeal, that part of the evidence only which was actually produced at the trial of the second case independently of the transcript of the evidence in the first case was certified by the shorthand reporter and settled by the judge; and that, as to the remainder of the evidence, the parties stipulated as follows:

"It is hereby stipulated and agreed by and between the undersigned, attorneys of record for the respective parties in the above-entitled action, that the annexed and attached transcript of testimony taken in case No. 111521, wherein the above-named plaintiff was also plaintiff and the above-named defendant was also defendant, heretofore tried in the above-entitled court, is a full, true, complete, and correct transcript of the evidence taken in the trial of said case No. 111521; that said annexed and attached transcript is also a full, true, and correct and complete transcript of testimony heretofore submitted to the above-entitled court in the trial of the above-entitled action pursuant to and as provided for in that certain stipulation heretofore made and filed in the above-entitled action as dated April 4, 1924; that the evidence and testimony set forth and recited in said annexed and attached transcript, together with the oral and documentary evidence introduced at the trial of the above-entitled action, comprises and constitutes all of the evidence introduced before the court in trial of the above-entitled action, and which was considered by said court in rendering its judgment herein; that a copy of said stipulation of April 4, 1924, is contained in the clerk's transcript prepared in the above-entitled action; that said clerk's transcript, together with the reporter's transcript of the evidence introduced at the trial of the above-entitled action, together with the annexed and attached transcript of evidence in said case No. 111521, constitute a complete transcript of the proceedings and evidence in the above-entitled action resulting in judgment heretofore made and entered therein, and that the above-entitled court may attach this stipulation and the annexed transcript of testimony to the transcript in the above-entitled action and settle the same as the transcript on appeal in the above-entitled action."

The affidavit of the judge who presided at the trial of the second case shows that, by stipulation of the parties to the action, the evidence which was received in the former case was read and considered in evidence in the second case; that a date was set for the settlement of the transcript and record in the second case, which resulted in the first instance in the settlement of the transcript of the testimony which was actually given on the hearing of the second case; that, according to the recollection of the judge, he refused to settle the copy of the transcript of the evidence taken in the first case, for the reason that, in his opinion, it was necessary to incorporate the transcript in the first case

in the transcript in the second case, or for respective counsel to stipulate that such transcript might be used without being so incorporated; that he was subsequently informed by counsel representing the plaintiff in the second action that he had secured such written stipulation, and that the transcript of the oral testimony taken in the second case might be settled; that he suggested to counsel that he would settle the transcript if the portions of the testimony considered in the first case were recopied, certified by the reporter, and presented for settlement, but that no such transcript as suggested by him was ever presented to him for settlement; and that he refused to settle the copy of the transcript filed in the first case for the reasons hereinbefore set forth.

The record herein further discloses the facts that, notwithstanding the stipulation by the parties, the reporter's transcript affecting such evidence was not certified by the shorthand reporter, nor settled by the judge, but that that part of the transcript which had been certified and settled was filed with the clerk of this court as a part of the record on appeal.

Respondent cites authorities to the effect that, in the absence of a properly authenticated transcript, notwithstanding a stipulation by the parties covering the situation, no record is presented upon which a reversal of the judgment of the lower court might be predicated, and consequently that this court is authorized to dismiss the appeal and affirm the judgment. 2 Cal. Jur. 608, 631. See, also, *In re Barney*, 191 Cal. 18, 214 P. 853. However, the later case of *McMahon v. Hamilton* (Cal. Sup.) 260 P. 793, indicates in principle that the appellate court has the power to direct the lower court to so amend its certificate or settlement of the record on appeal as to make it speak the truth. In that case the court, in part, used the following language:

"We have concluded that our order of July 11, 1927, authorizing the withdrawal and amendment of the transcript herein in the particulars above referred to, was a proper exercise of our appellate jurisdiction. In so concluding we are not unmindful of the numerous authorities, many of which are relied upon by the appellant and moving party, which declare, and correctly so, that a trial court is without power to and may not amend a record to be used upon appeal more than six months after the same has been certified as a correct transcript of the proceedings had and taken in such court. *Fountain Water Co. v. Superior Court*, 139 Cal. 648, 73 P. 590; *Baker v. Borello*, 131 Cal. 615, 63 P. 914; *Sprigg v. Barber*, 118 Cal. 591, 50 P. 682. It is also well settled that a record authenticated by the trial court cannot be changed by an appellate court. *Mendocino County v. Peters*, 2 Cal. App. 24, 27, 82 P. 1122, and authorities there cited. Our research has failed to disclose, however, any authoritative expression which would preclude this or any appellate court having jurisdiction over a record regularly on file,

from authorizing the temporary withdrawal thereof at any time during the pendency of the appeal, so that the same might be corrected and amended in conformity to the direction of the appellate court. In such a case we are not confronted with a want of power or jurisdiction in the trial court, assuming the six months' period to have expired, but rather with the inherent power of an appellate court to cause the amendment of a record before it so that the same might speak the truth. The trial court in such a case receives its power to act in the premises from the order of the appellate court. That an appellate court may have a record before it amended so as to speak the truth has long since been the subject of judicial decision. *Valentine v. Stewart*, 15 Cal. 387, 396. In that case this court adopted with approval the following declaration from *Johnson v. Whitlock*, 13 N. Y. 344, 349 [3 Kern. 344]: 'If this statement has been imperfectly made, we have no doubt of the power of the Supreme Court to direct a re-settlement, and to reform the proceedings in any manner not inconsistent with the actual finding of the Judge or Referee upon the facts. The facts, as found, cannot be changed and found differently, nor can leave be had to insert exceptions never in fact taken, but within these limitations it will always be proper to move in the Supreme Court, not to turn the case into a bill of exceptions—a proceeding which has no existence under the Code—nor into a special verdict, but so to amend the case itself as to fitly present the questions which are to be examined in this court.' * * * It has repeatedly been held by this court that technical objections are not favored and that a record may and will, when necessary, be corrected unless a right of the adverse party is injuriously affected thereby. *Cal. Wine Assoc. v. Commercial etc. Co.*, 159 Cal. 49, 53, 112 P. 858; *Perri v. Beaumont* [88 Cal. 108, 25 P. 1109]. Moreover, this court looks with favor upon an amendment the effect of which 'is simply to enable this court to review the decision of the lower court, in view of all the facts which that court had before it when it made such decision.' *In re Lamb*, 95 Cal. 397, 408, 30 P. 568, 571."

In the instant case, the evidence produced in the first case was, by means of a transcript thereof, used in the trial of the second case. Clearly, it was the intention of the parties to the litigation that such evidence should be certified to and settled by the judge before whom the second case was tried, as a part of the record on appeal, and that it should be included within that part of such record as had already been settled by the judge. In such circumstances, and considering the inherent power of the court, as announced in the case of *McMahon v. Hamilton* (Cal. Sup.) 260 P. 793, to direct the amendment of the record, it would seem that the respondent should not be permitted to prevail with reference to his motion to dismiss the appeal. The motion to affirm the judgment, being wholly dependent upon the granting of the motion to dismiss the appeal, necessarily fails as a result of the denial of the latter motion.

It is ordered that each of the motions be, and it is, denied.

We concur: CONREY, P. J.; YORK, J.

88 Cal. App. 264

COLLINS v. COMBS. (Civ. 5786.)

District Court of Appeal, Second District, Division 1, California. Jan. 9, 1928.

1. Partnership ⇨120—Complaint held to state action for contribution, based on special agreement between partners to wind up business.

Complaint, alleging agreement of partners to dissolve and wind up business, and that plaintiff would collect and sell assets, and from funds liquidate partnership obligations, and that obligations exceeded assets, and that plaintiff paid difference, and defendant was liable for one-half excess, *held* to state action for contribution based on special agreement, it being unnecessary to allege therein defendant's agreement to pay share of excess of liabilities over assets; promise therefor being implied.

2. Partnership ⇨120—Complaint for contribution between partners held not demurrable, where payment by defendant of his share of deficit was only remaining business.

Complaint by one partner against another to recover one-half excess of liabilities over assets in liquidation of firm's business paid by plaintiff *held* good as against general demurrer, where complaint showed that all firm's assets were disposed of, and obligations liquidated, and payment by defendant of his share of deficit was only remaining business of the firm.

3. Trial ⇨396(3)—Finding that one of original partners sold interest to plaintiff and defendant, who equally assumed payment of firm's debts, held within issues in action for contribution.

In action by partner who liquidated firm's business to recover from remaining partner one-half excess paid by him in liquidating firm's obligations over amount received from sale of assets, finding that original firm consisted of plaintiff, defendant, and B., but that B. sold his interest to plaintiff and defendant, who equally assumed payment of firm's debts at that time, *held* within issue as to members of partnership and their proportion of liability, notwithstanding complaint made no reference to B.

Appeal from Superior Court, San Bernardino County; Benjamin F. Warmer, Judge.

Action by Thomas Collins against G. B. Combs. From a judgment for plaintiff, defendant appeals. Affirmed.

Swing & Wilson, of San Bernardino, for appellant.

Raymond E. Hodge and P. N. McCloskey, both of San Bernardino, for respondent.

HAHN, Justice pro tem. This is an appeal by the defendant from a judgment rendered in favor of the plaintiff. The appeal comes before us on the judgment roll alone.

The allegations of the complaint material to our discussion may be summarized as follows: That on or about the 10th day of February, 1920, plaintiff and defendant entered into a copartnership agreement for the purpose of carrying on the business of manufacturing and selling crushed rock and sand at San Bernardino; that the defendant and plaintiff each, at the time of the formation of the copartnership, paid into the business the sum of \$2,000; that the copartnership business continued for a period of about 22 months, until on or about the 10th day of December, 1922, when the plaintiff and defendant mutually agreed to discontinue the business and dissolve the copartnership; that, at the time it was agreed to discontinue the business and wind up the affairs of the copartnership, it was further mutually agreed between the plaintiff and the defendant that the plaintiff would proceed to take possession of all of the assets of the copartnership, and collect all of the moneys owing to the copartnership; also to gather together all of the obligations owing by the copartnership; that the plaintiff was further authorized to sell all of the assets of the copartnership, and, from the funds belonging to the copartnership, liquidate all of the obligations of the copartnership; that, if any funds were left over from the assets of the copartnership, after paying all of its obligations, the plaintiff was to pay over to the defendant his full share of such excess. The complaint further alleges that, pursuant to the agreement to dissolve and wind up the affairs of the copartnership, the business was discontinued, and the plaintiff did collect all the moneys due the firm, and took possession of all of the equipment and personal property, and converted the same into cash; that the total amount of the funds thus acquired belonging to the copartnership was the sum of \$12,002.76; that plaintiff paid all of the outstanding claims against the copartnership, which amounted to the sum of \$16,089.56; that the total amount of the liabilities exceeded the total amount of the assets; and that the defendant was liable for one-half of such excess, which the defendant had refused to pay. Judgment is prayed for against the defendant for one-half of the amount which plaintiff alleges he was required to pay out in liquidating the obligations of the copartnership business over and above the total amount he received from the disposal of its assets.

A general and special demurrer filed to the complaint was overruled.

In his answer the defendant denies every material allegation contained in the complaint, except that he admitted that he had not paid the plaintiff the sum claimed by plaintiff as owing him. In addition to the denials, defendant's answer contains an af-

firmative defense, wherein it is alleged that in February of 1920, the copartnership which was then formed consisted of the plaintiff, defendant, and one L. E. Beckley, the three being owners of equal shares in the assets of said firm, and each to share equally in its profits and losses; that the defendant contributed to the copartnership in money and material a sum in excess of \$400; that the amounts contributed by plaintiff and Beckley were unknown to the defendant; that, about two months after the copartnership was formed, Beckley sold and conveyed all of his interest in the copartnership business to the plaintiff, and, as a part of the consideration running from the plaintiff to Beckley, plaintiff agreed to assume the payment of the portion of the partnership indebtedness that was then owing by Beckley; that at all times since the withdrawal of Beckley from the copartnership the plaintiff was the owner of the two-thirds interest and share in the partnership business, while the defendant was the owner of only one-third interest in the copartnership business; that, after the withdrawal of Beckley from the copartnership in April of 1920, plaintiff and defendant were actively engaged in conducting the business until the month of May, 1920, at which time the defendant "ceased further active participation in said business, and said plaintiff assumed, and thereafter continued, the operation of said business without the assistance or presence of the defendant"; that on September 20, 1920, the business was discontinued, and, without the knowledge or consent of the defendant, plaintiff sold and disposed of a portion of the assets of the copartnership; that in November or December following the plaintiff informed the defendant that he had disposed of a portion of the assets of the copartnership, and that he proposed to sell the remainder of the assets, and apply the proceeds derived therefrom toward the payment of the indebtedness owing by the firm; that the plaintiff did subsequently dispose of the assets, but that he has never made an accounting to the plaintiff for the money so received; and that the defendant had no knowledge of what disposition was made by the plaintiff of the moneys received from the sale of the assets of the firm. The defendant further alleges in his answer that the value of the assets of the firm was in excess of the obligations of the firm, and the prayer of the answer is "that plaintiff take nothing by reason of this action, and that he be henceforth dismissed, with his costs."

The court found in its findings of fact that during the month of January, 1920, plaintiff and defendant and L. E. Beckley formed the copartnership in question, each having an equal share in the business; that this copartnership continued until about the 10th day of February, 1920, at which time Beck-

ley withdrew from the copartnership, and conveyed all of his right, title, and interest in the business and the assets of the copartnership to the plaintiff and defendant; that the consideration running to Beckley for his interest was the payment of \$800 in cash, and the agreement by the plaintiff and defendant to pay the share of the indebtedness of the copartnership that Beckley would be liable for as a copartner; that at all times subsequent to the withdrawal of Beckley plaintiff and defendant constituted the copartnership, and were the owners of its property and assets in equal shares, and that the defendant at all times subsequent to the withdrawal of Beckley was liable for one-half of the obligations of the copartnership; that the plaintiff and the defendant continued to carry on and operated the copartnership business after the withdrawal of Beckley until December 1, 1922, at which time, by mutual consent, the business was closed, and the copartnership firm dissolved.

The court further specifically found that, at the time of the dissolution, it was agreed between the plaintiff and the defendant that the plaintiff should collect all moneys owing to the firm, take possession of all of the equipment and assets of the firm, and convert the same into cash; that he (the plaintiff) was to gather in all of the outstanding obligations of the copartnership, and, with the funds in his hands derived from the disposal of the assets of the firm, to liquidate all the firm's obligations, and on the final adjustment of the affairs of the firm, if any money remained in plaintiff's hands derived from the sale of the firm's assets after the payment of all of its obligations, plaintiff was to pay over to the defendant his share of such money. The findings further set forth that, pursuant to this agreement, plaintiff did take possession of all of the assets of the copartnership, and sold the personal property and equipment, and the total amount of funds he so became possessed of belonging to the copartnership amounted to the sum of \$11,943.72; that plaintiff did pay and liquidate all of the claims against the copartnership, and paid out therefor the sum of \$15,143.72; that there was an excess of obligations over assets, which amount had been paid by the plaintiff; and that the defendant was indebted to the plaintiff by reason thereof in the sum of \$1,500. The findings further negative all of the allegations of the answer, except such as were specifically found.

[1] Appellant urges as grounds for a reversal of the judgment: (a) That the demurrer to the complaint was erroneously overruled; (b) that the findings are outside of the issues, and do not sustain the judgment; (c) that the findings do not state an account; and (d) that the accounting was not complete.

In support of his first point appellant

urges that the complaint is uncertain, in that it cannot be determined therefrom whether it is an action for a full accounting of all of the affairs of the copartnership, or a proceeding for contribution by the defendant under a special agreement of liquidation of the affairs of the copartnership; and he urges further that, if the action is construed as one for contribution, then the complaint does not state a cause of action, for the reason that it contains no allegation of a complete accounting had, and without such allegation an action for contribution cannot be maintained by one partner against another.

To this contention respondent replies that the action is one for contribution, based on a special agreement between the plaintiff and the defendant.

We are satisfied that respondent's contention on this point must be sustained. In fact, it would seem to us that the only reasonable interpretation of the complaint is that it is an action for contribution based upon an agreement between the parties. As we have heretofore set forth, the complaint contains all of the necessary allegations to support such an action. There may be allegations not necessary to support such an action. If so, they are nothing more than surplusage. While it is true the complaint does not specifically allege that the defendant, in the agreement for dissolving the copartnership, agreed to pay any share of the excess of liabilities over the assets, or that the plaintiff was authorized to make any such excess payment, in the event that the funds derived from the sale of assets were insufficient to pay the liabilities in full, such an allegation is not necessary in order to support an action for contribution, for the reason that either party was liable for all of the obligations of the copartnership, and a promise to pay his share of any deficit was implied in the agreement made by the defendant with the plaintiff to close up the business and liquidate the affairs of the copartnership. *Sears v. Starbird*, 78 Cal. 225, 20 P. 547; *Kazman v. Light*, 53 Cal. App. 732, 200 P. 768. Inasmuch as the complaint clearly sets forth an action for contribution under a special agreement, the special demurrer was properly overruled.

[2] The general demurrer was also properly overruled. It clearly appears from the complaint that all of the assets of the copartnership had been disposed of and all of its obligations liquidated. There only re-

mained, for the purpose of winding up the affairs, the payment by the defendant to the plaintiff of his share of the deficit. *Kazman v. Light*, 53 Cal. App. 732, 200 P. 768.

[3] Appellant's next contention is that the "findings are outside the issues." The principal finding complained of recites that the original copartnership consisted of plaintiff, defendant, and one L. E. Beckley, but that Beckley sold out his interest in the copartnership to plaintiff and defendant for the sum of \$800, and that, in the transaction, plaintiff and defendant equally assumed the payment of that portion of the firm's indebtedness that was owing at the time by the retiring Beckley. While it is true that the complaint makes no reference to Beckley, and the finding of fact differs from the allegation as to that point in the answer, the finding was well within the issues raised by the pleadings, as were other findings complained of. One of the material issues in the case was, Who constituted the copartnership and in what proportions did those liabilities exist? The findings go directly to the heart of the matter. The case of *Simmons v. Simmons*, 166 Cal. 438, 137 P. 20, is not in point. There, there was but one issue raised by both answer and complaint; namely, whether the property involved was or was not community property. The court, after finding that the property was not community property, went further, and made a finding that the plaintiff had loaned the defendant some money, and proceeded to render judgment in favor of the plaintiff against the defendant for the amount of the loan. The court clearly went outside of any issue raised by the pleadings in determining that defendant owed the plaintiff \$1,000.

We have carefully examined the findings, and we can find no merit in the contention that the findings are outside of the issues.

Two other points are urged by appellant; namely, "that the findings do not state an account," and, second, "that the accounting was not complete." Both of these propositions are discussed by appellant in his brief on the assumption that the action was one for an accounting. Inasmuch as we have already disposed of that contention in holding that the action is one for contribution, there would seem to be no occasion for a discussion of these last two points.

The judgment and orders are affirmed.

We concur: CONREY, P. J.; HOUSER, J.

88 Cal. App. 319

(263 P.)

SHINDELAR et al. v. HADACHECK.
(Civ. 4868.)

District Court of Appeal, Second District, Division 2, California. Jan. 13, 1928.

1. Appeal and error ⇨931(3)—Where judgment was as prayed by complaint, case must be viewed as though court found facts alleged to be true and evidence supported findings.

Where judgment was as prayed by complaint and findings of fact and conclusions of law were waived, case must be viewed as though court had found all facts alleged in complaint to be true, and as though evidence fully supported such findings, since all intendments are in favor of upholding judgment.

2. Reformation of Instruments ⇨48—Decree reforming contract to state parties' intention as prayed by complaint was not reversible because it did not state exact form of contract.

Where decree in suit to reform contract directed that contract "be reformed to state true intention of parties to this action," as prayed by complaint, judgment would not be reversed because it did not expressly state exact form of contract when reformed.

3. Reformation of Instruments ⇨48—Decree reforming contract as prayed by complaint must be considered as reforming contract to recite definite consideration and describe land alleged in complaint.

Where decree in suit to reform contract and for specific performance directed that contract be reformed to state true intention of parties to action as prayed by complaint, decree must be considered as following pleadings and findings and as ordering reformation of contract so that it recited definite consideration alleged in complaint and described land alleged in complaint, so that objection that contract could not be specifically performed because consideration was not definite and because judgment awarded more land than was called for by agreement were without merit.

4. Reformation of Instruments ⇨36(3)—Complaint in suit to reform contract, reciting contract as written and stating alleged "real agreement" and intention of parties, sufficiently pleaded mutual mistake.

Complaint in suit to reform written contract, after reciting contract as written, stating an alleged "real agreement" and using language, "and intention of parties was," followed by statement of terms claimed to have been agreed upon by parties, sufficiently pleaded mutual mistake.

5. Specific performance ⇨32(1)—Defendant could be compelled to specifically perform land contract he did not sign (Civ. Code, § 3388).

As respects question of mutuality of obligation, under Civ. Code, § 3388, providing that party who has signed written contract may be compelled specifically to perform it though the other party has not signed it, defendant who did not sign land contract could be compelled to specifically perform it.

Appeal from Superior Court, Los Angeles County; C. P. Vicini, Judge.

Action to reform contract and for specific performance by Matthew W. Shindelar and others against Amos F. Hadacheck. From a decree for plaintiffs, defendant appeals. Affirmed.

Jas. W. Bell, of Los Angeles, for appellant.
J. J. Hughes and Fred W. Morrison, both of Los Angeles, for respondents.

CRAIG, J. This is an action to reform a written contract and for its specific performance. Findings of fact and conclusions of law were waived. The decree rendered directs that the contract "be reformed to state the true intention of the parties to this action." Provision is then made for specific performance of the contract through the conveyance of the lots in question to the plaintiffs, and the cancellation of the defendant's notes theretofore filed in court, the principal of which aggregates \$16,000, the remedy being that prayed in the complaint.

The contention of appellant, which has been most stressed, is that the remedy by specific performance will not be applied for the violation of an agreement unless, among other elements, the consideration is definite and certain. In the contract as originally written the consideration named was \$10, "and other valuable consideration." However, this is one of the particulars in which the plaintiff asks that the contract be reformed. It is alleged that the true consideration as actually agreed between the parties was \$16,000, to be paid by delivery to the defendant "of his promissory notes aggregating said amount that were then being held by said plaintiffs."

[1-3] The judgment is as prayed by the complaint. All intendments are in favor of upholding the judgment. The case is to be viewed as though the court had found all of the facts alleged in the complaint to be true and the evidence had fully supported such findings. Under such circumstances the judgment would not be reversed because it did not expressly state the exact form of the contract when reformed as prayed "to state the true intention of the parties." The judgment will be considered in that respect as following the pleadings and findings, and as ordering the reformation of the contract, so that it now recites the consideration alleged in the complaint and directed by the judgment itself to be rendered to the defendant. As thus reformed the contract is definite and certain, and the entire argument upon that subject has no application.

For the same reasons there is no merit to the assertion that the judgment awards more land than is called for by the agreement. The land described in the contract as reformed is

identically the same as that decreed to be conveyed.

[4] Defendant claims that the complaint is insufficient in that there is no allegation of a mutual mistake of the parties. The complaint, after reciting the contract as written, states an alleged "real agreement," and uses the language, "and the intention of the parties was," followed by a statement of the terms claimed to have been agreed upon by the parties. We think these allegations sufficient to plead mutual mistake.

[5] There is no merit in the contention that because the appellant did not sign the contract there resulted a lack of mutuality of obligation, and that specific performance is not a proper remedy. In so far as this objection is concerned, the plaintiffs have stated a cause of action within the provisions of section 3388 of the Civil Code.

The judgment is affirmed.

We concur: WORKS, P. J.; HAZLETT, Justice pro tem.

88 Cal. App. 222

PEOPLE v. GRACE. (Cr. 1527.)★

District Court of Appeal, Second District, Division 1, California. Jan. 4, 1928.

Hearing Denied by Supreme Court March 1, 1928.

1. Criminal law $\S$ 576(3)—Refusing to dismiss information for failure to bring defendant to trial after reversal, as required by statute, held error (Pen. Code, $\S$ 1387).

Denial of defendant's motions to dismiss information charging robbery, repeatedly made during the 9 months following reversal of conviction, for failure to bring him to trial, as provided in Pen. Code, $\S$ 1387, held error.

2. Criminal law $\S$ 1166(1)—Denial of defendant's motion to dismiss information for failure to bring him to trial held no ground for reversal, after trial under subsequent indictment (Pen. Code, $\S$ 1387).

Error in denying defendant's motion to dismiss information for failure to bring him to trial, as required by Pen. Code, $\S$ 1387, held of no avail, where information was finally dismissed, and defendant was tried under an indictment, since defendant had remedy to procure release by habeas corpus.

3. Indictment and information $\S$ 15(4)—Error in proceedings under information which was dismissed held not to require dismissal of subsequent indictment for same offense (Pen. Code, $\S$ 1385, 1387).

Under Pen. Code, $\S$ 1385, 1387, dismissal of information charging robbery held not of itself to require dismissal of subsequent indictment charging same offense, indictment and information being separate proceedings, so that error committed in connection with one proceeding could not affect the other, and it was immaterial that indictment was returned before information was dismissed, and without any order of the court.

4. Criminal law $\S$ 192—On retrial, after reversal, defendant cannot claim he was "once in jeopardy" because of first trial.

A person on trial for an offense, when the judgment of a former conviction of the same offense has been reversed, cannot effectively claim that he was "once in jeopardy" by reason of his first trial.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Jeopardy (in Criminal Law).]

5. Criminal law $\S$ 192—Nine months' delay in bringing defendant to trial, after reversal, did not operate as placing him once in jeopardy.

Delay of nine months in bringing defendant to second trial under charge in information, after reversal of first conviction, did not operate in law as having placed him once in jeopardy.

6. Criminal law $\S$ 576(4)—Delay of over 60 days, after filing indictment in starting trial, due to defendant's motion to dismiss, held not to require dismissal on appeal (Pen. Code, $\S$ 1382, subd. 2).

Where court was ready to start trial of defendant in robbery case within 60 days after filing of indictment, as required by Pen. Code, $\S$ 1382, subd. 2, and commencement of trial was delayed beyond that period because defendant filed a motion to dismiss, which was continued, defendant could not on appeal be heard to complain because of the delay in commencing trial.

7. Criminal law $\S$ 1186(4)—Any error in delaying commencement of trial beyond statutory period held not reversible, where there was no miscarriage of justice (Pen. Code, $\S$ 1382, subd. 2; Const. art. 6, $\S$ 4½).

Even if court erred in continuing trial of criminal case beyond 60 days after filing of indictment prescribed by Pen. Code, $\S$ 1382, subd. 2, because defendant filed motion to dismiss, the error was one of procedure, and therefore not reversible, under Const. art. 6, $\S$ 4½, where there was no miscarriage of justice resulting from the delay.

8. Criminal law $\S$ 296—Failure to render verdict on former jeopardy plea held not prejudicial, in absence of supporting evidence; plea being waived by failure to produce evidence.

Defendant waives his plea of "once in jeopardy" by failing to produce any evidence in support thereof, and failure of the jury to render verdict on such plea is not prejudicial to defendant, in absence of any evidence supporting it, and offering of incompetent evidence on such plea is in effect no evidence thereon.

9. Criminal law $\S$ 424(3)—Codefendant's statements, made after arrest for robbery in accused's absence, held inadmissible against accused as statements by coconspirator.

In prosecution for robbery, testimony of police officers relating to incidents connected with arrest of accused's codefendant and to alleged statements made by codefendant to them at the time of, and immediately after, his arrest, when accused was not present, held hearsay, and not admissible against accused as statements by a coconspirator, since the matters occurred after completion of the robbery, and only

statements by a coconspirator during the existence of the conspiracy are admissible.

10. Witnesses $\S$ 379(2)—Statements by codefendant in accused's absence, when arrested after robbery, held admissible to impeach his testimony exonerating accused.

In prosecution for robbery, testimony of police officers relating to incident connected with the arrest of accused's codefendant, and certain alleged statements made by codefendant to them at the time of, and immediately after, his arrest, when accused was not present, *held* properly admitted for purposes of impeachment of codefendant's testimony that accused did not participate in the robbery.

11. Criminal law $\S$ 824(8)—In absence of request for instruction that impeaching evidence be limited to that purpose, defendant could not complain on appeal that jury might not have so limited it.

In absence of request by defendant that jury be instructed that testimony, which was competent for purposes of impeachment of state's witness, should be limited to such purposes, defendant could not, on appeal, complain that perhaps jury failed to consider evidence for the limited purpose for which it was offered.

12. Criminal law $\S$ 1169(1)—Testimony respecting arrest of codefendant, in which accused's name was not mentioned, held not prejudicial to accused.

In prosecution for robbery, testimony of police officer relating to matters attending on the arrest of accused's codefendant, not made in accused's presence, *held* not prejudicial to defendant, where defendant was nowhere mentioned in such testimony, or connected with robbery in any way.

13. Criminal law $\S$ 1144(15)—Appellate court will assume that jury obeyed instructions to disregard stricken testimony.

Appellate court will assume that jury followed instructions of the trial court to disregard testimony stricken out.

14. Criminal law $\S$ 741(2), 1159(2)—Weight to be given to identification of accused is for jury, and appellate court will not interfere therewith.

The weight to be given testimony of complaining witness in the matter of identification of accused is for the jury, and it would be an improper invasion of the jury's sphere for the appellate court to interfere with the finding.

15. Robbery $\S$ 24(3)—Evidence held to support finding that defendant was one of robbers.

In prosecution for robbery, evidence *held* to support jury's finding that defendant was one of the two who held up complaining witness.

16. Criminal law $\S$ 331—Burden is on accused to prove defense of insanity by preponderance of evidence.

In a criminal case, the burden of proof as to the defense of insanity rests on defendant, and it must be proved by a preponderance of the evidence.

17. Criminal law $\S$ 331—Proof that defendant was committed to insane asylum does not shift burden to prosecution to prove defendant's sanity beyond reasonable doubt.

As respects defense of insanity in criminal case, proof that defendant was committed to the insane asylum does not shift burden back to prosecution to prove beyond reasonable doubt that defendant is sane.

18. Criminal law $\S$ 48—Insanity is no defense, unless accused was so deranged that he could not distinguish between right and wrong.

That insanity may be available as a defense in criminal case, it must appear that defendant, when act was committed, was so deranged that he was not conscious of the nature of the wrongful act committed, and could not distinguish between right and wrong as to the particular act done, and he may be punished, though he be laboring under partial insanity, such as suffering from insane delusion or hallucination, if he understands nature and character of his action and its consequences.

19. Criminal law $\S$ 713—District attorney was not guilty of misconduct in commenting on evidence properly admitted.

District attorney was not guilty of misconduct in commenting on testimony which was properly admitted in evidence.

20. Criminal law $\S$ 1171(6)—District attorney's statements to jury in robbery prosecution, characterizing defendant as "criminal," "desperado," and "denizen of underworld," held not prejudicial error.

Where defendant, in robbery prosecution, admitted that he had been convicted and imprisoned for burglary, that he had pleaded guilty to a charge of receiving stolen property, and had been confined as a narcotic addict, conduct of district attorney in referring to defendant as a "criminal," a "desperado," and a "denizen of the underworld," in his argument to the jury, *held* not prejudicial error, though such statements went beyond sphere of proper argument and of evidence in case.

21. Criminal law $\S$ 1170½(1)—Permitting prosecution's witness to refresh memory from transcript of evidence at preliminary hearing, and refusing similar right to defendant's witness, would not be reversible error.

Permitting witness for prosecution to refresh his memory from the transcript of evidence taken at the preliminary hearing, and refusing similar right to defendant's witness, would not constitute reversible error.

22. Robbery $\S$ 26—Advising verdict for defendant in robbery case would be improper, where evidence supported verdict of guilty.

Where there was abundant evidence to support verdict of guilty in robbery case, it would have been improper for court to advise a verdict in defendant's favor.

23. Criminal law $\S$ 753(1)—Law makes no provision for directed verdict in a criminal case.

There is no provision in law for court to direct a verdict in a criminal case.

Appeal from Superior Court, Los Angeles County; Carlos S. Hardy, Judge.

Earl V. Grace was convicted of robbery, and he appeals. Affirmed.

See, also, 247 P. 585.

John F. Groene, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and James S. Howe, Deputy Atty. Gen., for the People.

HAHN, Justice pro tem. The defendant, Earl V. Grace, was charged by an indictment filed by the grand jury of Los Angeles county with the crime of robbery. From a judgment of conviction and the denial of his motion for a new trial he makes this appeal.

Events happening in connection with the robbery and the arrest of the defendant material to this appeal may be briefly stated as follows: About 9 o'clock, on the evening of February 28, 1925, the complaining witness, A. J. Maes, who was engaged in the grocery business in the city of Los Angeles, was going to his home, which was located a short distance from his place of business. Just as he left his grocery store he was met by two men, one of whom accosted him, and made some remark about paying him a bill. Maes recognized this man as a neighbor by the name of Newell, but was evidently suspicious of the men, for, without stopping to reply, he continued on to his home. Just as Maes reached the front porch of his house, which was about 40 feet from the front sidewalk, his attention was attracted by the two men following him. As he stepped on his porch, one of these men, whom Maes states was the neighbor Newell, demanded his money, while the other man, a stranger to Maes, but subsequently identified by Maes as the defendant, Grace, pointed a revolver at him. Thereupon Newell relieved Maes of about \$125 in currency, a number of checks, some keys, two membership cards in the Chamber of Commerce, and other personal effects. The holdup occupied but a few minutes, during which time an electric light was burning on the porch above where the men were standing. Within an hour after the robbery Newell was arrested by two policemen, Walter S. Schubert and J. F. Koehn. There was found on his person the money, checks, and other articles taken from the complaining witness. Newell confessed the robbery, and, as it appears from the rebuttal testimony, informed the officers that Grace was his partner in the robbery, and that he could be found at 300 North Lorena street. Thereupon, accompanied by Newell, Officers Koehn and Schubert went to the house at 300 North Lorena street, arriving there about 11:30 p. m. These officers testified that, just as they drew up in front of the house in question, the electric lights in the house suddenly went out. Koehn went to the front door and knocked. After a moment's waiting, the door was not opened, and

Koehn then forced the door open. At the same time that Koehn went to the front door, Schubert went to the rear door, through which he gained admission to the house without difficulty. In the house, which was a five-room bungalow, were three sleeping rooms. In one of these rooms a man and woman were found in bed. In another several men were found, and in the third three men were found lying on the bed, and underneath the bed Grace was found hiding. The officers in searching through the bed found a .38 caliber revolver under the pillow, and in one of Newell's pockets four cartridges were found which fitted the revolver. The revolver was identified by the prosecuting witness as similar in appearance to the one that was used when he was robbed. After some discussion between the officers, Grace, and the other occupants of the house, the officers took Grace and Newell to the police station, and they were subsequently charged by information with the robbery. Newell pleaded guilty to the charge, while the defendant Grace stood trial.

Before discussing the legal questions involved on the appeal, it becomes necessary to give a brief résumé of certain dates and events in connection with the first trial, appeal, and reversal of the judgment of conviction.

The original information charging both Newell and Grace with the crime was filed on April 3, 1925, and on April 20, 1925, the defendant, Grace, was arraigned and pleaded not guilty. At the time of his arraignment, the trial judge ordered that the defendant, Grace, be first put on trial for his sanity. For some reason, which does not appear in the record, this order of the court was ignored, and the defendant was put on trial for the offense on July 15, 1925. He was found guilty as charged, and an appeal was taken from the judgment of conviction. On May 3, 1926, the District Court of Appeal (247 P. 585) reversed the judgment of conviction on the ground that the defendant had not been accorded a trial to test his sanity, as ordered by the court, and the case was remanded for a new trial, with the instructions that the defendant be put on trial before a jury for his sanity. On July 7, 1926, the remittitur went down from the Court of Appeal. Not until March 24, 1927, did the defendant have his trial to determine his sanity, at which time the jury returned a verdict that he was sane. On April 11, 1927, the defendant appeared in court for his second trial under the information, at which time the district attorney stated to the court that an indictment had been returned by the grand jury on April 3d, charging defendant with the crime of robbery, being the identical offense charged in the information, and for which he had once been tried under the information. The district attorney stated further that, by rea-

son of the returning of the indictment, he desired to move the dismissal of the information, which motion was on that date by the court granted. The record shows that the defendant, through his counsel, protested vigorously against the granting of the motion for dismissal, but, as we view this case, his protest does not become material. On April 11, 1927, the defendant was arraigned upon the indictment, and upon the following day pleaded not guilty to the charge contained therein. At that time, through his counsel, he made a motion to dismiss the indictment. The hearing on this motion upon which briefs were filed by both sides was continued from time to time until May 3, 1927, when the motion to dismiss was denied. It appears also that the defendant had filed a demurrer to the indictment, which was on May 3d overruled. The trial was set for June 3d, but on that date a motion to dismiss the indictment was again made by appellant, and this motion was continued to June 6th, as also the trial. On June 6, 1927, after motion to dismiss was denied, the defendant went to trial on the charge of robbery contained in the indictment. He was found guilty of the charge, and now prosecutes this appeal.

[1, 2] Appellant urges as his first ground for reversal that the trial court erred in not dismissing the information in which the defendant, Grace, was jointly charged with Newell of the offense of robbery; and, second, that the court erred in sustaining the district attorney's objection to certain records which appellant offered in evidence in support of his plea of once in jeopardy. Both of these points are more or less related in the discussions by appellant in his brief, and we will deal with them together.

We are of the opinion that the trial court erred in not granting the motion of defendant to dismiss the information. In *re Begerow*, 133 Cal. 350, 65 P. 828, 56 L. R. A. 513, 85 Am. St. Rep. 178. From the time of reversal of the judgment of conviction, and during the following 9 months the defendant made repeated motions to dismiss the information because of the failure to bring him to trial, as provided in section 1387 of the Penal Code. However, inasmuch as the information was finally dismissed, it is of no avail at this time to consider the matter further, unless, as urged by the appellant, he was also entitled to have the indictment dismissed because of the unwarranted delay in bringing him to trial under the information. The defendant unquestionably had his remedy through filing a petition for habeas corpus after the refusal of the trial court to grant his motion for a dismissal, and, had he pursued this remedy, he undoubtedly would have gained his release from custody. In *re Begerow*, 133 Cal. 350, 65 P. 828, 56 L. R. A. 513, 85 Am. St. Rep. 178.

[3] But we cannot agree with him that the wrong he suffered through the erroneous ruling of the court in connection with the information attached in any way to the indictment and the proceedings had thereunder. Section 1385 of the Penal Code reads as follows:

"The court may, either of its own motion or upon the application of the district attorney, and in furtherance of justice, order an action or indictment to be dismissed. The reasons of the dismissal must be set forth in an order entered upon the minutes."

Section 1387 of the Penal Code reads as follows:

"An order for the dismissal of the action, as provided in this chapter, is a bar to any other prosecution for the same offense, if it is a misdemeanor, unless such order is explicitly made for the purpose of amending the complaint in such action, in which instance such order for dismissal of the action shall not act as a bar to a prosecution upon such amended complaint; but an order for the dismissal of the action is no bar if the offense is a felony."

There can be no question but what the court had the legal authority to dismiss the information on motion of the district attorney, and, further, that the district attorney was acting well within the provisions of the statute in causing the defendant to be indicted for the same offense, as it appears that the indictment was filed within three years of the date of the robbery. *People v. Follette*, 74 Cal. App. 178, 240 P. 502. The mere fact that the same offense was charged in the indictment that had previously been charged in the information does not establish any legal relation or connection between the information and the indictment. Each was a separate proceeding authorized by the statute, and complete in itself. Nothing done while the information was pending could supply a needed step required in the proceedings under the indictment, and manifestly no error committed in connection with the one proceeding could affect the other. The dismissal of the information terminated that proceeding, and, so far as the indictment was concerned, effectively disposed of the information as though it had never been filed. When the defendant stood before the court, and was arraigned under the indictment, his status was the same as though there never had been an information filed against him, or that he had never been tried under the information, found guilty, and the case reversed.

In the case of *In re Begerow*, 136 Cal. 297, 68 P. 773, 56 L. R. A. 528, we find circumstances comparable to those in the instant case. Begerow had been charged by information with the crime of murder in July of 1900. He had five trials under that information; each trial resulting in a disagreement of the jury. In May of 1901, almost a year after

the filing of the original information, when more than 60 days had elapsed subsequent to the last mistrial, Begerow made a motion to dismiss the information on the ground that he had not been brought to trial within 60 days, as provided in subdivision 2 of section 1382 of the Penal Code. The court refusing to grant his motion, Begerow filed a petition for habeas corpus in the Supreme Court, and upon hearing he was released, the Supreme Court holding that he was entitled to a dismissal of the information under section 1382 of the Penal Code. Immediately thereafter the district attorney filed another complaint charging Begerow with the same crime of murder, and he was taken into custody again. His contention that the circumstances preceding his release and the release itself served to stay the hand of the law from any further proceedings charging him with the same offense was not upheld by the court. In a somewhat extended discussion of this very question the Supreme Court epitomized its conclusion in the following excerpt from the opinion in the case of *Ex parte Clarke*, 54 Cal. 412:

"But the order dismissing the prosecution ends the action commenced by the complaint upon which the magistrate issued his warrant of arrest. It ends the action, however, not by any judgment upon the merits of the case, but by an order in the nature of judgment of nonsuit, a simple expression of the opinion of the court that that particular proceeding ought not to be further prosecuted."

Nor does the fact that the indictment was returned before the information was dismissed, and without any order of the court, affect the situation. *People v. Follette*, 74 Cal. App. 178, 240 P. 502.

[4] Appellant further contends that the court erred in not permitting him to put in evidence the record of his first trial for the purpose of supporting his special plea of "once in jeopardy." The language used by counsel for the defendant in offering the record in question, as also the remittitur from the Court of Appeal reversing the judgment in the first case, indicates that he contended: First, that the proceeding which resulted in a verdict of conviction by the jury, even though reversed by the Court of Appeal, operated in law as having put him once in jeopardy; and, second, that the delay of some nine months in bringing the defendant to trial under the charge in the information operated also in law as having placed him "once in jeopardy." It has been determined through a somewhat extended line of decisions in this state that a person on trial for an offense, when the judgment of a former conviction of the same offense has been reversed, cannot effectively claim that he was "once in jeopardy" by reason of his first trial. This subject has been so fully discussed by this court, as well as the Supreme

Court, that we feel that a mere reference to several of these cases meets all of the requirements of this opinion. *People v. Frank*, 75 Cal. App. 74, 241 P. 924; *People v. Rittenhouse*, 56 Cal. App. 541, 206 P. 86; *In re Begerow*, 136 Cal. 297, 68 P. 773, 56 L. R. A. 528.

[5] As to his second point under this head, that the unwarranted delay in according him a second trial under the information furnishes him in law the ground to contend that he was "once in jeopardy," we feel does not warrant any extended consideration, as we can see no merit in such a contention.

[6] Appellant urges that the indictment should have been dismissed because he was not accorded his trial within 60 days from the date of the filing of the indictment. It appears from the record that the indictment was filed on April 4, 1927; that in due course the defendant was arraigned, and pleaded not guilty. At the time of his plea he filed a motion to dismiss the indictment. It appears that this motion was submitted on briefs, and on May 3d the motion to dismiss was denied and a demurrer to the indictment overruled. Subsequently the case was set down for trial on June 3d, which was within the 60-day period. The minutes of the court in connection with this case on June 3d read as follows:

"Motion to dismiss indictment is interposed. and motion is continued to June 6th, 1927. Witnesses are instructed to return."

On June 6th appears the following entry in the minutes:

"Motion to dismiss indictment comes on for hearing and is denied."

Following the denial of defendant's motion to dismiss, he went to trial before a jury on June 6th.

We submit that from this record the appellant is not in a position to seriously contend that he was deprived of a trial within the 60-day period. The minutes of the court indicate that the court was ready to start his trial on June 3d, when he interposed his motion to dismiss, and, apparently for some reason, and we must assume that it was a sufficient reason, the hearing on the motion was continued until June 6th, which was apparently the first court day subsequent to June 3d. Manifestly the delay in starting the trial after the 60-day period had elapsed was due to appellant's own action in filing a motion to dismiss. He cannot now be heard to complain because of the delay occasioned in the hearing of his motion.

[7] Conceding, however, that the court erred in continuing the trial beyond the 60-day period, we are satisfied that no miscarriage of justice resulted by reason of such delay. The error, if any, is one of procedure, and readily comes within the purview of sec-

tion $\frac{1}{2}$ of article 6 of the Constitution. *People v. Zuvela*, 191 Cal. 223, 215 P. 907.

[8] Appellant further urges that in any event he was entitled to have the jury make a finding upon his special plea of "once in jeopardy," and in support of this contention cites the case of *People v. Tucker*, 115 Cal. 337, 47 P. 111, and other earlier decisions of the Supreme Court of this state. While it is unquestionably true that in several of the earlier cases the position contended for by appellant has been sustained, it is clearly as true that in recent decisions of this court and of the Supreme Court of the state of California, wherein similar questions were under consideration, the courts, while not directly overruling the earlier cases, unquestionably recognize and give support to a different rule. In the case of *People v. Frank*, 75 Cal. App. 74, 241 P. 924, after considering the earlier and later cases wherein this question was under consideration, this court said:

"From these later decisions, we question whether the strict rule invoked in the earlier cases above referred to can now be considered the law of this state. On the other hand, we think it can be reasonably inferred from these later decisions that the appellant may and does waive his pleas of former acquittal and once in jeopardy by his failure to produce any evidence in support thereof, and, furthermore, that the failure of the jury to render a verdict upon said pleas in the absence of any evidence to support them does not result in any prejudice to appellant."

While it is true in the instant case on appeal appellant did offer in support of his special plea the record of the proceedings of his former trial and conviction, this was not legal evidence that could furnish support for his plea of "once in jeopardy," as we have heretofore stated. Hence, the evidence offered being incompetent, there was in effect no evidence as a matter of law tendered to the jury in support of the plea of "once in jeopardy," and, under the authority of *People v. Frank*, supra, the failure of the jury to find on that issue has not prejudiced the appellant. *People v. Strickler*, 167 Cal. 627, 140 P. 270; *People v. Newell*, 192 Cal. 659, 221 P. 622; *People v. Stoll*, 143 Cal. 689, 77 P. 818, and *People v. Brannon*, 70 Cal. App. 225, 233 P. 88.

[9, 10] Appellant complains of certain rulings of the trial court whereby J. F. Koehn, Walter Schubert and Rudolph Sieger, police officers, were permitted to relate incidents connected with the arrest of Newell and certain alleged statements made by Newell to them at the time of, and immediately after, his arrest; the defendant, Grace, not being present on these occasions. This testimony unquestionably was hearsay testimony, and the defendant's objections thereto should have been sustained, unless it comes within

one of the exceptions wherein hearsay testimony may be given.

The Attorney General in his brief urges that the testimony was properly admitted: First, because Newell was a coconspirator, and, there being testimony before the court that Newell and Grace had committed the holdup, a foundation had been laid that would entitle the state to offer testimony of statements made by a coconspirator; and, second, that the testimony was properly admitted for the purposes urged by the district attorney that it tended to impeach the testimony given by Newell as a witness for the defense.

The rulings could not be justified on the ground that the testimony purported to give statements of a coconspirator, for the reason that it appears that the conversation between Newell and the officers, which the witnesses Koehn and Schubert undertook to relate, occurred after the robbery, and it is well settled that only statements made by a coconspirator during the existence of the conspiracy may be offered in evidence. These conversations, having occurred subsequent to the completion of the robbery, were hearsay, and not admissible. *People v. Oldham*, 111 Cal. 649, 44 P. 312; *People v. Collum*, 122 Cal. 186, 54 P. 589.

[11] However, we are satisfied that the testimony was properly admitted for impeachment purposes. Newell was put on the stand by the defendant, and in his direct examination he testified that the defendant, Grace, was not with him on the night of the robbery, and did not participate with him in the holdup of Maes; that his partner in the robbery was one Edward Miller. The witness further undertook to describe the appearance of Miller, as also the clothing he wore on the night of the robbery. The sole and only purpose of Newell's testimony was to support contentions of appellant that he was not one of the two who committed the crime. On cross-examination Newell was asked by the district attorney if he had not stated to Officers Koehn and Schubert, at the police station, shortly after his arrest, in substance, that his partner in the holdup was the defendant, Grace, and that Grace at the time of the robbery wore a brown khaki shirt and cap, and whether he did not further say to these officers at the same time and place that Grace was staying at No. 300 North Lorena street, and that he (Newell) would take the officers to where Grace resided, but that he would not testify against him. Newell denied having made any such statement, or statements to that effect, to the officers. Upon rebuttal the district attorney put on the witness stand, Officers Koehn and Schubert, who, in response to the questions which had been asked of Newell for impeachment purposes, testified that Newell had made such statements to them. We are satis-

fied that the testimony was properly admitted for impeaching purposes. It is true that such testimony would not have been properly admitted for the purpose of proving that Grace did participate in the robbery, but the record clearly shows that the district attorney offered it solely for impeaching purposes. Unquestionably, had the defendant's counsel so requested of the court, it would have been the duty of the court to have instructed the jury that this testimony was admitted for a limited purpose, and that they did not have the right to consider it for any other purpose than that of affecting, if at all, the credibility of the witness Newell. We have examined the record, and find that no such instruction was requested of the court, and hence the appellant at this time is not in position to find fault, if perchance the jury failed to consider the evidence for the limited purpose offered.

[12] As to the testimony of Officer Sieger which is complained of, it appears that his testimony was limited to matters attending upon the arrest of Newell. Nowhere in his testimony does he mention Grace, or make reference to any matter that in any way tended to connect Grace with the robbery. While it is true that for these reasons it might well be held that his testimony concerning the arrest of Newell was immaterial in this case, we cannot see wherein this testimony could be regarded as prejudicial to the rights of the defendant.

[13] Appellant also criticizes the fact that the court permitted Officer Koehn on his direct examination to testify that, when in company with Newell, they reached the house at No. 300 North Lorena street, Newell pointed to the house, and said: "There is where Lacey lives; there is where he stays." (It appears from the record that defendant Grace was sometimes known as Lacey.) Counsel for the defendant objected to this statement of the witness, and the court immediately ordered that it be stricken out, and the jury was instructed by the court to disregard this testimony. We are justified in assuming that the jury followed the instructions of the court.

[14,15] The next point urged by appellant is set forth in the following language: "The identification of the defendant by the prosecuting witness Maes was uncertain and weak." While the prosecuting witness Maes in the trial gave positive testimony that he recognized Grace as being one of the two men who held him up, there is some conflicting testimony as to what occurred when on the morning after the robbery Maes was taken to the city jail where Grace was confined, and asked to identify him, if possible, as one of the two men who robbed him. Manifestly the question as to the weight to be given the testimony of the complaining witness in the matter of identification is for the jury to

decide, and it would be an improper invasion of the jury's sphere for this court to interfere with the finding. We are satisfied that there is sufficient evidence to support the jury's finding that Grace was one of the two who held up the complaining witness.

[16,17] Appellant next contends that the court erred in giving certain instructions to the jury relating to the issue of insanity, and in refusing certain instructions upon the same subject requested by appellant. The court instructed the jury that: "The burden of proof as to the defense of insanity rests upon the defendant and it must be proved by a preponderance of the evidence." This instruction has been repeatedly held to correctly state the law as to the burden of proof, and the weight of evidence required when the defendant offers the plea of insanity as a defense in a criminal case. *People v. Sloper*, 198 Cal. 238, 244 P. 362; *People v. Morisawa*, 180 Cal. 148, 179 P. 888. Appellant's contention that, while the defendant must carry the burden of proving his plea of insanity, he has met the full requirement of the law by showing that the defendant was committed to the insane asylum, and that upon such a showing the burden shifts back to the prosecution to prove beyond a reasonable doubt that the defendant is sane—is not supported by any authorities to which our attention has been directed.

[18] The next instruction complained of reads as follows:

"In order that insanity may be available as a defense to a crime charged, it must appear that the defendant, when the act was committed, was so deranged and diseased mentally that he was not conscious of the nature of the wrongful act committed. If he has reasoning capacity sufficient to distinguish between right and wrong as to the particular act he is doing, knowledge and consciousness of what he is doing is wrong and criminal, and will subject him to punishment, he must be responsible for his conduct. Although he may be laboring under partial insanity—as, for instance, suffering from some insane delusion or hallucination—still, if he understands the nature and character of his action and its consequences, if he has knowledge that it is wrong and criminal, and that if he does the act he will do wrong, such partial insanity or the existence of such delusion or hallucination is not sufficient to relieve him from responsibility for his criminal acts. People suffering from delusions or hallucinations may know right from wrong, but not be responsible for their actions."

The foregoing instruction, in substance, has had the approval of this court, as well as the Supreme Court of this state. *People v. Zari*, 54 Cal. App. 133, 201 P. 345; *People v. Morisawa*, 180 Cal. 148, 179 P. 888.

We do not deem it necessary to discuss in detail the refused instructions. These instructions were drafted upon the theory that the burden shifted to the prosecution after the defense had put in evidence the record of the

defendant having been committed to the insane asylum, and upon the further theory that, if there was any reasonable doubt in the mind of the jury as to the insanity of the defendant, this doubt should be resolved in favor of the defendant. It has been repeatedly held, in fact it is no longer a controverted matter in this state, that the burden of supporting a plea of insanity when presented in a criminal prosecution is upon the defendant, and that, in order to sustain this burden, he must show by a preponderance of the evidence, that, at the time of the commission of the act he was insane. *People v. Willard*, 150 Cal. 543, 89 P. 124.

[19] But one further point is urged which we feel merits attention, and that is the alleged misconduct of the district attorney during the trial, and in his argument before the jury. It is first contended that, when the district attorney, in his argument to the jury, referred to and commented upon the testimony of Officers Koehn and Schubert, given on rebuttal concerning the alleged statements made by Newell at the time of his arrest, his conduct constituted such error as was prejudicial to the rights of the defendant. As we have already held the testimony was properly admitted, it naturally follows it was the proper subject of comment.

[20] Appellant further contends that, when the district attorney, in his argument to the jury, referred to him as a "criminal," a "desperado," and a "denizen of the underworld," his conduct was such as to constitute prejudicial error. The district attorney in referring to the defendant in the language above quoted undoubtedly allowed himself to go beyond the sphere of proper argument of the evidence in the case. We cannot say that this language constituted prejudicial error. It appears from the record that the defendant admitted on the witness stand that he had been convicted of, and served a term for, burglary in the state prison at San Quentin; also that he had pleaded guilty to a charge of receiving stolen property, and had been confined as a narcotic addict. It would undoubtedly aid in maintaining the dignity of the court if counsel in their argument to the jury would confine themselves to a reasonable discussion of the evidence presented in the case, and omit the use of epithets and the calling of names.

[21-23] Appellant, in concluding his brief, complains that the court did him an injustice in permitting a witness for the prosecution to refresh his memory from the transcript of the evidence taken at the preliminary hearing and in refusing a similar right to a witness for the defendant. In our examination of the record we do not find any ruling of the court which justifies this criticism. Moreover, if perchance such a ruling was made, we do not see wherein it would pos-

sibly constitute reversible error. Also as to the criticism made that the court should have granted appellant's motion for a "directed verdict," the first answer would be that there is no provision in law for the court to direct a verdict in a criminal case, and, if appellant means by the term a "directed verdict" that the court should have advised the jury to return a verdict of not guilty, then the answer would be that there was abundant evidence to support the verdict of guilty, and hence it would have been improper for the court to advise a verdict.

We find no reversible error in the record and for that reason the judgment and order refusing a new trial are affirmed.

We concur: HOUSER, Acting P. J.; YORK, J.

88 Cal. App. 94

HANSEN v. ROGERS et al. (Civ. 3350.)

District Court of Appeal, Third District, California. Dec. 28, 1927.

1. Dedication ⇨39—One filing subdivision map, describing lots with reference to streets, is bound by error therein as to width of street.

One filing a subdivision map, describing lots with reference to streets, is bound by error therein, whereby particular street was laid down on map as being 60 feet in width, while on ground it was actually 82 feet wide, since making of map constituted abandonment to public of land actually within limits of designated street.

2. Dedication ⇨38—After acceptance by county of offer to dedicate streets, owner cannot claim property shown on map as part of street (St. 1907, p. 290, § 4).

Where, pursuant to St. 1907, p. 290, § 4, in force at time, county board of supervisors accepted, for public use, dedication of all avenues and highways offered by map of subdivision, one filing map is thereafter precluded from laying claim to property, shown on map to be part of street, as being unplatted private property.

3. Adverse possession ⇨8(2)—Title to public dedicated street cannot be acquired by adverse possession.

One cannot acquire title by adverse possession to public dedicated street by taking possession and fencing it.

Appeal from Superior Court, Fresno County; Denver S. Church, Judge.

Action by Julius Hansen against Edward Rogers and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Everts, Ewing, Wild & Everts, of Fresno, for appellant.

Loren A. Butts and Carling & Cummings, all of Fresno, for respondents.

WEYAND, Justice pro tem. On August 1, 1881, one Thomas E. Hughes filed with the county recorder of Fresno county a subdivision map of some 2,880 acres of land adjacent to, and immediately south of, the city of Fresno, Cal. This subdivision was by Hughes denominated "Fresno Colony," and it divided this large tract into 144 lots of approximately 20 acres each. The Southern Pacific Railroad ran northwesterly through a part of this tract. Easterly and westerly through a portion of this tract there was platted a street, named "Church avenue." This street extended from the said railroad westerly to a street Hughes had by said map designated as "Cherry avenue," and which last-named street was distant approximately one-half a mile from a point where said railroad intersected "Church avenue." Lots 21, 22, 23, and 24 of said "Fresno Colony" were by the said Hughes map shown to border on the north side of "Church avenue," and lot 21 bordered on the east line of said "Cherry avenue." These streets are by said map designated as 60-foot streets.

On February 7, 1888, one J. E. Hughes filed with the same officer a map or plat whereby "all that portion of lots 21, 22, 23, and 24, 'Fresno colony,' lying westerly of Central Pacific Railroad" were entirely replatted as town lots; said map being called "Belgravia addition to the city of Fresno." Along the south side of the said "Belgravia addition" there is delineated a street called "Church avenue," and along the west side thereof there is a street named "Cherry avenue."

On May 3, 1909, there was filed a third map whereby "Belgravia addition" was replatted in part only, adopting substantially all the streets on the "Belgravia addition," including "Church avenue" and "Cherry avenue." This map was filed by Edward Rogers, as attorney in fact of Ellie Hill Rogers. On its face it is called a "resubdivision of Belgravia addition to the city of Fresno, which comprises all that portion of lots 21, 22, 23, and 24 of 'Fresno colony' lying west of the Southern Pacific Railroad," but it is renamed "map of South Fresno addition." This last map was duly acknowledged by Edward Rogers, as attorney in fact of Ellie Hill Rogers, and has appended the certificate of the surveyor who made the survey, the county auditor of Fresno county, and the acceptance by the board of supervisors of Fresno county. This map shows a series of town lots, designated by number of lot and block, along its entire south line for this distance of approximately one-half a mile, and as bordering on "Church avenue."

There is no contention herein as to the right of the several parties above named to file the several maps or plats.

From surveys recently made it now develops that an error was made in the original surveys, and that "Church avenue" is actual-

ly some 22 feet wider than the so-called 60-foot "Church avenue" of the "Fresno colony" map filed in 1881 by Thomas E. Hughes. All of the property in question is now within the corporate limits of the city of Fresno.

Over 30 years ago a drainage canal or ditch was constructed along and over the northerly side of "Church avenue," which construction was prior to the filing of the "South Fresno addition" map. This ditch was abandoned, and large sections thereof were filled in at various times.

Prior to the filing of this suit, one B. Williams became the owner of lot 29 of block 5, which lot bordered on "Church avenue," and which lot also faced easterly on the state highway, which road had been by the "Belgravia addition" and the "South Fresno addition" maps laid out along the easterly side of the tracts replatted. This lot was conveyed to Williams "according to" the South Fresno addition map. Subsequent to the acquisition by Williams his rights were by a foreclosure sale vested in one Stilios Tripolitis. The commissioner's deed conveyed the property to Tripolitis according to the same "South Fresno addition" map. This deed is based on a judgment dated June 9, 1923.

The appellant herein, as plaintiff, on September 19, 1925, began an action to quiet title to a strip of land which in said plaintiff's complaint is described as follows:

"That portion of the southeast quarter of the northeast quarter of section 15, township 14 south, range 20 east, described as follows, to wit:

"Beginning at the most easterly corner of lot 29 in block 5 of South Fresno addition, as shown on map thereof recorded May 3, 1909 (this is the South Fresno addition map) in book 4, p. 58, of Record of Surveys, in the office of the county recorder of said county (county of Fresno, etc.); thence southeasterly along the westerly line of Railroad avenue, as shown on said map, 22 feet; thence westerly along the northerly line of Church avenue, as shown on map of Fresno colony, recorded August 1, 1881, in Book 2, page 8, of Plats, to the southerly extension of the northeasterly line of the alley traversing block 5 of said South Fresno addition; thence northwesterly along the extension of said northeasterly line of said alley, 22 feet more or less to the junction of said northeasterly line with the south line of lots 28 and 29 in said block 5; thence east along said south line 171 feet more or less to the point of beginning."

This action is brought against the said Edward Rogers, and all unknown owners, under the 20-year statute.

The city of Fresno by its proper officers appeared as a defendant, and claims that the land in suit was at all times since the original platting by Hughes, and now is, a part of what was named "Church avenue." Stilios Tripolitis also appeared and contended that he was the owner of the parcel of land described in plaintiff's complaint.

Upon the trial judgment was rendered for the city of Fresno. The plaintiff moved for a new trial upon alleged insufficiency of the evidence to justify the decision, and that the decision is against law, and also for alleged errors occurring at the trial. This motion was denied. This appeal is from the judgment of the trial court.

Plaintiff introduced in evidence the three maps or plats hereinabove referred to. To show his chain of title plaintiff introduced in evidence several deeds from one by Thos. E. Hughes in the year 1883 down to the present time. These deeds, with two exceptions hereafter noted, conveyed this property by reference to one or the other of the three maps introduced in evidence. In other words, no deed, with the exception of the two above alluded to, conveyed except by reference to maps which showed a "Church avenue" bordering on the south side of the lands described in said deeds. The two exceptions above mentioned are as follows: On October 4, 1924, less than a year before this action was instituted, B. Williams and Amy Williams, his wife, conveyed to plaintiff a tract of land identical with the description in his complaint. On October 14, 1925, after this action was instituted, Edward Rogers and Ellie Hill Rogers, his wife, conveyed to plaintiff the same tract of land.

Plaintiff, during the trial, admitted as a fact that Tripolitis was the owner of the lot he claimed by his answer, to wit, lot 29 of block 5 of the "South Fresno addition," and plaintiff also specifically admitted that his title, if any he had, came through the defendant Edward Rogers.

The defendant Edward Rogers testified by deposition that, when he laid out "South Fresno addition," he made no claim to the property covered by the ditch.

[1, 2] Williams testified that he first had an option from defendant Rogers for the purchase of "an acre on the corner," adjoining "Church avenue," and the highway that had been laid out parallel to the railroad; that, when he closed his option with Rogers, he was given "lots" on the corner to make up an acre in area. These lots he accepted by a deed naming lots 25, 26, 27, 28, and 29 of block 5 of "South Fresno addition." He testified that he supposed his deed included the land described in plaintiff's complaint. Williams further testified that he took possession of the land plaintiff now claims, and fenced the same and used it. He also stated that he filled in the part of the unused ditch in the tract described in plaintiff's complaint. We are at a loss to understand by what method of reasoning plaintiff arrives at the conclusion that he becomes the owner of the land in question. When Thos. E. Hughes filed the map of "Fresno colony" in the year 1881, he was the owner of the land for at least half a mile on both sides of "Church avenue." If

by some error that particular street was in fact laid down on the map as being 60 feet in width, while on the ground it was actually 22 feet wider, or a width of 82 feet, Hughes became bound by his erroneous map. By this map he placed lots 21, 22, 23, and 24 of his "Fresno colony" as bordering on "Church avenue." When he parted with title in 1883, he did so by a deed that made reference to a map that showed that these lots then conveyed were bordering on the north side of his said "Church avenue." The defendant Rogers is bound by his acts, and the acts of his wife, when they replatted a part of "Fresno colony" as "South Fresno addition," in that they replatted lots 21, 22, 23, and 24 of the "Fresno colony" into town lots, a series of which bordered on "Church avenue." By this "South Fresno addition" map there is for at least a distance of 30 feet to the south of the series of lots a street named "Church avenue." At the time this last-named map was filed the act of the Legislature of the state of California, passed in 1907 (see Statutes of 1907, p. 290), was in force. Section 4 of said statute reads as follows:

"The map or plat so made, indorsed and acknowledged shall, if the same offers for dedication any highway, or portion thereof, be presented to the board of supervisors, board of trustees, city council or other governing body having control of public highways in the territory shown on such map or plat, and said governing body shall indorse thereon which of the public highways offered by said map or plat they accept on behalf of the public, and thereupon such highways as have been so accepted, and no others, shall be and become dedicated to the public use."

The board of supervisors of Fresno county accepted, "on behalf of the public and for public use, all the avenues, roads and highways offered by the accompanying map of 'South Fresno addition.'" When Rogers sold to Williams, he did so according to his map, which showed lot 29 of block 5 as bordering on said last-named street.

The board of supervisors of Fresno county having accepted his offer to dedicate any lands to the immediate south of his platted lots as "Church street," now precludes him from laying claim to property to the south of his platted lots, as being unplatted private property.

[3] We then have the question as to whether or not Williams could go upon a public dedicated street, and, by taking possession of the same and fencing the same, thus acquire title thereto. The making of the Hughes map in 1881 constituted an abandonment by Hughes to the public of whatever land was actually within the limits of what he chose to call "Church avenue." Hughes was not permitted to say in effect that he made a mistake and actually left a street 82 feet in width, and therefore he could reclaim a 22-

foot strip along the south side of lots he had sold as bordering on said "Church avenue." Much less can defendant Rogers, or those acting under him, do so. Rogers did not own the land south of "Church avenue," as did Hughes. Rogers accepted a deed of a tract that bordered on "Church avenue," all of which he subdivided into lots. We think the case of Humboldt County v. Van Duzer, 48 Cal. App. 640, 192 P. 192, fully answers this contention here. The judgment of the lower court was correct.

The judgment is affirmed.

We concur: FINCH, P. J.; HART, J.

COUTURE et al. v. OCEAN PARK BANK.★ (Civ. 4685.)

District Court of Appeal, Second District, Division 2, California. Jan. 10, 1928.

Hearing Granted by Supreme Court March 8, 1928.

1. Banks and banking ⇨148(2)—Checks to order of M. for T. were not paid to beneficiary when paid by bank to T. on his wrongful indorsement.

Checks drawn on bank, payable to order of M. Hardware Company for J. B. T. and to M. Plumbing Company for J. B. T. were not paid to beneficiary, where T. wrongfully indorsed them and identified himself to bank which paid checks to him and he had no interest in the checks nor the money they directed to be paid.

2. Banks and banking ⇨148(2)—Identification of party wrongfully indorsing checks was at bank's peril where it did not arise from negligence or fraud of maker.

Where checks were drawn to order of M. Hardware Company and M. Plumbing Company for J. B. T. to pay for materials charged to maker on maker's credit and wrongfully indorsed by T. and paid by bank to him, identification of T. by bank was at its peril, where it was not induced by maker's negligence or fraudulent act.

3. Appeal and error ⇨1048(5)—Overruling objection to question as to purpose of designation in checks held harmless, in view of answer that it showed job check was chargeable to.

In action against bank for wrongful payment to T. of checks made to order of M. Hardware Company and M. Plumbing Company for T., overruling objection to question to one of maker's firm as to purpose of designating T. in checks was not prejudicial, in view of answer that purpose was to show job on which amount of check was to be charged.

4. Banks and banking ⇨154(8)—Forgery was proved in action against bank paying on wrongful indorsement of check, though check was inadvertently made to nonexistent payee.

In action against bank for wrongful payment of checks made to order of M. Hardware Company and M. Plumbing Company for T.,

and which bank paid on wrongful indorsement of T., who identified himself, notwithstanding there was no M. Hardware Company in existence, trial court was within discretion in holding that indorsement of such name was a forgery, where word "Hardware" was used in check inadvertently instead of "Plumbing."

5. Banks and banking ⇨154(8)—Evidence held to authorize finding that check paid by bank on wrongful indorsement was not indorsed by payee.

Where checks were made payable to order of M. Hardware Company and M. Plumbing Company for T., and wrongfully indorsed and cashed by T., testimony of secretary-treasurer of plumbing company that checks were never indorsed by payee held sufficient to authorize finding that checks inadvertently made to hardware company instead of plumbing company was not indorsed by payee.

6. Banks and banking ⇨148(2)—Bank paying checks on wrongful indorsement held liable to maker therefor.

Where checks payable to order of M. Hardware Company and M. Plumbing Company for J. B. T. were paid by bank on wrongful indorsement of T., since payment was to an individual not named as payee and without payee's indorsement, bank was liable to maker therefor.

Appeal from Superior Court, Los Angeles County; Walton J. Wood, Judge.

Action by Emile J. Couture and another, co-partners doing business under the firm name and style of the Slingluff-Couture Company, against the Ocean Park Bank. From a judgment for plaintiffs, defendant appeals. Affirmed.

Tanner, Odell & Taft, of Los Angeles, for appellant.

Weber & Crawford, of Santa Monica, for respondents.

STEPHENS, Justice pro tem. This action concerns the payment of two bank checks which, with indorsements and marginal data, are herein set out in hæc verba:

"Ocean Park Bank. 90—193

"Commercial.

Savings.

"Santa Monica Branch

"Santa Monica, Cal., Sept. 2, 1922. No. 103. Pay to the order of Manual Arts Hdw. Co. for J. B. Tailer \$283.02 two hundred eighty-three and 02/100 dollars.

"The Slingluff-Couture Co.

"Emile J. Couture.

"Plumbing material."

Indorsement on back of above check as follows:

"James B. Tailer, Manual Art. Hard. Co."

"Ocean Park Bank. 90—193

"Commercial.

Savings.

"Santa Monica Branch.

"Santa Monica, Cal., Sept. 25, 1922. No. 177. Pay to the order of Manual Arts Plumbing Co.,

for J. B. Tailer \$318.00 three hundred eighteen and xx/100 dollars.

"The Slingluff-Couture Co.
"Emile J. Couture."

Check indorsed:

"Manual Arts Plumbing Co. J. B. Tailer."

Tailer indorsed the checks without authority from any one, presented them to the bank for payment, received the money, and has not accounted therefor. Plaintiffs brought this action to recover the principal named in the checks and recovered judgment. Defendant appeals. The testimony in the main is without conflict, and will be stated in our consideration of the points urged by appellant as grounds for reversal of the judgment. In the interests of brevity and continuity, we shall treat points 1 to 4, inclusive, without separating them.

Point No. 1: "The beneficiary mentioned in the checks received the money."

Point No. 2: "One of two beneficiaries mentioned in the checks received the money."

Point No. 3: "Plaintiffs were guilty of negligence and the defendant was not."

Point No. 4: "The agent of the plaintiff perpetrated a fraud on defendant and plaintiff is bound thereby and cannot recover."

[1] The testimony is clear and without conflict that Tailer, at the time the checks were drawn and paid, was a foreman plumber in the employ of plaintiffs, the respondents herein, and had been in such employ for six or seven weeks prior thereto. He had purchased certain plumbing and hardware supplies from Manual Arts Plumbing Company, a corporation, for the use and upon the credit of the plaintiff company, which had drawn the two checks in payment therefor and delivered them to Tailer for delivery to the plumbing company. Instead of delivering the checks as directed, however, he indorsed them himself and identified himself to the bank's satisfaction by material slips and lodge cards. He was paid the money and absconded. He had no interest in the checks nor the money they directed to be paid. He was, then, not a beneficiary in fact.

The case of *Ridgley National Bank v. Patton & Hamilton*, 109 Ill. 483, relied upon by appellant, is not in point. In that case a check was drawn payable to "Patton & Hamilton for account of Lewis Coleman & Co. or order." Had the bank paid Coleman proof might have been in order as to whether the proper person received the money, although the insertion of the words "or order" after "Coleman & Co." would seem to indicate that the latter were the real payees named in the check; and Patton & Hamilton, having received the check as attorneys for Coleman, in the absence of other facts, no action could have been successful against the bank by Patton & Hamilton, the payees, or by the payor. In the instant case, however, the

checks were payable "to the order of" the Manual Arts companies, and the proof showed that the party who received the money, not being the payee, had no title in the money. However, the *Ridgley Case* does not parallel the instant case at all. The bank in the *Ridgley Case* applied the money on deposit to another use, and, the court determined, wrongly so; and the equitable interest which it stated Coleman had in the check or money was because of the proof in that case, which proof in the instant case is not only entirely lacking, but affirmatively determines the fact that Tailer had no equitable or other interest in the checks.

[2] Tailer had cashed one or possibly two of plaintiffs' checks at this bank before, but neither of the tellers who paid the checks No. 103 and No. 177 has testified that he recognized him because of that fact, and both required identification. This identification was of course at the bank's peril, and the trial court had ample evidence to determine that the identification given by Tailer to the bank tellers was not from any negligence or fraudulent act of plaintiffs.

[3] The court asked one of plaintiffs' firm, "What was your purpose in designating a certain J. B. Tailer in these checks?" and defendant holds this to be error. We agree with counsel for defendant that any undisclosed purpose would not be effective in any manner against defendant. The answer that was elicited could not have been prejudicial to defendant—"The purpose of designating J. B. Tailer on these checks was to show the job on which the amount was to be charged." No doubt the court desired to know whether or not as a fact Tailer had any interest in the check. The answer explained this point, and it was further cleared by cross-examination.

[4] Point No. 5—"the forgery of the indorsement of check No. 103 for \$283.02 was not proven." This point is based upon the fact that check No. 103 was drawn to Manual Arts Hardware Company instead of Manual Arts Plumbing Company, as was check No. 177. Without quoting the evidence, suffice it to say that it is apparent that the word "Hardware" was used inadvertently instead of "Plumbing" in this connection. The trial court was well within its rightful discretion in making such a deduction.

[5] The contention of appellant that there is no testimony from which the trial court or this court could find that check No. 103 was not indorsed by the payee is untenable. The following testimony was given by the secretary-treasurer of the Manual Arts Plumbing Company:

"Mr. Crawford [for respondents]: I will show you checks 103 and 177—the first one is for \$283.02, the second one \$318.00—and ask you if the indorsement 'Manual Arts Plumbing Company,' is on that check. * * * A. The indorsement is there, but it was not indorsed

by Manual Arts Plumbing Company. Q. Was that indorsement made under your direction? A. No, sir. Q. Was it made with your consent? A. No. Q. Made with your knowledge? A. No."

[6] This inquiry was apparently related to both checks No. 103 and No. 177, and the witness, in saying that the indorsement was not made by the Manual Arts Plumbing Company, could well have meant, and no doubt was understood by the trial court to mean, that either of the indorsements was placed there by the authority of the Manual Arts Plumbing Company. The whole trend of the testimony indicates that there was no identity such as Manual Arts Hardware Company as distinct from the Manual Arts Plumbing Company. It follows that it was not without competent evidence upon which the trial court found that the check never was indorsed by the payee. The money called for by the two checks was paid to an individual not named as the payee therein, and without the payee's indorsement, and there is nothing in the case which acts as a legal release of the bank from responsibility for the error.

Judgment affirmed.

We concur: WORKS, P. J.; THOMPSON, J.

88 Cal. App. 157

SPRING VALLEY WATER CO. v. ALAMEDA COUNTY. (Civ. 5911.)★

District Court of Appeal, First District, Division 1, California. Dec. 31, 1927.

Hearing Denied by Supreme Court Feb. 27, 1928.

1. Appeal and error ⇨907(3)—Statement of facts must be taken as appearing in trial court findings, where appeal is on judgment roll.

Where record on appeal consists only of judgment roll, appellate court must take statement of facts as appearing in findings of trial court.

2. Taxation ⇨446—Assessment and collection of tax on riparian lands at full cash value included riparian rights and exhausted taxing power (Pol. Code, § 3627).

Where riparian lands were assessed under Pol. Code, § 3627, at full cash value without exclusion or deduction on account of riparian water rights, such rights were included in assessment, and on levy of tax pursuant thereto the taxing power was exhausted.

3. Waters and water courses ⇨156(2)—Abridgment, enlargement, or modification of common-law right to use of water course is measured by express stipulation in grant.

Right to use of water course, *ex jure natura*, or as incident to land, under the common law, is subject to be abridged, enlarged, or modified by grant, but extent of such abridgment, enlargement, or modification is to be measured

by express stipulation contained in grant or instrument of conveyance itself.

4. Waters and water courses ⇨156(5)—Riparian rights acquired by grantee under conveyances from different owners is limited by restrictions of particular grant.

One riparian owner or any number of riparian owners less than all could not, by grant or otherwise, extinguish or diminish the riparian rights attaching to the lands of other nonconsenting riparian owners, and sum total of all rights acquired by grantee of riparian rights is limited by restrictions of particular grant.

5. Waters and water courses ⇨156(5)—Grantor of riparian rights may enforce as against grantee full enjoyment of riparian right, restricted only by terms of grant.

Grantor of riparian rights may insist on and enforce as against his grantee a full enjoyment of his riparian right, restricted only by the terms of his grant, and in case diversion is made at any point other than specified riparian owner can enjoin the same.

6. Waters and water courses ⇨156(2)—Grant of riparian rights, limited to right to divert at certain point, conveyed only restricted right in accordance with limitation.

Where grantors of riparian rights limited diversion of water above a certain specified point, grantee thereunder did not become owner of all riparian rights on stream, but received only a restricted right to divert water at specified point.

7. Waters and water courses ⇨40—"Riparian right" as such is right to usufruct inherent in lands.

"Riparian right" as such is a right to usufruct inherent in the lands with absolute right in riparian owners to reasonable use of waters at all seasons of year in usual and ordinary course of its flow.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Riparian Right.]

8. Waters and water courses ⇨153—Severed riparian right apart from and distinct from claim of ownership in land cannot be classed as riparian right.

While a riparian owner may by grant, laches sufficient to create an estoppel, or by prescription lose his riparian rights as such, and thus cause a severance of right from land, nevertheless the severed right apart from and distinct from any claim of ownership in or to land cannot be classed as riparian right, a part and parcel of the soil.

9. Waters and water courses ⇨156(2)—Effect of grant of riparian rights is to convey grantor's right to use of water and estop his complaining against use by grantee.

The effect of a grant of riparian rights separate from land is simply to convey grantor's right to use of water on his own riparian land and to estop grantor to complain against any use of water which grantee may make to injury of such riparian right.

10. Waters and water courses $\Rightarrow$ 156(5)—Interest acquired by grantee of riparian rights, limited by specifying diversion point, consisted of grantors' waiver to insist on riparian rights.

Where grant of riparian rights was limited to right of diversion at specified point, exact estate or interest acquired consisted of a waiver on part of riparian landowners conveying rights to insist upon their riparian rights in that each owner granted right existing in grantor to demand entire flow of stream in natural course down to riparian lands.

11. Taxation $\Rightarrow$ 257—Situs for purpose of taxation of riparian rights under grants limiting diversion to particular point held at point of diversion.

Where conveyances granting riparian rights limited grantee's right to diversion of waters at specified point without territorial limits of taxing districts, the situs of riparian right for purpose of taxation was at the point of actual diversion, notwithstanding that stream extended through such taxing districts.

12. Taxation $\Rightarrow$ 257—Right of diversion in stream does not, for purposes of taxation, extend throughout entire length of stream.

Right of diversion of waters in a stream at specified point under grant by several riparian owners does not, for purposes of taxation, extend throughout entire length of the stream.

Appeal from Superior Court, Alameda County; H. L. Preston, Judge.

Action by the Spring Valley Water Company against the County of Alameda. Judgment for plaintiff, and defendant appeals. Affirmed.

Earle Warren, Dist. Atty., and R. H. Chamberlain, Jr., Deputy Dist. Atty., both of Oakland, for appellant.

McCutchen, Olney, Mannon & Greene, of San Francisco, for respondent.

PARKER, Justice pro tem. This is an appeal by defendant from a judgment of the superior court in favor of plaintiff corporation. The purpose of the action was to have it judicially determined that certain assessments on water rights theretofore made by the assessor of Alameda county were and are void. The appeal is upon the judgment roll alone. The main question concerns the validity of certain taxes assessed against property of the plaintiff corporation.

[1] As the record here consists only of the judgment roll, we must take the statement of facts as the same appears in the findings of the trial court.

Plaintiff is a corporation legally organized and existing for the purpose of supplying water to the city and county of San Francisco and its inhabitants. The defendant, county of Alameda, is a political subdivision and public corporation of the state of California, to wit, a county. The Alameda county water

district, Niles sanitary district, and Decoto fire district are districts organized and existing under the laws of the state of California providing for the organization of county water districts, sanitary districts, and fire districts, respectively. All of the districts named are situated in Alameda county, and the Alameda water district lies entirely within the townships of Eden and Washington, in said county. The other districts named lie wholly within Washington township, in Alameda county. For the fiscal years embraced in the action plaintiff paid to, and there were collected by, the tax collector of Alameda county certain taxes levied in behalf of said county, certain taxes levied in behalf of said Alameda county water district, Niles sanitary district, and Decoto fire district, respectively, and all of said taxes were paid by the tax collector into the treasury of Alameda county. The treasurer credited the proper account of each district with the amount of taxes collected for it, all pursuant to law, and since the collection and distribution aforesaid, all of said taxes have been withdrawn and spent by the respective districts.

Without following the exact language of the findings, the essential facts relative to the property or rights subjected to the taxes thus collected may be summarized.

The plaintiff, Spring Valley Water Company, is the owner of the right to divert from Alameda creek and its tributaries water to the amount of 21,500,000 gallons daily and use the same for business, commercial, and other nonriparian and beneficial purposes, and under and pursuant to such right is and since long prior to March, 1922, has been diverting said amount of water from said creek, or the full flow of the creek when such flow was less than said amount, and using the same for said purposes. The points of diversion are and always have been without the territorial limits of the districts named hereinbefore and for the benefit of which said districts the tax is levied and collected. The amount of 21,500,000 gallons of water daily is equal to or exceeds the usual or normal flow of said creek, and plaintiff has never diverted water from said creek in excess of said amount. Plaintiff also has certain storage rights entitling it to impound and divert all of the waters of said creek excepting certain varying amounts, which it is required to release from storage and allow to pass down the creek for the purpose of replenishing underground waters below its dam. Plaintiff has constructed a large reservoir known as "Calaveras reservoir," and by means of said reservoir and its diverting works plaintiff is about to divert water from Alameda creek in addition to the amount of 21,500,000 gallons daily. Neither the reservoir nor the point of diversion of the addi-

tional amount of water is within the territorial boundaries of any of said districts, and plaintiff has not at any time diverted water from Alameda creek or any of its tributaries at any point within any of the districts named.

Plaintiff does own certain lands within the limits of the district, and as a part and portion thereof owns certain riparian rights. It is conceded, however, that this ownership is not in the slightest involved in the issues here for determination. The fact is mentioned solely to indicate that all the facts found have been considered; therefore no further mention will be made of this fact, and what follows will proceed as though this fact had not been found.

Plaintiff at no time has been the owner or claimed to be the owner of any right to divert water from Alameda creek or any of its tributaries within any of the said districts named.

This finding, that plaintiff at no time has been the owner of any water right within the district, or claimed to be such, is attacked by appellant here; and it is argued that the facts following indicate and determine the fact to be an erroneous conclusion from the admitted facts.

In 1910 and prior thereto through various and sundry conveyances, agreements and condemnation proceedings, for each of which plaintiff paid valuable consideration, plaintiff acquired from the respective owners thereof and as against all lands riparian to Alameda creek lying within said districts the right to divert water from Alameda creek for business, commercial, and nonriparian purposes. The material portions of a very large number of said conveyances and agreements were as follows:

The grantor does grant unto Spring Valley Water Company all riparian rights in the water of said stream which are vested in the said grantor, and as against the said grantor, his heirs, etc., and as against the lands; the right at the pleasure of said grantee, its successors, etc., to impound, appropriate, divert, and take the waters of said Alameda creek and of any and all the tributaries and feeders thereof, to the uses and purposes of the waterworks of said grantee, its successors, etc., and by means of a dam or dams erected across the said creek or any of its tributaries at any point or points at or above the inlet of the Vallejo Mill stone chute (but not at any point below said inlet), and of such conduits as it shall erect to divert the waters out of said stream for the uses and purposes aforesaid.

The material portions of the remaining conveyances, with a few excepted, read exactly the same, with this added, namely:

"But this grant shall be and is hereby limited to the waters which shall be above the inlet of the Vallejo Mill stone chute specified above as

the point of diversion, and shall not apply to any of the waters of said creek or of its tributaries which shall be below the said inlet of said Vallejo Mill stone chute."

In a few instances the conveyances and agreements contained no express provision limiting the place at which the plaintiff might make its diversions from Alameda creek. The point mentioned in the conveyances and agreements as the inlet of the Vallejo Mill stone chute is and at all times was outside any of the districts named.

All lands riparian to Alameda creek or any of its tributaries and lying within any of the districts named have been regularly assessed without any exclusion of or on account of the riparian rights incident thereto.

The trial court found further, predicated its finding upon the facts as stated, that the water rights taxed are not now and at no time have been, either in whole or in part, within the boundaries of either of said districts.

It was the judgment of the court below that plaintiff recover the sums it had paid into the treasury of defendant county. From this judgment defendant appeals.

It is the contention of appellant that plaintiff is the owner of the water rights within the districts named. Appellant's position is stated as follows:

"It is obvious that since all the riparian owners have conveyed away to respondent all of their riparian rights and their rights to object to the taking of water, it is immaterial as to what point respondent makes the diversion thereof. Although the actual point of diversion be outside the boundaries of the districts, if the company has the *right* to divert the water within the districts, it is a taxable property right therein."

Appellant further contends that respondent company's right to divert water from Alameda creek is based upon the rights acquired by the various conveyances above mentioned from every riparian owner on the creek within the districts; and that by means of these conveyances respondent acquired a definite property right separate and distinct from the individual riparian rights of the owners, but which right is nevertheless situated for the purposes of taxation along the entire length of the creek, since it arises out of and is based upon the acquisition of the rights appurtenant to the riparian lands.

We have in this case a finding that all riparian lands in the districts have been assessed without exclusion or deduction of or on account of the riparian rights incident thereto, and taxes for the full amounts according to such assessments were levied and collected upon said lands on behalf of the districts named.

[2] The rights assessed, toward which the entire inquiry is directed, are described as

"the right to divert for business and commercial purposes." It has been held in California that an assessment of riparian lands includes the riparian water rights if there is nothing appearing in the assessment rolls denoting a contrary intention. *Spring Valley Water Co. v. County of Alameda*, 24 Cal. App. 278, 141 P. 38. Therefore, under the finding of fact heretofore referred to, we must conclude that when all of the lands riparian to Alameda creek were assessed at their full cash value (Pol. Code, § 3627), without exclusion or deduction of or on account of the riparian rights, the said rights were included in the assessment, and from the further finding that the taxes levied pursuant to said assessment have been paid, we conclude the taxing power exhausted.

[3] The question as to whether or not riparian rights may be taxed as separate from the riparian lands is not before us for determination. Nor does the question demand or require any exhaustive or analytical review of the authorities on the law of riparian rights. The view of the highest court of our state has been announced in the *Herminghaus Case*, 252 P. 607. In general, we may say that the right to the use of the water course, *ex jure natura*, or as incident to the land, under the common law, is subject to be abridged, enlarged, or modified by grant. But the extent of such abridgment, enlargement, or modification is to be measured by the express stipulation contained in the grant or instrument of conveyance itself. A riparian owner may grant the right to the use of water as permitted him under the common-law rules to another, and as between himself and his grantee such a deed is binding. *Kinney on Irrigation and Water Rights*, §§ 530, 533.

[4, 5] Taking the grants in the present case we find that, while a comparatively small number did not restrict or limit the right granted, by far the greater number of grants did contain such a restriction. While it may be conceded that certain owners of lands riparian to Alameda creek did convey to plaintiff their riparian rights in, of, and to said creek, yet the effect of this grant would be to convey only the rights of the particular grantors. One riparian owner or any number of riparian owners less than all could not, by grant or otherwise, extinguish or diminish the riparian rights attaching to the lands of other nonconsenting riparian owners. Therefore, as far as plaintiff in the instant case acquired any rights by a purchase from all of the riparian owners, the sum total of the rights acquired by plaintiff would be limited by the restrictions of a particular grant. This would be apparent from the very nature of the riparian right, for the reason that, assuming there were twenty riparian owners on a stream, the grant or deed of nineteen of these owners could not destroy the right of

the remaining one, and whatever property the grantee of these nineteen might obtain through the grant would still be subject to the riparian claim of the remaining nonconsenting owner. *Duckworth v. Watsonville, etc., Co.*, 150 Cal. 526, 89 P. 338. When plaintiff here had purchased the riparian rights of all of the lands riparian to Alameda creek, we find it had the right restricted by this provision:

"But this grant shall be and is hereby limited to the waters which shall be above the inlet of the Vallejo Mill stone chute specified as the point of diversion, and shall not apply to any of the waters of said creek, or of its tributaries, which shall be below said inlet of said Vallejo Mill stone chute."

It is a found fact that the point of diversion thus specified is beyond and without the territorial limits of any of the districts named. It is evident from such a deed that the grantor did not grant his entire riparian right, but merely impaired and abridged his right to the extent specified; namely, that he by grant permitted his grantee to divert the waters of the stream at a given point thereon. It needs no citation of authority to support the proposition that the grantor, riparian owner, could insist upon and enforce as against his grantee a full enjoyment of his riparian right restricted only by the terms of his grant, and that if diversion were made at any point other than specified the riparian owner could enjoin the same.

Appellant cites authority to the effect that the point of diversion or place of user may be changed by the owner of a water right when no one could be injured thereby. This doctrine is not questioned here, but its application is not discernible. Here the point of diversion is restricted by the grant, and to a great extent constitutes the grant. The control of the grantee is not absolute, and the enjoyment of his right is based, not upon his own appropriation or his own independent claim of user, but solely upon his limited grant.

[6] Appellant throughout bases his contention upon the theory that the rights of plaintiff, *Spring Valley Water Company*, include the right to divert water at any point on the stream, and appellant derives this theory from its assumption that plaintiff is the owner of all of the riparian rights on the stream. We think appellant has based his contention upon an unsound premise. As indicated, plaintiff has under the grants a restricted right not embracing all of the riparian rights in Alameda creek. What the plaintiff did acquire by these grants was exactly what the court found, to wit, the right to divert water from Alameda creek for business, commercial, and nonriparian purposes at a specified point on said creek without the territorial limits of the districts here involved.

Much has been written of and concerning the riparian right as such. It is difficult, if not impossible, to state clearly the extent of this right in all of its possible variety. The case noted hereinbefore, *Herminghaus v. Southern California Edison Co.* (Cal. Sup.) 252 P. 607, after an exhaustive review of the subject, at page 616, thus defines the riparian right:

"As such riparian owners said plaintiffs are abstractly entitled to the reasonable use of the said waters of said river at all seasons of the year. Their right thereto is to the usufruct of said flowing stream in the usual and ordinary course of its flow, and this right is a vested right inherent in the soil of their said lands and not a mere incident or appurtenant thereto. It is a right which is neither gained nor lost by use or disuse abstractly, and in the absence of adverse rights gained by others by prescription or of their loss by laches creating an estoppel. * * * It is a right which they partake of in common with other riparian proprietors along said stream entitled to a similar usufruct in its waters. It is a right which appropriators of water from said stream do not * * * share with riparian owners thereon, in the absence of rights to the use of said waters gain by such appropriators by grant or by prescription."

Also *Fall River Valley Irr. Dist. v. Mount Shasta Power Co.* (Cal. Sup.) 259 P. 444.

[7] Conceding, as we must, that this accurately and fully defines the right, it follows that the riparian right as such is a right to the usufruct inherent in the lands.

It has been stated:

"Riparian rights incident or appurtenant to no land cannot exist. * * * The right is incident to the land—belongs to it by nature. We have not found any case holding that it may be severed from the right to the abutting land, so as to become a right in gross." *Lake Superior Land Co. v. Emerson*, 38 Minn. 406, 38 N. W. 200, 8 Am. St. Rep. 679.

While this was stated in 1888, many years ago, it was written of and concerning a doctrine of very ancient origin, and it is applicable in the main now as it was then. However, and not altogether in conflict with this idea, the California courts have held that the riparian right may be separated from the ownership of the soil, though the said courts have not held that there may be two separate and distinct rights in the soil and in the water, and each of these rights classed as riparian. In *Gould v. Stafford*, 91 Cal. 155, 27 P. 545, it is said:

"The right of a riparian proprietor to the flow of a stream of water over his land is an incident of his property in the land, is annexed to the land, and considered part and parcel of it, * * * but may be severed or segregated from the land by grant, by condemnation, or by prescription."

If, therefore, a riparian owner grants away all or any portion of his riparian right,

he thereby to the extent of such grant severs from the land his riparian rights.

In *Yocco v. Conroy*, 104 Cal. 471, 38 P. 108, this language is used:

"To whatever extent defendant [the riparian owner] granted * * * the use of the water of the stream, to the same extent he parted with his riparian right to divert or use that water to the detriment of his grantee."

[8] We conclude from the cases cited and from the very nature of the riparian right as defined and recognized that while a riparian owner may by grant, laches sufficient to create an estoppel, or by prescription lose his riparian rights as such, and thus cause a severance of the right from the land, nevertheless the severed right, apart from and distinct from any claim of ownership in or to the land, cannot be classed as a riparian right, a part and parcel of the soil. In other words, to class this severed right as riparian would be to hold that, being separate and apart from the land, it exists because it is a part and parcel of the land from which it is severed—being an illustration of exquisite folly resulting from wisdom too finely spun. If, as generally held, the right of a riparian owner includes and consists mainly of the right to have the water of a stream to which his land is riparian flow down the natural channel to his land unobstructed and unpolluted, it would seem manifest error to conclude that this right could be exercised and enjoyed by a diversion of the waters in a manner wholly preventing the waters from ever reaching the lands to which it was attached.

[9] It follows, therefore, that the effect of a grant of riparian rights as separate from the land is as stated in *California, etc., Co. v. Madera Irr. Co.*, 167 Cal. 86, 138 P. 721, as follows:

"The effect of such a grant is simply to convey the grantor's right to the use of the water on his own riparian land, and to estop the grantor to complain against any use of the water which the grantee may make to the injury of such riparian right. * * * Such estoppel is effective as to the whole riparian right of the grantor simply because of the terms of his purported grant thereof. By reason of his voluntary act he has waived for himself and his successors all claims based on the doctrine of riparian rights, and is in no position to complain of any invasion thereof by the grantee or his successors."

See, also, 26 Cal. Jur. 216.

[10] Without further citation we conclude that when plaintiff herein acquired the riparian rights so called, limited as they were to the place of enjoyment specified, the exact estate or interest acquired consisted of a waiver on the part of the several riparian landowners to insist upon their riparian rights. In other words, to the extent in the grant restricted, each riparian owner grant-

ed to plaintiff the right existing in the grantor to demand the entire flow of the stream in its natural course down to the riparian lands. Therefore, when plaintiff made actual diversion of the waters of Alameda creek at a point above the lands of the consenting landowners and, as found here, devoted the waters to a useful nonriparian use, the right of plaintiff was and is in no sense riparian, but it is a separate and individual right, the enjoyment of which is permitted by the grant waiving the right of the lower riparian owner to enjoin the use.

In passing, however, it may be said that this self-created estoppel runs not merely against the consenting riparian owner but likewise against the riparian lands. Arguendo, it could perhaps be urged, therefore, that such a result could only demonstrate a transferred interest in the lands. However, this opportunity for debate represents one of the difficulties encountered in the attempt to preserve individual property rights and promote agriculture development in the face of an established policy which only too frequently militated against the latter. See *Gould v. Stafford*, 91 Cal. 146, 27 P. 543.

[11] With reference, then, to the right of plaintiff herein to divert the waters of Alameda creek at a point without the territorial limits of the districts involved, and to put the waters diverted to nonriparian uses without the said districts, we hold that the situs of that right on the stream is at the point of actual diversion and not within the territorial limits of any of the districts named.

[12] The appellant contends further that the right necessarily and inherently is a right in the stream, and therefore extends to the entire stream throughout its length and flow. In answer to this we have the court's finding that the diversion of plaintiff exhausts the stream at the point of diversion, from which it would appear that there is no stream to which the right could thereafter attach itself. Passing this, however, we are not prepared to hold that a right of diversion in a stream extends throughout the entire length of the stream for purposes of taxation. If we did adopt this view, it might follow that a water user in a stream rising in one county and flowing down through several other counties would be subject to taxation in every such county. While, as stated, in theory a water user may be said to have some sort of inchoate right in the entire stream, the question arises as to the extent of that right in any portion of the stream below his point of diversion. Repeating, we hold that the situs of the right here involved is at the place of its enjoyment; namely, at the point of diversion. Conceding, as claimed by appellant, that a right may be taxed even if not enjoyed, nevertheless when the right and the actual user thereof combine the necessity of speculating upon the situs of an unenjoyed

right does not arise. The use locates the right.

Judgment affirmed.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

88 Cal. App. 170

SPRING VALLEY WATER CO. v. PLANER,
County Tax Collector. (Civ. 5908.)★

District Court of Appeal, First District, Division 1, California. Dec. 31, 1927.

Hearing Denied by Supreme Court Feb. 27, 1928.

1. Mandamus ⇨12—Performance of plain duty may be compelled by mandamus.

Writ of mandate will issue to compel the performance of a plain duty.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Mandamus.]

2. Mandamus ⇨118—Mandamus lies to compel tax collector to issue receipt on tender of tax legally due on showing that legal and illegal taxes were capable of segregation.

Where taxpayer tendered and offered to pay all amounts legally due and collectable, omitting therefrom only such taxes as were illegal and void, tax collector may be compelled by mandate to issue receipt in full, where it appeared that illegal and legal taxes were separately computed and collected and thus capable of segregation.

3. Taxation ⇨604—Equity takes cognizance of and gives necessary relief in tax affairs.

Equity takes cognizance of tax affairs and gives relief where necessary and prudent, particularly when tax sought to be enforced is void.

4. Taxation ⇨604—Remedies of equity practice will not be withheld where property sought to be burdened with tax is without territorial jurisdiction.

Where property of taxpayer is sought to be burdened with a tax and property is without the territorial jurisdiction of the taxing body, the remedies of the equity practice will not be withheld.

5. Mandamus ⇨118—Mandamus to compel tax collector to issue receipt on tendering legal amount of taxes will not be refused as vesting discretion in tax collector.

Mandamus to compel tax collector to issue receipt showing payment in full of taxes on tender of all taxes except those illegally assessed will not be refused as placing a discretion in taxing officer to determine what portion of tax is valid and what portion invalid, not contemplated or authorized in general scheme of taxation, since the issuance of the writ concludes the question of discretion and is negative of any idea that such discretion is vested in tax collector.

Appeal from Superior Court, Alameda County; H. L. Preston, Judge.

Proceeding in mandamus by the Spring Valley Water Company against Edward T.

Planer, as Tax Collector of the County of Alameda. Judgment for plaintiff, and defendant appeals. Affirmed.

Earle Warren, Dist. Atty., and R. H. Chamberlain, Jr., Deputy Dist. Atty., both of Oakland, for appellant.

McCutchen, Olney, Mannon & Greene, of San Francisco, for respondent.

PARKER, Justice pro tem. Appeal by defendant from judgment in favor of plaintiff.

[1] This is a proceeding in mandamus. The case involves the validity of certain taxes assessed and also presents the question of the propriety of the remedy sought. The purpose of the action was to compel the tax collector to issue to plaintiff his receipt showing payment in full of current taxes upon the tender of all taxes save and except the district taxes discussed in *Spring Valley v. Alameda* (Civ. 5911) 263 P. 318, this day decided by this court. The contention of appellant is that this is not a proper exercise of the writ of mandate, and his ground of contention is that to employ the writ in similar cases would tend to endless confusion in the system of tax collections, and that plaintiff has a plain, speedy, and adequate remedy under the general law. However, it is the law that the writ of mandate will issue to compel the performance of a plain duty, and it is obvious that when a legal tender, within the time specified by statute, of an amount sufficient to discharge the tax claim is made to the tax collector, it is his duty to issue the usual receipt, and mandate lies to compel the performance of this duty. *Perry v. Washburn*, 20 Cal. 318.

The plaintiff here in its complaint alleged such a tender on the stated allegations that the taxes which had been omitted from the tender were illegal and void; in other words, that he had tendered and did tender and offer to pay all amounts legally due and collectable. Upon proof of these allegations he would be entitled to the writ of mandate.

[2-4] In the case at bar it appears that the district taxes were separately collected, and the amounts thereof were not embraced in the general tax rate of the county. It appears from the tax rolls in evidence that the general rate was the basis of a separate computation throughout, and in cases where property was sought to be subjected to a district tax the rate and amount of such tax were interlined or stamped on the assessment. We can see no occasion for the confusion feared. The judgment of the court declaring of no effect the attempted imposition of district taxes upon the property of plaintiff operated as a cancellation of the tax erroneously imposed, and this judgment will easily satisfy the demands of the system. If plaintiff chose, it could have paid the tax under protest, or it could have paid

and made demand on the supervisors to refund on the theory of an unlawful or erroneous assessment, or it could have permitted the entire taxes to become delinquent and the property eventually go to sale, and then test out the validity of the tax in question. In either of these cases the local government would have the funds of plaintiff, and handle them in the regular business of government, and if the tax were declared invalid a restitution would follow. It seems, as far as the anticipated confusion is concerned, it would be far more chaotic to be carrying along uncertain and questionable funds than it would be to have the matter determined at once. The court below found sufficient facts upon which to base its conclusion that the obligation of the entire first installment of all of said taxes had been paid in full. That equity takes cognizance of tax affairs and gives relief where necessary and prudent is amply sustained by authority. See *High on Injunctions*, chapter 8, § 484 et seq. And particularly will the courts by extraordinary process intervene when the tax sought to be enforced is void. Meeting the question as presented, we would hold that where property of a taxpayer is sought to be burdened with a tax, and the property is without the territorial jurisdiction of the taxing body, the remedies of the equity practice will not be withheld. As hereinbefore noted, the tax was void and of no effect as to this property. It was not a case of a mere error in the manner of collection, or of the time of levy or assessment. At no time could the tax become a lien upon the property in question. The tax was easily segregable from the general levy; and if it were not, then the question of segregation would be as difficult in any future stage of the tax proceedings.

In addition to what has been said, it appears that it would be an idle act, tending to unnecessarily prolong the instant litigation, if we were to hold the tax invalid and yet reverse the judgment. If we were now to hold the plaintiff to its remedies at law, the result would be to require further statutory proceedings, all based upon a concededly invalid and void tax. The tax in as far as it affects the property of plaintiff has been adjudged void, and the issuance of the receipt for taxes now admittedly in full payment is a proper subject of mandate.

[5] Appellant urges that to allow the tax collector in each instance to determine what portion of a tax is valid and what portion invalid must be to place in that officer a discretion not contemplated or authorized in the general scheme of taxation, and will tend to wreck and disorganize the system outlined. The obvious answer is that the issuance of the writ of mandate concludes the question of discretion and is negative of any

idea that such a discretion is vested in the tax collector.

In *Perry v. Washburn*, supra, it is said:

"The taxpayer, upon the payment of his tax * * * is entitled to a receipt from the collector, and it is the duty of that officer to execute and deliver the same. It is a duty which the law specially enjoins on him, and its performance may in consequence * * * be enforced by mandamus. * * * The taxpayer is not obliged to trust to parol evidence of his payment, which is liable to loss; he is entitled to a record of the fact on the books of the collector, and to written evidence of the fact in his own possession."

The evident purpose of the present action was to have determined the validity of the tax involved. When the tax was determined and adjudged to be void, the conclusion followed that plaintiff had made a lawful tender of all taxes due, and it is not disputed here that such tender was lawful and continuing. It seems clear, then, that under the decision quoted plaintiff would be entitled to his receipt, as the only claim of the tax collector upon which a denial of the receipt rested was that plaintiff had not tendered the full amount due. To determine the tax invalid and void as against the property assessed, and then remit plaintiff to a pursuit of statutory remedies would seem useless and unreasonable, particularly when all subsequent proceedings would have as a support the foundation which had already been decreed as void and of no effect. Whatever other remedies might be allowed by statute, it would all come back to the proposition that plaintiff should be relieved from the payment of an illegal and void tax.

Judgment affirmed.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

88 Cal. App. 192

BROWN v. SHROEDER et al. (Civ. 6043.)

District Court of Appeal, First District, Division 1, California. Dec. 31, 1927.

1. Appeal and error ⇨1170(10)—Failure to make further finding relative to fraud held not reversible error, where findings and judgment indicated that more complete findings would have been adverse to appellant (Code Civ. Proc. § 956a, as added by St. 1927, p. 583; Const. art. 6, §§ 4½, 4¾).

In action for dissolution of partnership and accounting, in which defendant alleged plaintiff obtained his interest by fraud, court's failure to make further findings as to such fraud is not ground for reversal, where from facts found and judgment ordered it was evident, in light of entire record, that, if more complete findings had been made, they would have been adverse to appellant under Code Civ. Proc. §

956a, as added by St. 1927, p. 583, and Const. art. 6, § 4¾, read in connection with section 4½.

2. Trial ⇨397(1)—Specific finding as to each material issue is not always necessary, where findings as whole show court's conclusion.

It is not always necessary to make specific finding as to each of several material issues, where findings, taken as whole, or construed together, clearly show that they include court's conclusion on all material issues.

3. Appeal and error ⇨931(7)—Reviewing court will conclude that court rested judgment on clear, sustained, and sufficient finding, if there be one, and disregard others.

Where, in any case, there is a clear, sustained, and sufficient finding on which judgment may rest, every presumption being in favor of judgment, it will be concluded on appeal that court rested its judgment on such finding, and others may and will be disregarded.

4. Appeal and error ⇨996—Reviewing court may draw necessary inferences from findings to support judgment.

Reviewing court is entitled to draw necessary inferences from findings in order to support judgment.

5. Trial ⇨377(2)—Allowing plaintiff to reopen case for further testimony held not abuse of discretion, where record did not show that any further testimony was introduced.

Trial court's action, in permitting plaintiff to reopen case for further testimony, after cause had been submitted, and court had announced decision, and minute order directing judgment for plaintiff had been entered, held not abuse of discretion, where record did not show that plaintiff offered any testimony after case was reopened; no harmful result being shown.

6. Fraudulent conveyances ⇨299(10)—Testimony as to plaintiff's indebtedness held not to justify finding of fraud in failing to record instruments under which he acquired certain property, without showing of inability to pay indebtedness from other assets.

Testimony showing that indebtedness existed between plaintiff and certain creditors held not sufficient to require finding of fraud in plaintiff's failure to record instruments under which he acquired half interest in certain property, since fraud will not be presumed from mere showing of indebtedness, particularly where record is silent as to plaintiff's ability to pay from other assets.

7. Appeal and error ⇨1071(1)—In suit to dissolve partnership, erroneous finding that allegation that defendant held property in trust for plaintiff was true held not reversible error, in view of other findings.

In suit for dissolution of copartnership and for accounting, erroneous finding that allegations of certain paragraph were true, referring to allegation that defendant held interest in property in trust for plaintiff, held not to warrant reversal, where further specific findings did not impose trust, especially since al-

legation found to be true is purely one of law, and general finding, so far as it is concerned, is finding of immaterial matter.

8. Judgment $\S$ 565—Judgment of dismissal "without prejudice" held not to bar subsequent action between same parties on same subject-matter.

Suit for dissolution of partnership and for accounting held not barred by dismissal without prejudice on plaintiff's motion, with consent of defendants' counsel, of prior suit setting up identical cause of action, since purpose of words "without prejudice" was to prevent defendants from availing themselves of defense of res judicata in subsequent proceeding (citing Words and Phrases, "Without Prejudice").

9. Appeal and error $\S$ 1172(1)—Error in judgment in requiring appointment of receiver held not to require retrial.

In suit for dissolution of partnership and for accounting, error in judgment in requiring appointment of receiver will not require retrial of case, but judgment will be reversed in part, with directions to enter correct judgment.

Appeal from Superior Court, Alameda County; James G. Quinn, Judge.

Action for dissolution of a copartnership and for an accounting by Harry Brown against Dorothy Shroeder and another. Judgment for plaintiff, and defendants appeal. Reversed in part, with directions.

Richard Liebman and Frank M. Carr, both of Oakland, for appellant Shroeder.

Stanley R. Sterne, of Oakland, for appellant Crist.

L. D. Manning and W. E. Harvent, both of Oakland, for respondent.

PARKER, Justice pro tem. Defendants, in separate appearance, appeal from judgment in favor of plaintiff, decreeing a dissolution of partnership and ordering an accounting and appointing a receiver to wind up the affairs of an alleged copartnership. A brief summary of the pleadings and the facts, as the case is before this court, will be necessary at the outset.

Plaintiff alleged in his complaint that at a time, fixed therein as December 20, 1923, he was the owner of a certain interest in the furniture and equipment of an apartment house known as and called Lotus Apartments in Oakland, together with a leasehold interest and estate in and to the said premises; that on said date plaintiff sold and conveyed to defendant Dorothy Shroeder all of his title and interest in and to said furniture and the lease for a valuable consideration, which plaintiff received in full; that at the same time, and as a part of the same transaction, the said Dorothy Shroeder executed and delivered to plaintiff a bill of sale, transferring to said plaintiff a one-half interest in the said furniture, furnishings, and

leasehold interest; that as a further part of said transaction, and on the same date, plaintiff, Harry Brown, and defendant Dorothy Shroeder entered into a partnership agreement for the purpose of operating the apartment house, agreeing to bear equally the expenses thereof, and dividing equally between them the profits. This agreement provided that, in the event a bona fide offer to purchase the lease, furniture, and good will of said copartnership business is made by any person, the partner not desiring to sell must buy from the party desiring the sale, his one-half interest for one-half the purchase price offered by the intending buyer. The partnership agreement further provides that, in case legal action is brought for the breach of the said agreement, then the party guilty of such breach shall pay to the other upon demand an attorney's fee of \$250 for prosecuting said action, and that said sum is a reasonable sum for said fee, and that the same shall be a part of the expense in said action.

The complaint further alleges that on March 18, 1924, the said plaintiff, Harry Brown, and defendant Dorothy Shroeder entered into another agreement supplemental to the said agreement of partnership, by the terms of which agreement of March 18, 1924, all accounts of said partnership business were mutually settled and adjusted between plaintiff Brown and defendant Shroeder. In this last agreement, amongst other things, it was provided that, if defendant Dorothy Shroeder shall fail to account to plaintiff, Harry Brown, on the 15th day of every month, or shall fail to fully perform and observe each and every provision of this agreement, and also of the agreement of December 20, 1923, the plaintiff, Harry Brown, shall be entitled to an immediate dissolution of the partnership existing and to the immediate appointment of a receiver to take full charge of said business and full possession of the premises and all the assets of said business.

Plaintiff then alleges a failure of defendant Shroeder to account, and an exclusion of plaintiff from the premises. Plaintiff next alleges that on or about April 11, 1924, defendant Shroeder executed a document purporting to sell to defendant Herman Crist all of her right, title, and interest in and to the lease and other personal property, and delivered said document to defendant Crist, and that defendant Crist claims an interest in and to the said lease and personal property by virtue of the bill of sale, but that defendant Crist has never been in possession thereof; that said attempted sale was without knowledge of plaintiff; and that he (plaintiff) was never informed of the desire of Shroeder to sell nor of the offer of Crist to buy. Plaintiff alleges this purported transfer to

defendant Crist was made without consideration, and with full knowledge of plaintiff's interest.

The defendants Dorothy Shroeder and Herman Crist appeared separately.

The answer of defendant Dorothy Shroeder denied that on December 20, 1923, or at any time prior thereto, or at any time, or at all, plaintiff had any interest in the apartment house in question. The said defendant Dorothy Shroeder in her answer sets up the history of her relationship with plaintiff, Harry Brown, commencing in April, 1922. She avers that at that time she had consented that Brown act for her in the purchase of the furniture, furnishings, and lease of the apartment house in question; that very shortly thereafter Brown reported to her that he had purchased the place for her, and she went into possession, after paying Brown the sum of \$4,500, and that she entered the premises in her own right, and that plaintiff Brown at that time never claimed any interest therein; that, upon her persistent demands for a bill of sale or other document evidencing her title, the plaintiff, Brown, informed her that he had paid \$9,000 for the lease and the furnishings, and that she (Shroeder) was the owner of only a one-half interest. The answer of this defendant then alleges that she learned that plaintiff Brown had paid \$5,500 instead of \$9,000, and that she thereupon paid to him, and he did accept, the sum of \$1,000 additional to cover his payment in excess of the \$4,500 already paid him by this defendant. Defendant Shroeder further alleges that thereafter, to wit, in October, 1923, Brown commenced an action in the superior court of Alameda county against her, wherein he sought a judgment declaring him a partner with her, and also the appointment of a receiver, and that said action was dismissed at request of said Brown on March 18, 1924.

Defendant Shroeder admits that on December 20, 1920, Brown executed and delivered to her the bill of sale pleaded in the complaint. She denies, however, the execution by her of the bill of sale to Brown for a one-half interest, or the execution by her of the agreement of partnership or the agreement pleaded as supplemental thereto. In

this connection she avers her ignorance of English, written or spoken, and her total unfamiliarity with business proceedings. She alleges that these last-mentioned agreements were represented to her as being connected wholly with the suit pending wherein a receiver had been appointed, and were in effect mere formalities, having for their purpose the dismissal of the suit and withdrawal of receiver; that at no time were the contents of either agreement explained to her, and she had no opportunity for independent advice or counsel; that the procurement of her signature to the said instruments was fraudulent; that the alleged bill

of sale or transfer, purporting to convey from her to Brown a one-half interest in the property and lease, was never executed by her in any manner or at all. She admits the sale of the premises to defendant Herman Crist, and alleges the same to have been in good faith and for a cash consideration of \$4,500, and accompanied by delivery, and pleads the recordation of her bill of sale from Brown prior to sale to Crist. She further alleges that an action commenced against her by Brown was on the identical cause of action here pleaded, and that the judgment of dismissal therein entered at the request of plaintiff, Brown, and by consent of defendants, with stipulation that each party pay his own costs, was a judgment on the merits and a bar to the maintenance of the present action.

Defendant Herman Crist in his answer denies that plaintiff was ever the owner of the apartment furnishings and lease; denies on information and belief the allegations of plaintiff concerning plaintiff's dealings with defendant Shroeder; and alleges that the transfer from Dorothy Shroeder to Crist was bona fide and for a valuable consideration, and without notice of any claims of plaintiff. He alleges the recordation of the bill of sale from plaintiff to Dorothy Shroeder and the issuance of the municipal license to Shroeder, and the further fact that nothing appeared of record any place to give constructive notice of the claim of plaintiff, and alleges plaintiff's negligence in permitting the defendant Shroeder to be clothed with apparent ownership, and that plaintiff, Brown, has intentionally concealed his interest in the premises for the purpose of deceiving and defrauding his creditors and innocent purchasers.

For a further answer the defendant sets up the judgment referred to by defendant Shroeder, and pleads the same as a bar to the present action.

A trial was had by the court, and evidence offered and submitted. The court made and entered its findings of fact and conclusions of law in favor of plaintiff and against the defendants.

Each of the defendants named has appealed, and each presents the appeal upon a separate bill of exceptions. By a separate bill of exceptions it is meant, however, that defendant Crist presents his bill of exceptions fully engrossed, and the bill of exceptions of defendant Shroeder, while purporting to be a separate bill, adopts in great part the transcript of her codefendant. In passing it may be said that this is a rather unorderedly method of presentation, and one fraught with much uncertainty.

It may be here noted that respondent contends that the order appealed from is not an appealable order, in that it is not a final judgment. We deem it needless to give further notice to this contention, for the reason

that this court has heretofore passed upon that specific point with reference to this identical order. See *Schroeder v. Superior Court*, 73 Cal. App. 687, 239 P. 65.

The appellant Dorothy Shroeder bases her appeal upon two main grounds, namely: (1) The court failed to find on the defenses of fraud specifically, and specially pleaded and raised; (2) the judgment rendered upon the findings is erroneous upon its face.

[1] As to the first ground, failure to find on fraud allegations, the court did find specifically that the allegations of the complaint were true, excepting that there was an express failure to find on the amount of profit derived from the venture, but found that an accounting will be necessary between the parties, and that the appointment of a receiver was not necessary.

The court specifically found that in May, 1922, the defendant Dorothy Shroeder entered into an agreement to purchase from plaintiff, Brown, a one-half interest in the furniture, furnishings, and lease, and that, on June 6, 1922, she paid the balance of the agreed purchase price, and entered into a partnership agreement, and further specifically finds that the lease on the property was, on April 26, 1922, assigned to plaintiff, Brown, and that he (Brown) on June 6, 1922, assigned one-half interest to Dorothy Shroeder.

The issue tendered by defendant Shroeder was that in April Brown was to act merely as her agent and purchase for her alone the premises here under discussion. This is the first allegation of fraud; namely, Brown represented to her that he was buying the property solely for her, and he was to have no interest therein. We think the finding of the court as noted sufficiently covers this issue.

The defendant Shroeder bases her claim of fraud particularly upon the fact that throughout the entire transaction there was never any agreement or understanding, save that she was to be the sole purchaser, and she makes unequivocal denial that she ever made any bill of sale to plaintiff, Brown, of a half interest in the furniture and lease. The court finds that she did execute and deliver to plaintiff the said bill of sale.

The defendant Shroeder, after denying the execution of the bill of sale, does admit her signing the partnership agreement and the subsequent agreement affirming the same and settling the partnership accounts up to March, 1924. But she alleges that she was induced to sign these instruments through the fraud of plaintiff, in that he represented to her that these instruments were of an entirely different nature, and that she, relying upon these representations, was misled to her injury.

The court finds that these instruments were executed by defendant at the time and in the manner as set forth in the complaint, and that, at the time of the execution of the

last agreement, the defendant Dorothy Shroeder paid plaintiff \$250 in settlement of their accounts to that date.

It can readily be seen that all of the allegations of fraud and deceit interposed by way of defense by defendant Dorothy Shroeder are predicated upon the first ground of her defense; namely, that the entire transaction with Brown was in his capacity as broker, and that she was to have the full title, and that she never executed any bill of sale to him. The essence of the subsequent fraud would be not that he, as a half owner, persuaded her to sign a partnership agreement, thinking it was something else, but that he, with no title or claim at all, thus imposed upon her. As to this the court did make express findings.

The court further found that plaintiff, Brown, sold and conveyed the property in question to defendant Shroeder for a valuable consideration, which plaintiff received in full from said defendant. The court further found that the plaintiff executed and delivered to defendant Shroeder during the pendency of the former suit a bill of sale for the entire property, *and that as a part of that transaction* Dorothy Shroeder executed her bill of sale for the one-half interest to plaintiff, and that both parties executed the partnership agreement.

We deem these findings sufficiently responsive to the issues of fraud that were tendered. It can readily be inferred therefrom that the court thereby found that the true transaction was as found, and that the defendant Shroeder was not executing other instruments. Also there is a general finding by the court that the allegations of the answer of Dorothy Shroeder, except as noted, are untrue.

In support of our conclusion on the sufficiency of the findings, we call attention to the following principles of law governing in respect thereto:

[2] It is not always necessary to make a specific finding as to each of several material issues where the findings taken as a whole, or construed together, clearly show that they include the court's conclusion upon all the material issues. *Rossi v. Beaulieu Vineyard*, 20 Cal. App. 770, 130 P. 201.

[3] If in any case there be one clear, sustained, and sufficient finding upon which the judgment may rest, every presumption being in favor of the judgment, it will be here concluded that the court did rest its judgment upon that finding, or those findings, and the others may, and will be, disregarded. *American National Bank v. Donnellan*, 170 Cal. 15, 148 P. 188, Ann. Cas. 1917C, 744; *Thayer v. Tyler*, 169 Cal. 671, 147 P. 979.

In the case of *Berry v. Crowell*, 55 Cal. App. 537, 203 P. 836, it is said:

"Under the general finding of the court, all facts alleged in the answer not specifically referred to in those findings, are determined to

be true. This general finding is sufficient to embrace that allegation contained in the answer setting forth, from the side of the defendants, just what representations were made, and all of them. * * * If sufficient can be gathered from the whole of the findings of the court that material issues are fairly determined, the finding will support the judgment. 'It was not necessary that the facts as found should be in any particular form or follow the pleadings. If the truth or falsity of each material allegation in issue can be demonstrated from the findings, the law is complied with.'"

From the facts found and from the judgment ordered it is evident, in the light of the entire record, that, if more complete findings had been made, they would have been adverse to the contentions of appellant. If that be so, the failure to find further is not ground for reversal of the judgment. *Krasky v. Wollpert*, 134 Cal. 338, 66 P. 309.

[4] We are entitled to draw necessary inferences from the findings in order to support a judgment. *Hulen v. Stuart*, 191 Cal. 571, 217 P. 750.

In *Millard v. Legion of Honor*, 81 Cal. 342, 22 P. 864, Justice McFarland, in referring to the necessity of findings and the Code provision governing, uses this language:

"One main object of the provision seems to have been to prevent a court from summarily ordering judgment without giving any reasons for it—without stating any facts or legal conclusions upon which it is based. There was also, no doubt, some intent to facilitate the review of a judgment on appeal. But surely the main object was not to afford a cover under which a losing party might successfully set a trap to capture a just judgment. The findings come after the case has been tried, considered, and determined, and after the character of the judgment * * * right or wrong, has been fixed. They are merely incidental to the main thing—the judgment; and to test their sufficiency by a standard which exacts the extreme of accurate statement and minute detail is to put the incident in the place of the principal."

The words of the learned justice are most fitting at this time. By the recent constitutional amendment, section 4½, art. 6, Constitution of California, and the legislation following said amendment, section 956a, Code of Civil Procedure (St. 1927, p. 583), this state has adopted these views as a matter of governmental policy. Whatever may be the practical effect of the amendment to the Constitution or the legislation following it, it is obvious that the general effect intended was as expressed in the Code section, namely, that, wherever possible, causes may be finally disposed of by a single appeal and without further proceedings in the trial court, except where the interests of justice require a new trial. This new section to the Constitution follows section 4½, art. 6, and no doubt should be read in connection therewith, the two constituting a striking example of the

evolution of the organic law to keep pace with modern ideals.

2. The second ground upon which defendant Shroeder bases her appeal, namely, that the judgment rendered upon the findings is erroneous upon its face, embraces practically the same contentions urged by her co-defendant Crist on his appeal. Therefore we will pass this ground, and discuss it with the claims of Crist.

Appeal of Defendant Herman Crist.

This defendant bases his appeal upon the following grounds:

[5] (1) The trial court abused its discretion in granting plaintiff's motion to reopen said cause. It appears that, after the cause had been submitted, and after the court had announced its decision, and a minute order directing judgment for plaintiff had been entered, the plaintiff, on motion, was permitted to reopen the case to present further testimony. From the record before us it does not appear that the plaintiff offered any testimony after the case was reopened, but the appellant rests his contention that the order permitting the reopening was improper upon and cites the affidavits filed by plaintiff on his motion as being insufficient, and claims, therefore, that the order setting aside the submission was erroneous. In other words, appellant does not complain because the cause was reopened, but that the order of submission was set aside. As indicated, all the record discloses is that the cause was reopened. There is nothing to show what testimony was taken or proceedings had, if any, after the reopening. No harmful result is shown, nor do any facts appear from which an inference of injury may be drawn. Appellant cites a number of cases having to do with the question of newly discovered evidence as the basis of an order granting a new trial. Obviously these cases have little, if any, application here. We find no affirmative error or abuse of discretion in the trial court's action in permitting further testimony.

[6] (2) Appellant Crist complains that the lower court failed to find upon material issues, and upon other material issues made findings wholly inadequate as a matter of law. Defendant Crist had alleged in his answer that his purchase from Shroeder was in good faith, and for a valuable consideration; that he had made search of all public records, and found the title vested in Dorothy Shroeder, and the municipal license issued to her alone; that plaintiff Brown had allowed her to remain in full and exclusive possession of the premises, and had clothed her with all indicia of ownership, and that Crist relied on these records and the apparent ownership, and purchased. He further alleged that Brown fraudulently concealed his interest, if any he had, for the purpose of defrauding creditors and innocent pur-

chasers. With these allegations Crist further pleaded an estoppel as against Brown, shutting off the right of Brown to assert any claim as against him (Crist) the innocent purchaser for value.

The court found specifically as follows: That Herman Crist, when he purchased from Dorothy Shroeder, had knowledge that plaintiff claimed an interest in the premises, and had further knowledge of the prior suit between the partners; that Herman Crist occupied an apartment as tenant for about 18 months prior to his purchase from Shroeder, and had conversed with witnesses as to the interest of plaintiff in the premises; that Herman Crist, before purchasing, had sought an assignment of the lease to himself from the owner of the building, and had failed to obtain the same, and, since his purchase, has taken receipts for the rent in the name of plaintiff. Further, the court specifically found that Crist had knowledge that plaintiff had been excluded from the premises before he purchased. The court, going further, found that there was no negligence or fraudulent intent upon the part of plaintiff in permitting Dorothy Shroeder to be in charge of the apartments on or prior to the date of the purchase by Crist, and that such charge was pursuant to the partnership agreement.

Tested by the authorities hereinbefore cited, we deem these findings amply responsive to the issues tendered. There was not a word of testimony offered or any evidence adduced as to any privity between plaintiff and defendant Crist, or as to any representations or statements made by plaintiff to Crist. Defendant Crist offered some testimony to show the indebtedness existing between Brown and other creditors, seeking thereby to create an inference that the failure to record and the continued possession of Shroeder were intended to defraud the other creditors. Fraud will not be presumed from a mere showing of indebtedness, particularly where, as here, the record is silent as to the ability to pay from other assets.

The court has specifically found Crist to have been a purchaser with full notice, and thus his status is determined. In whatever way the general conduct of Brown might have been intended to defraud or mislead creditors in general, it is obvious that it did not mislead Crist.

The judgment of the court in no wise affected the purchase of Crist in as far as the interests of Shroeder were concerned. The said judgment gave Crist what he had purchased; namely, the interest of Shroeder, subject to the claims of which Crist had knowledge when he bought.

[7] Defendant Herman Crist further specifies that the court erroneously found that he (Crist) takes the interest of defendant Shroeder, and holds the same in trust for plaintiff. The theory of appellant Crist arises from

the fact that in plaintiff's complaint, paragraph 7, appears this allegation:

"That any claim or interest of defendant Herman Crist is subject to the interest of plaintiff herein, and any conveyance of any interest of defendant Dorothy Shroeder to Herman Crist devolved in trust for the benefit of plaintiff."

The said paragraph 7 contained seven different subparagraphs on different topics, being the concluding paragraph of the complaint. The court found generally thereon as follows:

"And it is found that the allegations of paragraphs 6 and 7 are true, except that the appointment of a receiver is not necessary."

Appellant Crist contends that the effect of this finding leaves him with nothing; that whatever otherwise might be his by reason of his purchase from Shroeder he holds in trust for plaintiff.

In the first place, the allegation is a mere conclusion of law; and, if it could be held that the court specifically found as a fact that this was the law, it would not have the effect feared by appellant. The trust alleged was in connection with the other allegations; and the conclusion of law which the court reached was to the effect that defendant Crist took the interest of defendant Shroeder, subjected only to the partnership accounting and the one-half interest of plaintiff. The conclusion of the court and its judgment held that the transfer to Crist was complete as far as defendant Shroeder was concerned, and that by virtue thereof Crist, with reference to the rights of plaintiff, stood in the same position as his vendor stood as far as the rights to the property involved were determined.

The findings as a whole negative the claim of appellant Crist. In any event, as noted, the allegation found to be true is purely one of law, and the general finding thereon is a finding, as far as the allegation is concerned, of an immaterial matter.

We deem it unnecessary to review in detail all of the findings. It is clear that the result works no harm to appellant Crist, for the reason that the court makes further and specific findings on his rights in the premises, and neither directs nor decrees any trust to be imposed upon his ownership, but specifically awards him everything to him transferred, subject only to the partnership rights of plaintiff, concerning which the court found he had full knowledge.

[8] Another contention urged by both appellants is that a former judgment in an action between the same parties was and is a judgment on the merits, and bars the instant action.

The present action was commenced on July 31, 1924. It appears from the record that on April 17, 1924, this plaintiff, Harry Brown, commenced an action against the de-

defendants Dorothy Shroeder and Herman Crist in the superior court of Alameda county. The cause of action therein set up was identical with the present cause, and the issue tendered by the defendants was identical. After answer was filed, this former case came on for trial on July 30, 1924. On that date the record discloses the following entry in the minutes of the court:

"No. 77468. Brown v. Shroeder et al. On motion of counsel for plaintiff, in open court, by consent of defendants' counsel, it is ordered that the above-entitled action be, and the same is, hereby dismissed without prejudice; and it is further ordered that, pursuant to stipulation of said counsel, each side pay its own costs."

The record before us here contains the pleadings in the former case and this minute order. No judgment roll is offered and no record of any judgment ever having been entered. The main case relied upon by appellants is *Merritt v. Campbell*, 47 Cal. 547. While later authorities are cited, they are based directly upon the *Merritt* Case. In that case the court bases its conclusion mainly upon the principle that in practice it has generally, if not universally, been considered to be the intention of parties, in agreeing to dismiss an action, to thereby put an end to the controversy. However, the court specifically limits the effect of the decision by declaring it to hold "only that a judgment of dismissal, when based upon and entered in pursuance of the agreement of the parties, must be understood, *in the absence of anything to the contrary expressed in the agreement and contained in the judgment itself*, to amount to such an adjustment of the merits of the controversy by the parties themselves, through the judgment of the court, as will constitute a defense to another action afterward brought upon the same cause of action." In the instant case we have no judgment roll showing the entry of any judgment; nothing save the minute entry of the court's order of dismissal without prejudice. The dismissal "without prejudice" was surely not a judgment on the merits, nor was it an open and voluntary renunciation of a suit pending, which would be held to operate as a retraxit.

Courts are not inclined to extend the doctrine of retraxit. When there has been no adjudication of the case upon its merits, it will only be in exceptional cases that this court will hold that a judgment of dismissal is the equivalent of *res adjudicata* upon the facts. *Pyle v. Piercy*, 122 Cal. 383, 55 P. 141. It would be destructive of substantial justice if counsel were permitted to stipulate to a dismissal of a cause, expressly without prejudice, and then be permitted to urge a judgment upon the merits, basing the contention only upon the dismissal pursuant to the stipulation. The term "without prejudice" is almost self-explanatory. In "Words

and Phrases," both editions, will be found many references to cases wherein the effect of this term has been declared. In almost all of the illustrations given, the words have been used in connection with dismissals. The purpose and effect of the words "without prejudice" in a decree dismissing a bill is to prevent the defendants from availing themselves of the defense of *res adjudicata* in any subsequent proceeding by the same plaintiffs on the same subject-matter. This is the doctrine of *Story*, Eq. Pl. § 793; *O'Keefe v. Real Estate Co.*, 87 Md. 196, 39 A. 428; *Taylor v. Slater*, 21 R. I. 104, 41 A. 1001. The California cases contain nothing on the subject as applicable to a case where both parties stipulate and consent to a dismissal "without prejudice." However, the leading case, *Merritt v. Campbell*, *supra*, restricts the operation of the decision to cases, where a judgment of dismissal is entered in pursuance of the agreement of the parties, in which there is an "absence of anything to the contrary expressed in the agreement and contained in the judgment itself."

We hold that the words "without prejudice" in the case at bar is a direct expression negating the intent or conclusion that the dismissal should prevail as a judgment on the merits, and saves the dismissal from the operation of the rule of the *Merritt* Case.

Incidental to this discussion we cite the case of *McCallum v. Stull*, 59 Cal. App. 572, 211 P. 466, wherein the court says:

"It is patent that the appellant was contending in the trial court that the first action was dismissed and that therefore there was no judgment to be foreclosed. If such was the contention of the appellant, then [he] should have produced a judgment roll showing that a judgment of dismissal was entered and that such judgment was within the jurisdiction of the court entering it."

[9] Finally, both appellants here meet upon another common ground. Adopting, for this contention, the findings of fact and conclusions of law as entered in the court below, they contend that the judgment rendered and entered therein is erroneous upon its face, and not determinative of the rights of the parties to the action.

Conceding that appellants are to some extent correct in their conclusions, nevertheless we see no necessity for a retrial of the cause.

The interlocutory judgment by its terms orders, adjudges, and decrees as follows:

"That the partnership theretofore existing between Harry Brown and Dorothy Shroeder ought to be, and is hereby, dissolved as of date April 11, 1924, and that an accounting of the business of the said partnership is necessary between plaintiff and Dorothy Shroeder of all of the lease, business, good will, and other equipment of Lotus Apartments, together with the leasehold interest and estate in and to said premises;

"And it is ordered that John Meillitte be, and he is hereby, appointed receiver to take and hold possession of the partnership property pending the accounting and until the partnership business is wound up on dissolution, with power to liquidate and dispose of said business under the order and direction of the court, with bond in the sum of \$1,000.

"Plaintiff shall have judgment against Dorothy Shroeder for counsel fees fixed at \$250.

"Further ordered, adjudged, and decreed that defendant Herman Crist is entitled to all of the right, title, and interest of Dorothy Shroeder on such accounting, to wit, to the proceeds of a one-half interest in said partnership business, good will, and property."

Appellants contend that the findings of fact and conclusions of law do not authorize or support such a judgment. It is pointed out that the findings of fact declare the appointment of a receiver is not necessary, and the conclusions of law determine that plaintiff is entitled to the possession of the partnership property pending an accounting, and until the partnership business is wound up on dissolution. Further, appellants contend that the judgment is indefinite and meaningless with reference to the accounting in as far as the judgment merely provides that an accounting is necessary, and makes no provision for the taking of an account or the manner in which or by whom the account is to be taken. Lastly, they contend that, in an action between partners, no present judgment for money due should be rendered until after completion of account taken, and that therefore the judgment is erroneous, in that the court decrees that plaintiff shall have judgment against defendant Dorothy Shroeder for the sum of \$250 for counsel fees.

Plaintiff in the court below conceded the judgment to be unsupported as to the appointment of a receiver, and moved the court below to amend the judgment in that particular. The court below accordingly attempted to correct the judgment in this regard. However, this court on a writ of prohibition forbade the trial court from further proceeding and from in any manner amending the provisions of the judgment in view of the fact that an appeal had been taken. The action of this court and the reasons therefor are fully set forth in *Schroeder v. Superior Court*, 73 Cal. App. 687, 239 P. 65.

Appellants urge the accounting might disclose a balance due defendant Shroeder far in excess of this amount. In the agreement between the parties it was stipulated that, in case legal action is brought for breach of contract, the party guilty of such breach shall pay to the other upon demand an attorney's fee of \$250 for prosecuting such action, and stipulating the said amount to be a reasonable sum, and agreeing that it shall be a part of the expense of said action. The court found that defendant Shroeder was

guilty of the breach, and made the award objected to in pursuance of the terms of the agreement.

In the present case we have a complete determination of the issues and proper conclusions of law drawn therefrom. As far as the facts of the controversy may be affected, we find no error up to this point. Therefore we feel it would be and is unnecessary to order a re-examination into the facts. Taking the facts as found and the conclusions of law drawn therefrom by the trial court, the respondent plaintiff is entitled to a decree dissolving the partnership as of April 11, 1924, and that an accounting should be had. The findings of act and conclusions of law do not authorize the appointment of any receiver, but provide that plaintiff shall remain in possession of the property for purposes of liquidation and until the partnership business is wound up on dissolution.

Therefore the judgment appealed from is reversed to the extent noted, and the court below, without further trial, is directed to enter judgment as indicated herein; namely, dissolving the partnership as of the date set forth, and directing and ordering an account to be taken between plaintiff, Harry Brown, and defendant Dorothy Shroeder, and providing that, during the pendency of said accounting and the winding up of the affairs of the partnership, the plaintiff have possession of the partnership property, without the intervention of a receiver. And also the judgment shall decree the defendant Herman Crist entitled to all the right, title, and interest of Dorothy Shroeder on such accounting, to wit, the proceeds of a one-half interest in the partnership business, good will, and property; each party to bear his own costs of appeal.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

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BRYANT v. WELLBANKS. (Civ. 5873.)★

District Court of Appeal, First District, Division 1, California. Dec. 31, 1927.

Hearing Denied by Supreme Court Feb. 27, 1928.

1. Pleading $\S$ 236(2)—Permitting amendment 18 months after original complaint not abuse of discretion, in absence of showing of injustice or hardship.

Permitting amendments of complaint 18 months after filing original complaint will not be held an abuse of discretion, in absence of claim or showing that injustice or hardship resulted.

2. Pleading $\S$ 248(9) — Amended complaint held not to substitute new cause of action by suing in plaintiff's own right for injuries to goods.

In action for recovery of shipment of tomatoes, second amended complaint, only dif-

ference of which was that defendant, originally sued as doing business with another, is named as conducting individual business under company name, and that tomatoes were shipped by plaintiff himself, instead of by firm of which plaintiff was member, as originally alleged, and claim subsequently assigned to plaintiff, demand in each case being for same amount, did not substitute a new cause of action, and permitting filing of such amended complaint was not error.

3. Partnership ⚡64—Persons doing business under fictitious name may freely contract, but cannot enforce contract until compliance with statute (Civ. Code, §§ 2466-2468).

Under Civ. Code, §§ 2466-2468, persons doing business under fictitious name may contract without restraint, and their contracts may be enforced against them; but they cannot enforce such contracts, but may enforce contract on complying with statute at any time before trial.

4. Partnership ⚡64—Contract with partnership doing business under fictitious name, but failing to file certificate, is valid and assignable (Civ. Code, §§ 2466-2468).

Contract with partners doing business under fictitious name without filing certificate required by Civ. Code, §§ 2466-2468, is valid and binding, and could properly be assigned to one of such partners.

5. Parties ⚡76(1)—Noncompliance with statute by persons doing business under fictitious name, affecting capacity to sue, must be raised in appropriate way (Civ. Code, §§ 2466-2468).

In an action by individual or partnership doing business under fictitious name, compliance with Civ. Code, §§ 2466-2468, need not be alleged by plaintiff, but such noncompliance is matter of defense, and objection to legal capacity of plaintiff to sue, based on that ground, must be raised in some appropriate way.

6. Parties ⚡76(6)—Objection to legal capacity of plaintiff to sue, on ground he is doing business under fictitious name without complying with statute, is waived, if not taken by demurrer or answer (Civ. Code, §§ 2466-2468).

Objection to plaintiff's legal capacity to sue, on ground he is doing business under fictitious name and has not complied with Civ. Code, §§ 2466-2468, must be taken by demurrer, if grounds for it appear on face of complaint, or by answer, if they do not; otherwise, it is waived.

7. Partnership ⚡64—Assignee of contract of partnership doing business under fictitious name without complying with statute may comply with statute, even after suit is brought (Civ. Code, §§ 2466-2468).

Assignee of partnership doing business under fictitious name without complying with Civ. Code, §§ 2466-2468, stands in place of his assignor, and compliance with statute, even after suit is brought on contract assigned may be effectual.

8. Partnership ⚡64—Defendant, in action by assignee of partnership contract, held to have waived capacity of partnership assignor in doing business under fictitious name without complying with statute (Civ. Code, §§ 2466-2468).

In action by one of partners, to whom contract entered into by partnership while doing business under fictitious name without complying with Civ. Code, §§ 2466-2468, was assigned, defendant by failing to raise objection as to noncompliance by partnership with statute, and urging only defense of assignee's capacity and compliance with statutes, held to have waived capacity of partnership assignor.

9. Partnership ⚡64—Partner, purchasing assets of retiring partner, can as to his portion thereafter comply with statute as to persons doing business under fictitious name (Civ. Code, §§ 2466-2468).

Surviving partner, purchasing assets of retiring partner as to his one-half interest, will be considered as holding claim as one doing business under name of original partnership, and where partnership had been doing business under fictitious name without complying with Civ. Code, §§ 2466-2468, later compliance with statute by such partner would be sufficient.

Appeal from Superior Court, City and County of San Francisco; K. S. Mahon, Judge.

Action by A. J. Bryant, doing business under the firm name and style of the Bryant Produce Company, against Webster Wellbanks. Judgment for plaintiff, and defendant appeals. Affirmed.

J. J. Dunne, of San Francisco (Brann, Van Duyen, Boekel & Rowe, of San Francisco, of counsel), for appellant.

George L. Stewart, of San Francisco, for respondent.

PARKER, Justice pro tem. This is an appeal by defendant from a judgment rendered in favor of plaintiff, and there is brought for review the order of the trial court denying defendant's motion for a new trial. The facts will be given hereinafter as the grounds of appeal are considered.

The original complaint was filed on June 5, 1923, alleging that A. J. Bryant, doing business under the name of Bryant Produce Company, shipped certain tomatoes to Webster Wellbanks and W. P. Day, doing business under the firm name of Wellbanks & Co., for which no accounting was had, and alleging further the indebtedness of defendants therefor. On June 14, 1924, plaintiff filed an amended complaint, in which he alleged, in addition to the allegations in the original complaint, that the defendant Webster Wellbanks was doing business under the firm name of Wellbanks & Co., and that said name was and is a fictitious name. In this amended complaint plaintiff added a second cause

of action, namely, for money had and received. In the amended complaint the caption was changed accordingly, and Webster Wellbanks was also joined as an individual defendant. On January 17, 1925, plaintiff filed a second amended complaint, with no change in caption or new parties brought in. In this second amended complaint plaintiff set up the same cause of action as in the preceding complaints, with the addition of a cause of action on an open book account. In each case the demand was for the same amount. Plaintiff in this second amended complaint alleged that the tomatoes in question were shipped to defendant by Bryant Produce Company, which was a copartnership composed of A. J. Bryant and Leon Kasonier; that said firm had been dissolved, and that plaintiff Bryant was the owner of all of the assets of said firm through assignment from the former partner, Leon Kasonier, including the claim sued on. The second amended complaint was filed by leave of court after due notice to defendant and a hearing. Defendant's demurrer to the second amended complaint having been overruled, answer was filed, issues joined, and trial had.

[1] Appellant here contends that the court's action in allowing the filing of this second amended complaint was error justifying a reversal of the judgment. It is appellant's contention that it was a clear abuse of discretion to allow such amendments after the lapse of time from the filing of the original complaint, namely, one year and half; and appellant further contends that the amendment as made was actually the substitution of a new cause of action. Nowhere throughout the lengthy and detailed brief of appellant on this point does he specify or urge any harm resulting to him by reason of the amendments allowed. In the absence of some claim that injustice or hardship resulted from the court's action, we do not feel that any abuse of discretion can be shown.

[2] As to the second amended complaint substituting a new cause of action, the record cited discloses that at all times the cause of action remained the same. The only difference apparent is that the defendant, originally sued as doing business with another, is in the later pleadings named as conducting his individual business under a company name, and the further difference that plaintiff in his original complaint set forth that the tomatoes were shipped to defendant by himself, while in the last amended complaint it is alleged that the shipment was made by a firm of which plaintiff was a member and the claim for payment subsequently assigned to plaintiff. Throughout the entire file of pleadings it appears that there was but one cause of action, wherein plaintiff alleged an indebtedness of defendant arising out of a shipment of tomatoes. Whether the cause of action was originally in plaintiff, or whether it had

been assigned to him, would not materially alter the cause of action itself, nor change the defense thereto. As was stated in *Union Lumber Co. v. Schouten & Co.*, 25 Cal. App. 83, 142 P. 911:

"As both complaints were for the recovery of the price of the same lot of goods, the action itself, irrespective of the theory on which the right to recover is based, must be regarded as having been commenced when the original complaint was filed."

A leading case on the subject of permitting amendments is *Frost v. Witter*, 132 Cal. 422, 64 P. 705, 84 Am. St. Rep. 53. Many cases are therein reviewed, and the rule approved that, where the cause of action set up in the original complaint and that set up in the amended complaint was simply the obligation sought to be enforced—that is to say, the obligation to pay the money agreed to be paid—and the only change that took place was in the remedy by which it was sought to enforce the obligation, there was no change in the cause of action. In this case we find this language:

"An action is nothing else than the right or power of prosecuting in a judicial proceeding what is owed to one," which is but to say, an obligation. * * * The action, therefore, springs from the obligation, and hence the 'cause of action' is simply the obligation."

In *Rabe v. Western Union Tel. Co.*, 198 Cal. 290, 244 P. 1077, an amendment was permitted making additional heirs parties plaintiff in an action for wrongful death. The court says, at page 300 (244 P. 1081):

"There is no merit in the contention that the amendment would have substituted a new and distinct cause of action for the one pleaded. This contention has been put at rest by many decisions of this state"—citing *Frost v. Witter*, *supra*.

See, also, *Oberkotter v. Woolman*, 187 Cal. 505, 202 P. 669.

In the case of *Doolittle v. McConnell*, 178 Cal. 697, 174 P. 305, the court again goes into the question of amendments at great length, and approves the rule of *Frost v. Witter*, and goes even beyond the liberality therein allowed, saying:

"An amendment which changes the alleged date of a contract, or the sum to be paid, or any particular of the matter to be performed, or the time or manner of performance, changes in one sense the cause of action; but it is not in this sense that the rule is to be understood. Amendments of that character, so long as the identity of the matter upon which the action is founded is preserved, are admissible. * * * So long as the form of action is not changed, and the court can see that the identity of the cause of action is preserved, the particular allegations of the declaration may be changed, and others superadded, in order to cure imperfections and mistakes in the manner of stating the plaintiff's case."

See, also, 21 California Jurisprudence, p. 200.

In the instant case the change wrought by the amendments made no material difference. The one cause of action was to recover from defendant the price of two carloads of tomatoes. At the outset plaintiff alleged, as stated, shipment to have been made by himself to defendant and one Day as partners doing business under the name of Wellbanks & Co. By the amendments he alleged that the original shipment was by a firm comprised of plaintiff and another person, and that the cause of action was assigned to plaintiff, and further changing the allegation concerning defendant, so as finally to allege that defendant Wellbanks alone does business under the name of Wellbanks & Co. Under the amended pleading, defendant was allowed any set-off he might have had against the assignor, as well as against plaintiff, and at the trial it was admitted that defendant Wellbanks alone constituted Wellbanks & Co. A successful defense to the amended pleading would have been a bar to any claim urged by plaintiff or his assignors.

As hereinbefore noted, defendant filed his answer and joined issue on the second amended complaint, denying specifically the allegations thereof, and a full and complete inquiry was had into all of the issues presented. In the answer filed it was not denied that the claim was originally in plaintiff and his then partner, nor was it denied that the claim had been duly assigned and transferred to plaintiff. Therefore we hold that the action of the trial court in permitting the amended complaints to be filed was not erroneous, and affords no ground for reversal of the judgment.

[3, 4] The appellant argues that the plaintiff respondent has no legal capacity to sue herein. The facts pertinent to this inquiry are as follows: In February, 1922, at the time of the transaction involved here, A. J. Bryant and one Leon Kasonier were partners doing business in the state under the name of Bryant Produce Company, which name and designation was fictitious within the meaning of sections 2466-2468 of the Civil Code. These two partners thus doing business had never filed in any of the counties of this state any certificate as by these sections required. In July of 1922 the partnership of Bryant and Kasonier was dissolved and upon the said dissolution Kasonier assigned to Bryant all of Kasonier's interest, right and title in and to the assets of Bryant Produce Company, including the claim of the said partnership against defendant Wellbanks. A. J. Bryant thereafter continued to do business, and prior to the first trial of this action complied with the provisions of sections 2466-2468 of the Civil Code, and ever since has been doing business under the name Bryant Produce Company.

Appellant contends that inasmuch as the

persons originally doing business under the fictitious name of Bryant Produce Company had filed no certificate as required by the sections cited, no action can be maintained on the claim. Section 2468 provides:

"No person doing business under a fictitious name, or his assignee or assignees, nor any persons doing business as partners contrary to the provisions of this article, or their assignee or assignees, shall maintain any action upon or on account of any contract or contracts made, or transactions had, under such fictitious name, or in their partnership name, in any court of this state until the certificate has been filed and the publication has been made as herein required."

It is contended that this present plaintiff, being in effect the assignee of the defaulting partnership, cannot maintain the present action upon or on account of any contracts made under the fictitious name. Sections 2466 et seq. of the Civil Code have been before the court in many cases, and the effect and scope of said sections is now rather definitely settled. In *Rudneck v. Southern California M. & R. Co.*, 184 Cal. 274, 193 P. 775, it is said:

"The fact, if it be a fact, that publication has not been made, is but matter of abatement. This is now settled."

Without citation of authority other than this one case, it is indisputable that the Code sections referred to place no restriction on the capacity to contract; in other words, a person or persons doing business under a fictitious name may freely contract without restraint, and as against him or them such contracts may be enforced, the statute withholding, however, the right from him or them to enforce these contracts in cases of failure of compliance with the statutory terms, and even then only when the default or delinquency is urged. The only penalty for noncompliance with the statute is that an action cannot be maintained until compliance is had. It is sufficient if there be compliance with the statute at any time before trial. *Rudneck v. S. Cal. Co.*, 184 Cal. 274, 193 P. 775; *Goodman v. Anglo-Cal. Trust Co.*, 62 Cal. App. 702, 217 P. 1078. In *Roullard v. Gray*, 38 Cal. App. 79, 175 P. 479, it was held sufficient compliance with the statute if the acts required occurred before the motion for nonsuit was filed. In *Vance v. Gilbert*, 178 Cal. 578, 174 P. 43, it is said:

"The only penalty of a failure" to comply with the requirements of section 2466 et seq., Civil Code, "is that such a partnership cannot maintain an action until it has complied with those sections."

In *Phillips v. Goldtree*, 74 Cal. 154, 13 P. 314, the court says:

"The only penalty attached by the Code to a failure to file the certificate is the legal incapacity to maintain an action upon any contracts made or transactions had in their partnership

name.' * * * There is no disability imposed to *make* contracts or to *have* transactions."

In 45 A. L. R., commencing at page 198, is found an exhaustive annotation on the subject of "Fictitious Name," and the decisions of many states are digested and compared. The California rule follows the great weight of authority, which announced the doctrine that a failure to file the certificate required by statute does not invalidate the contract or other transaction, or destroy the right of action, but operates only upon the remedy, and then only until the requirements have been met. It will thus be noted that the contention of the appellant here, to the effect that the contract with Bryant and Kasonier was a void and illegal contract by reason of the failure of the partners to file the certificate required by law, cannot be sustained.

The contract itself, then, being a valid binding contract, a chose in action, was assignable and transferable without any peculiar restriction of any kind. The sections of the Civil Code as amended in 1911 require the filing of the certificate before any action may be maintained by an assignee. Prior to the amendment it was settled law in this state that, notwithstanding the failure of any partnership in respect of filing the required certificate, the penalty was so far personal as not to affect suit by an assignee of the claim or demand. So, therefore, in the instant case we have a legal binding claim in the hands of an assignee, whose assignor was in partnership doing business within the statutes and neglecting to comply with the terms thereof.

[5, 6] But before we apply the rule to the facts of the present case there is one other point which must be considered. The law appears to be that, in an action by an individual or partnership, within the statutes, compliance with statutory provisions relating to the doing of business under assumed or fictitious names, or designations not showing the names of the partners, need not be alleged by the plaintiff, but that noncompliance is a matter of defense, and that objection to the legal capacity of the plaintiff to sue based on this ground must be raised in some appropriate way, as by demurrer if the incapacity appears on the face of the complaint or petition, or by answer or plea in abatement, or the objection will be deemed to be waived. Annotation, 45 A. L. R. 270. The objection must be taken by demurrer if the grounds for it appear on the face of the complaint, or by answer if they do not; otherwise, it is waived. There seems to be no other tenable position to be taken on the question, and this court has substantially so held in *Mora v. Le Roy*, 58 Cal. 8, and *Swamp & Overflowed Land District No. 110 v. Feck*, 60 Cal. 403. See *Phillips v. Goldtree*, 74 Cal. 151, 155, 13 P. 313, 15 P. 451.

In *Holden v. Mensinger*, 175 Cal. 300, 165 P. 950, the complaint on its face showed that

the copartners were doing business under a fictitious name, and the complaint itself did not aver a compliance with sections 2466 and 2468, Civil Code, and appellants contended that an averment of such compliance was necessary when upon the face of the pleading the fictitious name of the partnership appears. The court said:

But the cases cited do not decide, "nor does any other case decide, as appellant contends, that this omission is a 'fatal defect.' The omission merely subjects the complaint to the special defense of a plea in abatement."

In *Cook v. Fowler*, 101 Cal. 89, 35 P. 431, it is said:

"There is but a single point made by appellant. It is that the complaint shows that plaintiffs were copartners under a designation not showing the names of the persons interested as partners, and that they have failed to aver or prove a compliance with the provisions of sections 2466 and 2468 of the Civil Code. * * * The point is not well taken. The failure to make, file, and publish the certificate in question is matter of defense, to be set up by defendants, and, not having been so taken, is waived."

In *Paff v. Ottinger*, 32 Cal. App. 442, 163 P. 231, appears this language:

"The final contention of the appellants is that the trial court erred in its refusal to allow them to file an amended answer, wherein they allege for the first time, a lack of legal capacity in the plaintiffs to sue arising out of their alleged failure to comply with section 2466 et seq., Civil Code, relating to the filing of certificates of partnerships under fictitious names. These have always been held to be dilatory pleas, which are waived by the failure in the first instance to plead them."

In a South Dakota case, *Drake v. Great Northern Ry. Co.*, 24 S. D. 19, 123 N. W. 84, following the general authority, this is the court's language anent a plea setting up the defense of a failure to comply with a similar statute:

"Conceding, therefore, that a court would have the right, upon proper application, to relieve a party from the effect of such waiver upon good cause shown, * * * it could hardly be contended that an amendment such as we find in the case at bar would be in furtherance of justice. While there are certain pleas in abatement which should be looked on with favor, because, though interposed at a late hour, they may tend to the reaching of exact justice, yet it must be conceded, we think, that in a case of this kind, where the question in abatement goes to the right of plaintiffs to bring suit because they have not complied with some statutory provision unknown to the common law, and the compliance with which in no manner affects the justice of the cause of action, the trial court * * * would clearly have abused its discretion in allowing such a plea."

[7, 8] In the present case the action is brought by an assignee of a partnership. We

can conceive of no good reason why a different rule should apply than in an action brought by the original partnership. The defense is the same in either case and is met by the same proof. The assignee stands in the place of his assignor, and compliance with the statute even after suit brought may be effectual in the case of an assignee. *Henning v. Clark*, 46 Cal. App. 552, 189 P. 714.

Summing up, then, we have here a valid, legal, unpaid demand, due to a partnership which has failed to comply with the required provisions as to doing business under a designation not disclosing the names of all of the members of the partnership. The claim is assigned and the assignee brings suit to enforce the same. The assignee alleges the existence of the prior assigning copartnership and the obligation due thereto from the defendant, and then alleges the assignment to plaintiff. Defendant by answer does not deny the existence of the partnership nor does he deny the assignment. In the answer of defendant he raises no objection and tenders no issue as to compliance or noncompliance with the statute by Bryant and Kasonier doing business under the name of Bryant Produce Company.

Plaintiff, as heretofore detailed, after the dissolution of the prior partnership, did continue to do business individually under the name and designation "Bryant Produce Company," and alleged that fact in his complaint, together with the allegation of compliance with sections 2466-2468, Civil Code. The answer is as follows:

"Defendants deny that the *above-named plaintiff* at any of the times in said second amended complaint mentioned duly, or otherwise or at all, whether individually or in association with, or for, any other person, business association or company, complied with the provisions of sections 2466 and 2468 of the Civil Code of the state of California, nor did any other person, individual, business association or company in association *with or for said plaintiff* so comply with the provisions mentioned."

Then by way of a further, separate, distinct and independent defense:

"Defendants allege, state, and show that said plaintiff has no legal capacity to sue herein or to maintain the present action, and in this behalf these defendants allege and show that at none of the times in said second amended complaint mentioned, and or more particularly prior to, during and/or after February, 1922, and or more particularly at the time of the commencement of the present action, and thereafter, said plaintiff, whether individually or in association with, or for, any other person, business association or company, wholly failed and neglected to comply with the provisions of sections 2466 and 2468 of the Civil Code, nor did any other person, individual, business association or company in association with or for said plaintiff so comply with said provisions."

Thus it appears that the only defense urged was as to the capacity of plaintiff and the

compliance by plaintiff with the provisions cited. On this issue the court found that plaintiff, A. J. Bryant, prior to the first trial of the action, complied with the provisions of sections 2466-2468, Civil Code of California, and ever since has been doing business under the fictitious name of "Bryant Produce Company." This finding is amply supported by the evidence, and answers all the issues raised in the pleadings. We conclude that the capacity of plaintiff's assignors was not before the court by appropriate pleading, and the defense, not being pleaded, was waived.

[9] While we are content to thus dispose of appellant's point, it does not follow that we hold that the filing of the certificate by plaintiff herein was in itself insufficient. The exact question has never arisen in this state, or elsewhere, as far as our research discloses. Upon analysis of the present situation it may be doubted whether a surviving partner, taking over the assets of a firm through purchase of the retiring partner's interest, is an assignee of the firm. In this case Bryant, as a partner of Kasonier, took by purchase and transfer simply the interest of the latter, he (Bryant) already owning one-half. Therefore, if he held the claim of Bryant and Kasonier partly as original owner, it is clear he has sufficient personal and individual right to exclude him from the classification of an assignee, and to that extent at least he would be holding the claim still in the capacity of one doing business under the name chosen to designate the original partnership, and his compliance with the statute even at a later date would be sufficient. On this point there is a strong analogy presented in the case of *Henning v. Clark*, 46 Cal. App. 551, 189 P. 714, where a firm upon dissolution vested a claim in one of the former partners, and the court permitted compliance with the statute, even after dissolution, though the certificate filed did show the names of the original partners.

In *Isom v. Shields*, 69 Cal. App. 517, 231 P. 587, the partnership had been dissolved by the death of a partner, and prior to the dissolution there had been no compliance with the statute. The court there approved an assignment by the surviving partner, but it appeared that the partnership had been dissolved within 30 days of its formation, and therefore under the Code it was not in default in compliance. The Code provided, in section 2468, that the certificate must be filed within 30 days after commencement of the business.

Appellant next contends that the evidence is insufficient to support the findings or the judgment based thereon. On this point we find a real conflict in the evidence, and with this discovery our search ends. Very little evidence was offered by either side. Defendant offered nothing concerning the transaction involved, other than that he was called

as a witness by plaintiff under section 2055, Code of Civil Procedure. The plaintiff claimed that he had sold certain goods to defendant, and defendant, admitting receipt of the goods, claimed that he had purchased them from a third party, and that plaintiff had no interest in the transaction, or in the goods delivered. There is ample evidence to support the court's finding in favor of plaintiff.

Lastly, defendant complains of certain of the trial court's rulings in the admission and rejection of testimony. We have examined carefully the rulings complained of, and find no prejudice resulting to appellant. The greater part of the objections go to the admission of freight bills and shipping instructions given by plaintiff to carriers and others, the effect being to prove the ownership of plaintiff in the goods involved. The point urged by appellant is that he was not a party to these transactions and not bound thereby. However, he admitted receiving the very goods in question, and the effect of the proof received was simply to prove ownership in plaintiff. The fact of ownership in itself was but one step in plaintiff's proof, and following this proof plaintiff did show knowledge on the part of defendant of the ownership, or at least such facts as would compel an inference of knowledge on the part of defendant.

Finding no reason why the judgment of the trial court should be disturbed, the judgment is affirmed.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

88 Cal. App. 259

McKENZIE v. LOS ANGELES LIFE INS. CO.
et al. (Civ. 3479.)

District Court of Appeal, Third District. California. Jan. 7, 1928.

1. Appeal and error $\S$ 479(2)—Court's denial of supersedeas on appeal from order denying change of venue in action upon accident and health policy held discretionary (Code Civ. Proc. $\S$ 949, as amended by St. 1927, p. 874, $\S$ 3).

In suit on accident and health policy, the court's denial of supersedeas on appeal from an order denying change of venue held, under Code Civ. Proc. $\S$ 949, as amended by St. 1927, p. 874, $\S$ 3, discretionary.

2. Appeal and error $\S$ 478—In application for writ of supersedeas on appeal from order denying venue change, applicant should show special reason why entitled to stay.

In an application for a writ of supersedeas on appeal from an order denying a change of venue, the applicant should show some special reason why he is entitled to the stay in order

that the court may have a basis for the exercise of discretion in his favor.

Appeal from Superior Court, Sacramento County.

Action by James H. McKenzie against the Los Angeles Life Insurance Company, formerly known as the Mutual Indemnity Accident, Health & Life Insurance Company of California and the People's Mutual Life Insurance Company. From an order denying change of venue, the People's Mutual Life Insurance Company appeals and applies for writ of supersedeas. Writ denied.

Alfred B. Weiler, of San Francisco, for appellant.

J. J. Henderson, and W. A. Green, both of Sacramento, for respondent.

FINCH, P. J. The above-entitled cause is on appeal in this court from an order of the trial court denying the motion of the appellant, People's Mutual Life Insurance Company, for an order changing the place of trial from Sacramento county to the city and county of San Francisco. The appellant has applied for "a writ of supersedeas * * * staying and restraining the trial of said cause" pending the final determination of the appeal. Section 949 of the Code of Civil Procedure, as amended by St. 1927, p. 874, $\S$ 3, provides that an appeal from a judgment or order "does not stay proceedings, without a writ of supersedeas, where it adjudges the defendant guilty of usurping, or intruding into, or unlawfully holding a public office, civil or military, within this state, or where the order grants, or refuses to grant, a change of the place of trial of an action."

[1, 2] A mere reading of the section shows that the provision for a stay of proceedings in case of an appeal from an order denying a change of venue is not mandatory. If it were mandatory in all cases it would lead to "a most vicious practice. Every case in which one party sought delay would have to be continued upon an application for change of venue, however frivolous or imperfect it may be presented." *Hibbard v. Chipman*, 1 Cal. Unrep. 16. The most that can be said in favor of such an application is that the granting of a stay is discretionary. The applicant should show some special reason why he is entitled to the stay in order that the court may have a basis for the exercise of its discretion in his favor. No such reason appears in this case. The action is an ordinary one for the recovery, on appellant's policy of accident and health insurance, of monthly payments due for the loss of time caused by an alleged accident in which the plaintiff was injured. The grounds upon which appellant's application is based would exist in every case of denial of a change of venue. As said by this court in *People v. Pi-*

azza, 59 Cal. App. 43, 45, 209 P. 1017, 1018, "without passing on the merits of the appeal, it may be said that an examination of the record discloses nothing to influence the court's discretion in favor of the issuance of the writ."

The application is denied.

We concur: PLUMMER, J.; HART, J.

88 Cal. App. 798

Azariah MEREDITH, Plaintiff and Respondent, v. PEOPLE'S MUTUAL LIFE INSURANCE COMPANY of California, formerly known as the Mutual Indemnity Accident, Health & Life Insurance Company of California, Defendant; PEOPLE'S MUTUAL LIFE INSURANCE COMPANY, Appellant. (Civ. 3478.)

District Court of Appeal, Third District, California. Jan. 7, 1928.

Application for writ of supersedeas prayed to be directed to the superior court of Sacramento county, to restrain the trial of a certain cause pending appeal from an order granting change of venue. Writ denied.

Alfred B. Weiler, of San Francisco, for appellant.

Chester F. Gannon, of Sacramento, for respondent.

PER CURIAM. This is an application for a writ of supersedeas. The questions involved are the same as those considered in *McKenzie v. Los Angeles Life Insurance Co.* et al. (Cal. App.) 263 P. 338, this day decided by this court. For the reasons stated in the opinion filed in that case, the application is denied.

88 Cal. App. 272

In re MAZURAN. (Civ. 6036.) *

District Court of Appeal, First District, Division 1, California. Jan. 10, 1928.

Hearing Denied by Supreme Court March 8, 1928.

1. Attorney and client §52—Accusation held sufficient to state cause of action for disbarment of attorney and sufficiently certain in allegations of wrongdoing.

In disbarment proceedings, accusation alleging that accused, knowing of client's physical infirmity and mental incapacity, secured from him a \$25,000 note secured by mortgage on certain realty, a contract of employment as his attorney for year at compensation in same amount with necessary expenses, and a general power of attorney to handle all his affairs, and procured him to convey certain realty to his niece, by use of undue influence to defraud him, by persuading him that such transfers and documents were necessary to protect him against certain creditors, procured dismissal of actions to set aside such transfers, assigned note and mortgage to third person to shut off defenses, and caused assignee to commence action to foreclose, and that client was cheated, wronged, and defrauded by such acts, held sufficient to state cause for

disbarment and sufficiently certain in allegations of wrongdoing.

2. Attorney and client §52—Verification of accusation in disbarment proceedings held sufficient, though not stating that facts recited are true of affiant's own knowledge (Code Civ. Proc. §§ 291, 446).

Verification of accusation in disbarment proceedings, stating that affiant is duly appointed, qualified, and acting guardian of accused's former client, an incompetent, has read and knows contents of accusation, and that all facts, matters, and charges therein are true, held sufficient as in accord with Code Civ. Proc. § 291, though not stating that facts therein recited are "true of his own knowledge," etc., as provided by section 446.

3. Attorney and client §54—Accused in disbarment proceedings held not denied constitutional right because person verifying accusation was not called as witness.

Accused in disbarment proceedings held not denied constitutional right to be confronted with witnesses against him because person who verified accusation was not called as witness.

4. Witnesses §79(1)—Adjudged incompetency would be relevant, but not conclusive, on question of witness' mental unsoundness (Code Civ. Proc. § 1880).

In passing on question of mental unsoundness, disqualifying person to testify, under Code Civ. Proc. § 1880, the fact of an adjudged incompetency would be relevant, but not conclusive.

5. Witnesses §79(1)—Court held to have wisely exercised discretion in permitting testimony of client, of whose mental unsoundness only evidence was adjudication of incompetency and appointment of guardian of estate over year before trial of disbarment proceeding (Code Civ. Proc. § 1880).

Where client was adjudged incompetent and a guardian of his estate, but no personal guardian, appointed, over year before trial of disbarment proceedings against attorney, and such adjudication was only evidence of his mental incapacity, court wisely exercised its discretion in permitting him to testify as against objection that he was of unsound mind, within Code Civ. Proc. § 1880, at time of his production for examination, ability to properly handle and manage one's business and property being only remotely indicative of mental soundness.

6. Witnesses §255(2)—Witness held properly permitted to read his affidavit to refresh memory of certain incidents.

Witness, stating that he could not remember certain incidents occurring some two years back, held properly permitted to look over and read affidavit concerning them to refresh his memory, after testifying that he made, signed, and verified it at time when they were fresh in his memory.

7. Trial §41(5)—Attorney of record generally is not within rule prohibiting testimony by persons remaining in courtroom after exclusion of witnesses.

Attorney of record generally is not within rule that witness, present in courtroom during

examination of other witnesses, in violation of order excluding witnesses therefrom until called, cannot testify.

8. Trial $\S$ 41(5)—Attorney of record for accuser in disbarment proceedings held properly permitted to testify, though present in courtroom after exclusion of witnesses.

One entered of record as one of counsel for accuser, though not actively conducting disbarment proceeding, held properly permitted to testify, though present in courtroom during examination of other witnesses after order excluding witnesses therefrom until called.

9. Attorney and client $\S$ 57—Appellate court will not retry disbarment proceeding, but will only determine existence of facts sufficient to uphold judgment, regardless of conflict.

Appellate court, on appeal from judgment disbarring attorney, will not retry case on evidence before it, determine witnesses' credibility and weight of testimony as matter of original jurisdiction, and disregard lower court's judgment, but will limit inquiry to determination of existence of facts sufficient to uphold judgment, regardless of conflict, which, however, must be real, not merely apparent.

10. Attorney and client $\S$ 53(2)—Evidence held to support judgment of disbarment for fraud on mentally and physically weak client.

Evidence held sufficient to support judgment of disbarment from practice of law for fraud on mentally and physically weak client.

11. Attorney and client $\S$ 53(1)—Client held not attorney's accomplice, so as to require corroboration of his testimony in disbarment proceeding, because of execution of note and mortgage on attorney's advice to defraud creditors (Pen. Code, $\S$ 1111).

Illiterate and ignorant client held not accomplice of his attorney, within Pen. Code, $\S$ 1111, so as to require corroboration of his testimony in disbarment proceeding, because of his execution of note and mortgage on attorney's advice with intent to defraud his creditors.

Appeal from Superior Court, Fresno County; Stanley Murray, Judge.

In the matter of the disbarment of Marion J. Mazuran from the practice of law. From a judgment of disbarment, he appeals. Affirmed.

D. A. Knapp, of San Francisco, for appellant.

Collins & Collins, of Oakland (Everett H. Roan, of Oakland, of counsel), for respondent.

PARKER, Justice pro tem. Upon an accusation charging Marion J. Mazuran, an attorney at law, with a violation of his professional duties and of acts involving moral turpitude, a trial was had in the superior court of Fresno county, which caused a judgment to be entered depriving the accused of the right to practice as an attorney and counselor in the courts of the state of California.

From this judgment the accused has appealed.

[1] Appellant insists at the outset that the accusation, admitting the facts therein stated to be true, does not contain facts to indicate or charge any conduct on the part of the accused sufficient to constitute a cause for disbarment. The accusation, in substance, alleges that one Steve Baker, a man of advanced years and infirm, was incapable of handling his business and personal affairs, and that, within ten months after the time of the dealings between him and the accused the said Baker was adjudged an incompetent by a court of competent jurisdiction; that in March of 1923 the accused, an attorney at law, knowing of Baker's infirmity and incapacity and playing upon Baker's sentiments by reason of the fact that accused and Baker had both been born in a foreign country and spoke the same mother tongue, procured Baker to execute and deliver to the accused a promissory note for the sum of \$25,000, secured by mortgage on certain real property; that at the same time the accused secured from Baker a contract of employment, engaging accused as the attorney for Baker for a period of one year, and fixing the compensation of said attorney at \$25,000, and providing also that Baker pay all the necessary expenses of said attorney, including hotel, traveling, and incidental expenses, and further authorizing said attorney to employ counsel or attorneys at law to assist him in the business or litigation of Baker; that at or about the same date accused secured from Baker a general power of attorney, giving to said accused full and complete power to handle any and all of the affairs of Baker; that on the same date or thereabouts accused procured and caused the said Steve Baker to set over and convey by deed of gift to one Todorovich, a niece of Baker, certain real estate belonging to said Baker; that the execution of all of the instruments as alleged was without consideration and not the voluntary act of Baker, and the same were induced by the use of undue influence on the part of accused as a plan to defraud the said Baker, by persuading and convincing him that such transfers and documents were necessary to protect Baker against certain named creditors, and that said instruments were executed by Baker without opportunity being given him to read the same, and no explanation of the contents thereof afforded; that, when said Baker became aware of the nature and effect of the instruments so signed by him, he consulted other counsel and commenced an appropriate action to have these transfers and agreement nullified and set aside; that thereupon the accused, and through his agents, procured the dismissal of said actions; that thereafter, to cheat and defraud said Baker, the ac-

cused made an assignment of said note and mortgage to a third person for the express purpose of shutting off any defenses that might exist against the original holder; that the accused caused the assignee of said note and mortgage to commence an action to foreclose the mortgage; that the said Steve Baker was cheated, wronged, and defrauded by the said acts of the accused.

Further, the accusation alleges generally the weakness, mental and physical, of Steve Baker, that he had full confidence in and relied upon the accused, and that accused took undue and fraudulent advantage thereof.

From this summary it is quite evident that the accusation withstands the attack of appellant in respect of its sufficiency.

Further attacking the accusation, appellant claims the same to be uncertain in its allegations to the extent that it cannot be gleaned therefrom wherein any wrongdoing occurs.

From a reading of the accusation, there is no merit in this contention. The accusation was full and specific, and gave to the accused exact knowledge of the charges made and which he would be called upon to defend against.

[2] Next the appellant urges that the court never acquired jurisdiction of the proceedings by reason of the fact that the accusation was not verified. In this respect appellant claims that, while there was an attempted verification, the same was insufficient.

The alleged attempted verification (omitting venue and jurat) is as follows:

"Louis Zivanovich, being first duly sworn, deposes and says, that he is the duly appointed, qualified, and acting guardian of Steve Baker, an incompetent; that he has read the foregoing accusation and knows the contents thereof; that the accusation and also all of the facts and matters alleged in said accusation are true; and also that all the charges therein contained are true."

It is appellant's point that the party verifying the accusation must say, the facts therein stated are "*true of his own knowledge*," etc., as provided by section 446, Code of Civil Procedure. The Code of Civil Procedure provides for the disbarment of an attorney, and outlines the procedure in section 289 et seq. Section 291 provides:

"The accusation must state the matters charged, and be verified by the oath of some person to the effect that the charges therein contained are true."

Th sufficiency of the verification is to be tested by section 291. We hold the verification to be in accord with the provisions of this section and the decisions construing the same. In re Collins, 147 Cal. 8, 81 P. 220; In re Morganstern, 61 Cal. App. 707, 215 P. 721.

[3] Appellant further urges that he has been denied his constitutional right by reason of the fact that the person who verified

the accusation was not called as a witness. We deem the contention of little merit. No authority supports the claim. Appellant cites the time-honored provision of the Constitution to the effect that every person accused of crime shall have the right to be confronted with the witnesses against him. Without further comment, we hold the argument unsound.

[4, 5] The trial of this matter in the court was commenced on March 30, 1925. Complaint is made that the trial court permitted Steve Baker to give testimony at the hearing. The complaint is based upon the fact that in November, 1923, the said Baker was adjudged an incompetent and a guardian of his estate appointed, the court expressly finding, however, that a guardian of the person of said Steve Baker was not required. No authority is cited in support of the argument made. Section 1880, Code of Civil Procedure, provides:

"The following persons cannot be witnesses: 1. Those who are of unsound mind at the time of their production for examination."

We think that the ability of a person to properly handle and manage his business and property is but remotely indicative of his mental soundness. True, in passing upon the question of mental soundness, the fact of an adjudged incompetency would be relevant to the inquiry, but, standing alone, would not conclude the matter. No other evidence on the question of mental capacity of Baker was offered. From the record before us, with particular reference to the examination of the witness Baker, we think that the court below exercised its discretion wisely in permitting Baker to testify. In *People v. Harrison*, 18 Cal. App. 295, 123 P. 200, it is said:

"The law fixes no standard whereby to measure the competency of a witness alleged to be of unsound mind," and therefore "the determination * * * is almost wholly in the discretion of the trial judge. * * * Indeed, we have been unable to find any decision where such ruling has been disturbed."

The subdivision quoted from section 1880, Code of Civil Procedure, has received construction in *People v. Tyree*, 21 Cal. App. 707, 132 P. 784. Many cases are reviewed therein, and the conclusion reached agrees with the foregoing. We find no merit in appellant's claim of error on this issue.

[6] During the examination of a witness called by the accuser, the witness stated he could not remember certain incidents, as the events occurred some two years back. He was then asked if he had not made and signed and verified an affidavit concerning these incidents at a time when the same were fresh in his memory. On his affirmative reply he was permitted to look over and read the affidavit referred to for the purpose of refreshing his memory. The record before us does not show the contents of this affidavit.

In any event we feel the situation is well covered by the case of *People v. Durrant*, 116 Cal. 213, 48 P. 75, as also *People v. Selby*, 198 Cal. 431, 245 P. 426.

[7, 8] The next point is that the court permitted one Oscar Collins, a witness on behalf of accuser, to testify, after the said Collins was shown to have been present in the courtroom during the examination of other witnesses, notwithstanding the court's order at the commencement of the trial that all witnesses be excluded from the courtroom until called. The record discloses the fact to be that said Oscar Collins, though not actively conducting the proceeding, was entered of record as one of the counsel for the accuser. We think any attorney of record does not come within the rule, generally, and, if any serious harm could have resulted from the court's action here, it is not shown. From the record before us, we find nothing in the claims of appellant save the claim that, because Collins was attorney for Baker and chief instigator of the proceeding, he came within the rule. The argument falls of its own weight.

[9] Finally, the appellant contends that the evidence is insufficient to support the judgment. This contention is that we, as a court of review, should practically retry the case upon the evidence before us—that we should determine the credibility of witnesses and the weight of the testimony as a matter of original jurisdiction, and disregard the judgment of the lower court. This we decline to do. There is nothing in the nature of a proceeding of this character that alters the general rule. In *re Morton*, 179 Cal. 510, 177 P. 453; In *re Wharton*, 114 Cal. 367, 46 P. 172, 55 Am. St. Rep. 72; *Matter of Danford*, 157 Cal. 425, 108 P. 322; In *re McCowan*, 177 Cal. 93, 170 P. 1100; In *re Morganstern*, 61 Cal. App. 702, 215 P. 721. Following the doctrine of the cases cited, we limit our inquiry to the determination of the existence of facts sufficient to uphold the judgment regardless of the conflict, qualifying this, however, to the extent that we regard only a real conflict as distinguished from one merely apparent.

[10] There was substantial evidence before the court which, if credited, showed this state of facts: Steve Baker was a Slavonian farmer of limited knowledge of business transactions and no knowledge of legal procedure. He had agreed to purchase from Phoenix Fruit Company a certain tract of land for the sum of \$78,000, payable in yearly installments, and the last payment due some years hence. On this contract and in expenses incidental to the farming of the land, he had outlayed some \$18,000 at most. In March of 1923 Baker had come to the conclusion that his venture was not a profitable one and that he could not pay out on it. As he was the owner of other lands, he feared

that out of his undertaking a liability might arise that would involve his other holdings. He already had counsel, but he was advised to consult Mazuran, being told that the latter was an attorney of his own nationality and speaking the same language and a man of unusual attainments and legal ability, as the accused here modestly admits he is. Incidentally the property owned by Baker, aside from that under contract, would be of a valuation of about \$50,000 at most, and then incumbered with a mortgage in the sum of \$20,000. Baker accordingly met Mazuran and explained the situation to him regarding the Phoenix Fruit Company contract, and the relationship of attorney and client was shortly thereafter formed. Mazuran, the accused, then convinced Baker that the Phoenix Fruit Company contract could be set aside, and suggested a suit to that end, of which Baker did not approve and particularly sought to avoid. Mazuran thereupon secured from Baker a contract of employment, as alleged in the complaint (hereinbefore related), to perform all legal services necessary for Baker for an agreed price of \$25,000, and caused Baker to make and deliver to him a note for that amount secured by mortgage on his own property, also advising Baker to make a gift deed to a niece of Baker's, subsequent to the mortgage, of the real estate exclusive of the Phoenix Fruit Company lands. At the time Baker also paid to Mazuran the sum of \$1,200 in cash and at other times an additional amount of \$300. During these proceedings Baker advised the accused that he had other counsel and suggested a conference. Mazuran dissuaded him from this, and convinced him that the other counsel would not give him the fullest service if they had not already betrayed him. Within a short time thereafter Baker did receive independent advice, and sought to repudiate the agreement and cancel the note and mortgage, and engaged counsel for that purpose. Then Mazuran again convinced Baker of the jeopardy attaching to his rights and had the proposed action deferred, at the same time stating that for the sum of \$10,000 he would cancel the entire matter. Thereafter, and while a controversy still existed, Mazuran made an attempted assignment of the note and mortgage, and was instrumental in having the assignee commence action for foreclosure. The assignment so made was not in good faith, and was part of a plan and enterprise to cut off any alleged defense of Baker. It was further in evidence that there was no real controversy between Baker and the Phoenix Fruit Company, and that whatever difference or dispute might have arisen between them had been satisfactorily adjusted prior to the advent of Mazuran, which facts the accused could readily have learned. It also appears that the reasons given Baker in the securing of the mortgage were to the effect that, by

divesting himself of all assets, no creditor could get the same on execution or otherwise. After Mazuran became aware that the Phoenix Fruit Company matter had been closed satisfactorily to Baker, he still refused to dismiss a suit he had instituted on behalf of Baker against that company, and became so indignant that he threatened the attorney for the Phoenix Company with disbarment proceedings on the ground of the latter's unethical tactics in dealing directly with Baker. The record discloses that Mazuran never did dismiss the action, but that a dismissal followed only after a substitution of attorneys under order of court in the guardianship proceedings.

We think these facts sufficient to support the judgment.

[11] Lastly, appellant contends that, if it is shown that the securing of the note and mortgage from Baker was with intent to defraud the creditors, then Baker was an accomplice, and his testimony, lacking sufficient corroboration, should be entirely disregarded. In other words, if an attorney advises an illiterate and ignorant client to commit a wrong, the attorney should be exonerated if the advice is followed. This last stand seems more like a confession than a contention. The accused was being tried for what he did, and not for what Baker did or what Baker wanted the accused to do. If Baker had plans not measuring up to a high moral standard, it surely was the duty of accused as an attorney to set him right and not to aid in the consummation of any plan of Baker of this nature. It is impossible that a case may arise wherein it would be held that one was an accomplice within the meaning of section 1111, Penal Code, and require corroboration even in a disbarment proceeding. The present case does not warrant such a conclusion.

Judgment affirmed.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

88 Cal. App. 292

FIRST NAT. HOUSING TRUST, LIMITED,
v. SUPERIOR COURT OF STATE OF CALIFORNIA IN AND FOR CITY AND COUNTY OF SAN FRANCISCO et al. (Civ. 6095.)

District Court of Appeal, First District, Division 1, California. Jan. 11, 1928.

1. Divorce ⚡267—Court in divorce suit may appoint receiver and authorize him to sue to recover husband's property to pay alimony (Civ. Code §§ 137, 140).

While court in divorce suit is without jurisdiction to order receiver to seize property not included in judgment or which is claimed by one in possession not party to action, court has jurisdiction to appoint receiver to take possession

of property of husband for purpose of carrying out orders relative to alimony, under Civ. Code §§ 137, 140, and may authorize receiver to maintain an action for the recovery of such property.

2. Divorce ⚡267—Order in divorce suit appointing receiver for interest of spouses in community property, and authorizing him to take possession and bring necessary actions, held valid (Civ. Code, §§ 137, 140).

Order in divorce suit, appointing receiver, during pendency of the action, of all the interest of the spouses in certain community property, and authorizing receiver to take possession and bring such actions that might be necessary, and requiring him to pay wife amount allowed her as alimony, held valid under Civ. Code §§ 137, 140.

3. Prohibition ⚡5(3)—Court acting within its jurisdiction in appointing receiver is not subject to prohibition to annul appointment.

Prohibition will not lie to annul the appointment of a receiver by a court acting within its jurisdiction.

4. Prohibition ⚡5(3)—Trustee alleging fee ownership in property under husband's deed held not entitled to prohibition to restrain proceedings for possession by receiver in divorce suit (Civ. Code §§ 137, 140, 863).

Trustee, claiming property as fee owner under deed from husband, held not entitled to prohibition to prevent receiver appointed in divorce suit from taking steps to secure possession of property under court's order, or to annul order as void, where husband's beneficial interest in property was not denied, since order appointing receiver for community property was within court's jurisdiction under Civ. Code §§ 137, 140, and interest of trustee was not inconsistent with existence of husband's beneficial interest in property under section 863.

Application by the First National Housing Trust, Limited, and others for writ of prohibition to be directed to the Superior Court for the City and County of San Francisco, John J. Van Nostrand, Judge, to restrain proceedings under an order appointing a receiver. Writ denied, and proceeding dismissed.

H. L. McAllister, of San Francisco, for petitioner.

E. R. Hoerchner and R. F. Mogan, both of San Francisco, for respondents.

CASHIN, J. An original application for a writ of prohibition to the superior court of the city and county of San Francisco and to Eugene M. Levy, a receiver appointed in an action pending therein.

The petition, the averments of which are admitted by the respondents' demurrer, alleges that petitioner, First National Housing Trust, Limited, is a trust estate organized under the laws of Nevada; that petitioners A. E. Lasker and H. L. McAllister are its trustees; that petitioner first named, on or about January 22, 1927, by deeds from B. E. Priem,

became the owner in fee of several parcels of real estate and certain personal property described in the petition, one of the parcels of real property being situated in Alameda county and the others in different counties in California. It also appears from the petition and the exhibits attached that before the execution of the above transfers B. E. Priem commenced in respondent court an action for divorce against Fannie F. Priem, his wife, to which the latter filed her answer, with a cross-complaint by which a divorce from Priem was sought, together with a division of the community property of the marriage. On December 24, 1926, the court ordered judgment for Mrs. Priem on her cross-complaint and a division of the community property in the proportion of 51 per cent. thereof to the cross-complainant and 49 per cent. to the cross-defendant. No findings of fact or judgment in the action have as yet been filed or entered. On February 18, 1927, the court made its order requiring Priem to pay to his wife as alimony the sum of \$125 per month, and on April 4, 1927, a further order for the payment of \$500 on account of attorneys' fees and costs. On April 8, 1927, upon the application of Mrs. Priem and after notice to her husband, an order appointing a receiver for the purpose of enforcing the orders for the payment of alimony, attorneys' fees and costs was made. In its last order the court found the property described in the petition herein to be the community property of the spouses, and Eugene M. Levy was appointed receiver during the pendency of the action of "all the right, title, and interest of B. E. Priem and Fannie R. Priem" therein and "of the rents, issues, and profits thereof." The receiver was authorized by the order to take possession of the property and to bring such actions as might be necessary, and was further required to pay to Fannie R. Priem the amounts previously allowed by the court for alimony, attorneys' fees, and costs.

The petition further shows that the receiver duly qualified in accordance with the order of appointment, that demand was made upon a tenant in possession of one of the parcels of real property for the payment of the rent to the receiver, and that an action for its recovery was commenced.

Petitioners contend that, in view of the conveyances made by Priem, respondent court was without jurisdiction to appoint a receiver, that the order was therefore void, and that further action thereunder should be prohibited.

[1] When an action for divorce is pending, the court may in its discretion require the husband to pay as alimony any money necessary to enable the wife to support herself or to defend the action. Civ. Code, § 137. It may also require the husband to give reasonable security for providing maintenance or making any payments required under the above action, and may enforce the same by the appointment of a receiver or by any other remedy applicable to the case. Civ. Code, § 140; *McAneeny v. Superior Court*, 150 Cal. 6, 87 P. 1020. A court is without jurisdiction to order its receiver to seize property not included in the judgment (*Kreling v. Kreling*, 118 Cal. 421, 50 P. 549; *Staples v. May*, 87 Cal. 178, 25 P. 346), nor may it authorize the seizure of property which is claimed by one in possession who is not a party to the action (*Stuparich Mfg. Co. v. Superior Court*, 123 Cal. 290, 55 P. 985; *Tapscott v. Lyon*, 103 Cal. 297, 37 P. 225; *Havemeyer v. Superior Court*, 84 Cal. 327, 24 P. 121, 10 L. R. A. 627, 18 Am. St. Rep. 192), but it may nevertheless authorize the receiver to maintain an action for its recovery (*Ex parte Hollis*, 59 Cal. 405; *Miller v. Superior Court*, 63 Cal. App. 1, 217 P. 817).

[2] In the present proceeding it is alleged that the First National Housing Trust, Limited, is a trust estate and the owner in fee of the property described. These allegations are not inconsistent with the ownership of a beneficial interest in the property by Priem (Civ. Code, § 863); and the order of respondent court limited the power of the receiver to the right, title, and interest of Priem and his wife therein. While the order authorized the receiver to take possession of the property and the rents, issues, and profits, its provisions when read together clearly show that that was not the intention of the court, nor did it attempt to compel the relinquishment of possession by those claiming the right thereto otherwise than by suit, which the receiver was authorized to maintain.

[3, 4] The court had jurisdiction to appoint the receiver (Civ. Code, § 140), and its jurisdiction was not exceeded by its order of appointment. Prohibition will not lie to annul the appointment of a receiver by a court acting within its jurisdiction (*Takeba v. Superior Court*, 43 Cal. App. 469, 185 P. 406; *Havemeyer v. Superior Court*, supra), and the alternative writ is therefore discharged and the proceeding dismissed.

We concur: TYLER, P. J.; KNIGHT, J.

88 Cal. App. 302

PEOPLE v. RAENTSCH. (Cr. 1509.)

District Court of Appeal, Second District, Division 2, California. Jan. 11, 1928.

1. Embezzlement $\S$ 35—Proof of defendant's embezzlement of \$2,500 held not fatal variance, under indictment charging embezzlement of \$3,575.

Proof of defendant's embezzlement of \$2,500 held to sustain indictment charging embezzlement of \$3,575, as against claim that there was a material variance between pleading and proof.

2. Criminal law $\S$ 829(9)—Refusal to require jury to consider testimony in light of presumption of innocence held proper, where court instructed that defendant was presumed innocent.

Where court instructed that "defendant in criminal action must be presumed innocent until contrary is proved," and "in case of a reasonable doubt whether his guilt is satisfactorily shown he is entitled to an acquittal," refusal to give requested instructions that jury must consider all testimony in light of presumption of innocence held justified.

3. Criminal law $\S$ 829(18)—Refusal to instruct that as between conflicting conclusions jury should acquit held not error, where jury was fully instructed on reasonable doubt.

Refusal of court to instruct that if two plausible and reasonable conclusions could be drawn from evidence, one pointing to guilt and other to defendant's innocence, jury must return verdict of not guilty, held not error, where jury was fully instructed on question of reasonable doubt.

4. Criminal law $\S$ 695½—Ruling which correctly refused to permit impeachment of witness' testimony before grand jury was not rendered erroneous by subsequent presentation of matter in grand jury transcript.

Action of court in excluding testimony introduced to impeach witness' testimony before grand jury, where ruling was correct because of insufficient foundation, was not rendered erroneous by subsequently presenting matter contained in grand jury transcript, especially where actual record of trial failed to show such matter.

5. Criminal law $\S$ 1120(6)—Where record failed to show witness had been indicted, objection, on appeal, to exclusion of impeaching questions relative to dismissing indictment, held unavailing.

Objection, on appeal, that trial court refused to permit impeachment of state's witness by showing bias or prejudice on account of indictment against witness having been dismissed, presented nothing for consideration, where record failed to show that witness had ever been indicted.

6. Criminal law $\S$ 1120(3)—Alleged error in excluding records in another case, not identified by record, held not reviewable.

Alleged error of trial court in sustaining objection to offer of records and files in another

case presented nothing for review, where it did not appear what the nature of the action was, where it was pending, or of what the records and files consisted.

Appeal from Superior Court, Los Angeles County; Carlos S. Hardy, Judge.

Karl Raentsch was convicted of embezzlement, and he appeals. Affirmed.

Paul B. D'Orr and Thomas P. Cruce, both of Los Angeles (Bingham Gray, of Los Angeles, of counsel), for appellant.

U. S. Webb, Atty. Gen., and Charles A. Wetmore, Jr., Deputy Atty. Gen., for the People.

WORKS, P. J. Defendant was convicted of the crime of embezzlement. He appeals from the judgment and from an order of the trial court denying his motion for a new trial.

[1] The indictment charged that appellant was intrusted by the complaining witness with the sum of \$3,575 and that he embezzled the entire amount. The evidence showed that he was intrusted with the sum total named, but that he converted to his own use but part of it, the sum of \$2,500. Appellant contends that in these circumstances there was a material variance between pleading and proof. The point is answered by *People v. Gray*, 66 Cal. 271, 5 P. 240, in which case the Supreme Court said that "proof of the embezzlement of only a part of the amount charged was sufficient to support the information." See, also, *People v. Riordan* (Cal. App.) 250 P. 190, and *People v. Ledbetter* (Cal. App.) 259 P. 982.

[2] It is contended that the trial court erred in refusing to give two certain requested instructions. One of them was to the effect that "the defendant is presumed to be innocent, and this presumption of innocence abides with the defendant until after you have considered your verdict," and that the "presumption of innocence goes with you in your retirement to consider your verdict, and you must examine the evidence in the light of that presumption of innocence." The second requested instruction recited that "you must consider all of the testimony in the light of the presumption of innocence of the accused; that you must permit this presumption of innocence of the accused to abide with you until after you have reached a verdict; and that you must consider all of the evidence in the light of that presumption." Laying aside all question whether the first of these proposed instructions was objectionable because it contained the statement that the presumption abided with the jury "until after you have considered your verdict," and the second because it recited that the jury must permit the instruction "to abide with

you until after you have reached a verdict," we think the trial court was justified in refusing to give both. The jury was instructed that "a defendant in a criminal action is presumed to be innocent until the contrary is proved," and that "in case of a reasonable doubt whether his guilt is satisfactorily shown he is entitled to an acquittal." A situation exactly like the one here presented was before the Supreme Court in *People v. Miles*, 143 Cal. 636, 77 P. 666. It was said in the opinion there rendered that, "as reasonable men of ordinary intelligence, the jurors must have known that the presumption of defendants' innocence mentioned by the court had reference to the entire trial and to all the evidence there adduced." It was accordingly determined that the trial court's refusal to give a requested instruction similar to the ones asked for here was not injurious to the appellants. *People v. Miles* has been followed as late as *People v. Wolfgang*, 192 Cal. 754, 221 P. 907.

[3] Appellant also complains of the refusal of the trial court to give an instruction to the effect that "if, from the testimony, there are two plausible and reasonable conclusions to be drawn, one pointing to the guilt of the defendant, and one pointing to the innocence of the defendant, then you are to accept the one pointing to the innocence of the defendant, and find a verdict of not guilty." The sole argument advanced by appellant in support of the point is embraced in a quotation from the opinion in *People v. Corey*, 8 Cal. App. 720, 97 P. 907. We think the case can afford no comfort to appellant, especially as the trial court here instructed the jury fully upon the question of reasonable doubt, a similar circumstance having been the controlling factor in the case cited.

A point made by appellant is introduced thus:

"The next question for the court is on the question of evidence and the refusal of the trial court to permit defendant to question and to attempt to impeach the witness Olson. In order to bring this question clearly before the court, it will be necessary to set out in detail the evidence and the rulings of the trial court. * * * At page 266 of the reporter's transcript, the defendant attempted to impeach the testimony of the witness Olson and that impeachment was assented to by the trial court. The reporter's transcript involving that matter is as follows."

Appellant then sets out in his brief several pages of matter shown in the transcript, from which it appears that certain impeaching questions were asked and answered. However, as shown by the extract, appellant's counsel sought to present to the witness a certain portion of his testimony given before the grand jury. Upon objection the matter referred to was handed to the trial judge for his inspection. The record then shows, as quoted in the brief:

"The Court: This is the testimony of the witness on the stand?

"[Counsel for appellant]: The testimony of the witness on the stand before the grand jury.

"The Court (after reading transcript): Objection sustained."

The record is barren of any attempt to show what was the testimony before the grand jury which was submitted to the court's inspection and upon which the judge based his ruling, but nevertheless appellant, immediately after quoting the language which evidenced the ruling, proceeds to say in his brief:

"The matter asked of the witness, as he testified before the grand jury, in which the court sustained an objection by the district attorney, and referred to [in] * * * the reporter's transcript, is as follows."

Then are set forth ten or a dozen questions and answers, a reference to *Boos Bros.* being contained in one of the answers. Before the grand jury transcript was submitted to the inspection of the trial judge, counsel for appellant, as shown by a portion of the transcript of evidence taken at the trial which is reproduced in the brief, had asked the question: "How many \$1,500 payments did you make to *Boos Bros.*?" Objection was interposed to the question and the objection was sustained. Immediately after his quotation of matter asserted by him to have been taken from the grand jury transcript, appellant concludes thus concerning the point he presents:

"It will be seen that the question asked of the witness Olson and the ruling of the court thereon * * * which is as follows: 'Q. How many payments did you make to *Boos Bros.*?' [the objection and the ruling then being stated]—was prejudicial to the defendant when the court made his further ruling on the offer of the grand jury testimony, as heretofore set out."

[4] We understand from the state of appellant's brief that the point made here is that the trial court erroneously excluded the question which called for the number of payments made to *Boos Bros.* We understand further that the contention is that the ruling became erroneous only when the court had excluded whatever it was that was shown by the grand jury transcript. Such a position is untenable. The ruling on the question as to payments was clearly correct when it was made—indeed, so much seems to be admitted by the manner in which appellant makes his point—and it could not have been made wrongful by what happened afterward. The question was not called to the attention of the court, and no attempt was made to press it after the foundation for it was attempted to be laid. But the foundation was not laid, to the extent that the point could be considered here, even if the matter in the grand

jury transcript had been presented to the trial court before the question was asked, for the reason that the actual record of the trial fails to show what the matter was which was contained in the grand jury transcript. In the transcript of Olson's testimony, up to the point at which he was asked about the payments to Boos Bros., there is no mention of those individuals, nor of the fact that any payments whatever had been made to them.

Appellant contends that the trial judge unduly limited the examination of Olson upon a certain point concerning which his counsel sought to question him. The examination related to what is termed in the record the "French village" transaction. The argument of the point is very meager and from it we are unable to detect a semblance of error in the rulings of the trial court.

[5] Appellant asserts in his brief that the witness Olson himself had been under indictment and that the indictment had been dismissed. He then complains that the trial court "refused the defendant the right to question the witness Olson as to his relations with the defendant on trial and to show whether or not there was any bias or prejudice of the witness Olson by reason of the fact that the indictment against the witness Olson had been dismissed." Unfortunately, however, appellant fails to direct us to any showing in the record that Olson had been indicted, or that any indictment against him had been dismissed. Nor are we shown what questions were addressed to the witness for the purpose stated in the brief, nor what objections were made which impelled the attacked rulings of the trial court, nor, in truth, are the rulings themselves pointed out. It would appear, therefore, that appellant gives us nothing to consider.

[6] Appellant contends that the trial court erred in sustaining an objection to an offer of the "records and files" in a certain case. The portion of the reporter's transcript to which our attention is directed shows such an offer, objection, and ruling, but we are not shown what the nature of the action was, where it was pending, nor of what the "records and files" consisted. The consideration of this "point," therefore, imposes no heavy labor upon us. We cannot perceive that it is meritorious and appellant must therefore be satisfied with our conclusion that it is not.

The contention is made that the trial judge was guilty of misconduct affecting the substantial rights of appellant, but the point is so evidently without merit that we forbear to incumber the official reports with a further mention of it.

Judgment and order affirmed.

We concur: CRAIG, J.; THOMPSON, J.

**EDWARDS v. SUPERIOR COURT OF
STATE OF CALIFORNIA IN AND FOR
LOS ANGELES COUNTY et al. (Civ.
5870.)***

District Court of Appeal, Second District, Division 1, California. Jan. 9, 1928.

Hearing Denied by Supreme Court March 8, 1928.

1. Divorce ⇨264—Wife is entitled, under appropriate circumstances, to order supplementary to execution of alimony judgment (Civ. Code, § 137; Code Civ. Proc. § 1007).

Under Civ. Code, § 137, and Code Civ. Proc. § 1007, wife awarded alimony in divorce suit is entitled, under appropriate circumstances, to an order supplementary to execution of judgment.

2. Mandamus ⇨4(1)—Writ of mandate should be denied, where remedy by appeal exists (Code Civ. Proc. § 1086).

Under Code Civ. Proc. § 1086, issuance of writ of mandate should be denied, where a remedy by way of appeal exists.

3. Mandamus ⇨4(3)—Where reversal of order dismissing proceeding supplementary to execution of alimony judgment on appeal would leave appellant in no better position, she may have mandate to enforce rights (Code Civ. Proc. § 963).

Ordinarily, remedy for error by trial court in dismissing proceeding supplementary to execution of judgment awarding wife alimony in divorce suit would be by way of appeal, rather than writ of mandate, under Code Civ. Proc. § 963, but in special circumstances, as where mere reversal of order would leave appellant in no better position than before for lack of power to compel issuance of order to which entitled, she may have mandate to enforce her rights.

4. Mandamus ⇨4(3)—Mandamus will issue to require restoration to calendar of dismissed proceeding supplementary to execution of alimony judgment, appeal providing inadequate remedy (Code Civ. Proc. § 963).

As appeal, under Code Civ. Proc. § 963, from order dismissing proceeding supplementary to execution of judgment awarding alimony to wife in divorce suit would not provide adequate remedy, even if decided favorably to her, in that it would merely confirm her right to demand issuance of order without empowering her to compel hearing thereon, peremptory writ of mandamus to restore proceeding to calendar will issue.

Application by Hortense I. Edwards for a writ of mandate requiring the Superior Court in and for the County of Los Angeles, Fletcher Bowron, Judge, to restore to the calendar a proceeding supplemental to execution. Peremptory writ granted.

Charles M. Easton, of Los Angeles, for petitioner.

Everett W. Mattoon, Co. Counsel, and Claude H. McFadden, Deputy Co. Counsel, both of Los Angeles, for respondents.

HOUSER, J. It appears that some time prior to the filing of the petition herein petitioner was granted a decree of divorce from her husband, wherein she was awarded alimony; that several months thereafter, because of the fact that nothing had been paid by the husband on account of such alimony, he was cited for contempt of court. At the same time, but under a separate proceeding supplementary to execution, the husband was ordered to answer respecting his property. When the two matters came on for hearing, the judge then and there presiding required the wife to elect whether she would proceed by and through the citation for contempt of court, or by virtue of the proceeding supplementary to the execution of the judgment. Upon the declination and refusal of the wife to so elect, the court thereupon dismissed the proceeding supplementary to the execution and caused to be entered in its minutes an order of which the following is a part, to wit:

"* * * The court gives plaintiff the right of election as to whether he elects to proceed upon the examination of judgment debtor or the order to show cause re contempt, the court holding that the two proceedings are inconsistent with each other. The counsel for plaintiff refused to elect between the two proceedings and the court then orders the proceeding in re examination of judgment debtor dismissed, to which plaintiff enters his exception. * * *

By virtue of a writ of mandate petitioner seeks to have the proceeding supplementary to the execution restored to the calendar of the lower court, to the end that the husband may be required to answer regarding his property.

[1] The question first raised by respondents as to whether, in an action for divorce where alimony is awarded the wife, under appropriate circumstances she is entitled to an order supplementary to the execution of the judgment. No authorities directly in point are cited. However, the provisions of the statutes would seem to be ample. Section 137 of the Civil Code gives the right to execution in satisfaction of an order of "alimony" during the pendency of an action for divorce; and section 1007 of the Code of Civil Procedure provides that:

"Whenever an order for the payment of a sum of money is made by a court, pursuant to the provisions of this Code, it may be enforced by execution in the same manner as if it were a judgment."

[2] No attempt is made by respondents to justify the "inconsistency" between the alleged contempt of court and the proceeding supplementary to the execution, as suggested by the judge before whom the several matters were set for hearing. It is, however, urged by respondents that mandamus is not the appropriate remedy to correct the error, if any, made by the lower court.

Section 1086 of the Code of Civil Procedure provides that the writ of mandamus must issue "in all cases where there is not a plain, speedy, and adequate remedy, in the ordinary course of law." Under such provision it is generally held that where a remedy by way of an appeal exists, the issuance of the writ of mandate should be denied. 16 Cal. Jur. 787, and cases there cited. It therefore becomes important to inquire whether the order of dismissal of the proceeding supplementary to execution of the judgment was an appealable order.

[3] Section 963 of the Code of Civil Procedure, which specifies the several instances in which an appeal may be taken, among other things, contains a provision in effect that an appeal will lie "from any special order made after final judgment." In the case of *Stensland v. Superior Court*, 39 Cal. App. 172, 178 P. 549, it is ruled that an appeal lies from an order made on proceedings supplementary to execution. In the instant matter, it would therefore follow that ordinarily, if an error was committed by the trial court, the remedy of petitioner, if any, would be by way of an appeal, rather than by the force of a writ of mandate. However, it appears that in special instances where, for example, the effect of a mere reversal of the order from which an appeal might be taken would leave the appellant in no better position than that occupied by him in the first instance—that is to say, with a simple right to the issuance of the order, but with no power to compel it—the party aggrieved may have a mandate to enforce his rights. The point is illustrated in the case of *Holtum v. Greif*, 144 Cal. 521, 78 P. 11, where a petition was presented to the court for a writ of mandate requiring the respondents to issue execution on a judgment. In that case Chief Justice Beatty, in speaking for the court, said in part:

"* * * Here it is suggested there is a plain, speedy, and adequate remedy by appeal from the order overruling the motion for execution; but this remedy, although plain, is neither speedy nor adequate. The appeal, in the ordinary course, would not be decided for a long time, and pending the appeal there would be no security for the payment of the judgment; and, besides, nothing would necessarily result from an appeal beyond a reversal of the order, and this would merely confirm the right of the petitioner to execution—a right already complete. So that, unless the judgment of reversal was accompanied by a mandatory direction to order the issuance of execution, the petitioner would find himself at the end of his appeal precisely where he is now—with a right to demand the issuance of the writ, but with no power to compel it. Considerations such as these must have been the ground of decision in *Garoutte v. Haley*, 104 Cal. 497, 38 P. 194. * * *

In the case of *Sullivan v. Superior Court*, 185 Cal. 133, 195 P. 1061, the same rule was applied as affecting a writ of assistance.

See, also, *Hunt v. Broderick*, 104 Cal. 313, 37 P. 1040; *Garoutte v. Haley*, 104 Cal. 497, 38 P. 194.

[4] In the instant case, as in substance is pointed out in each of the cases to which reference has been had, an appeal from the order in question, if decided favorably to the appellant, would fail in providing an adequate remedy in that it would "merely confirm the right" of the appellant in the premises and leave her at the end of her appeal precisely where she is now—with the right to demand the issuance of the order supplementary to the execution of the judgment, but with no power to compel a hearing thereon.

So far as the proceeding supplementary to execution is concerned, let the peremptory writ issue as prayed.

We concur: CONREY, P. J.; YORK, J.

88 Cal. App. 131

SAN BENITO COUNTY v. RILEY, State Controller. (Civ. 5899.)

District Court of Appeal, First District, Division 1, California. Dec. 30, 1927.

1. Highways §99¼—Motor Vehicle Fuel Act imposes mandatory duty on state controller to draw warrants in favor of counties complying with act.

Under the Motor Vehicle Fuel Act (St. 1923, p. 571), controller has mandatory duty to draw warrants on state fund in favor of counties for certain amounts, and only justification for refusal to perform such duty is that county has failed to comply with conditions of act as to creation of proper county road fund for reception of money, and in making reports.

2. Highways §99¼—County complying with Motor Vehicle Fuel Act has right to moneys under act regardless of indebtedness arising under another statute.

Where county has complied with conditions of Motor Vehicle Fuel Act (St. 1923, p. 571) as to the creation of proper county road fund and in making reports, there is no statutory law expressly or by implication vesting authority in the controller to suspend operation of mandatory legislative act and thus deprive county of moneys to which it is admittedly entitled, pending settlement of disputed indebtedness between state and county, arising under statute entirely foreign to particular one involved.

3. Highways §99¼—Under Motor Vehicle Fuel Act, state controller must upon ascertainment of county's share of taxes deliver his warrants for amount fixed.

Under Motor Vehicle Fuel Act (St. 1923, p. 571), county's proportionate share of motor vehicle fuel taxes is subject to mathematical ascertainment, and controller not having power to suspend operation of act, it becomes his ministerial duty to draw and deliver his war-

rant for amount fixed, irrespective of what his power and authority may prove to be relating to settlement of other accounts.

4. Counties §214—In county's mandamus proceeding to compel controller to pay county share of taxes, court was without jurisdiction of special defense that county was indebted to state for support of feeble-minded persons, in view of remedy at law (Motor Vehicle Fuel Act; Pol. Code, §§ 2192, 2193, 4078).

In proceeding by county for writ of mandate to compel controller to issue warrants to county for its share of taxes under Motor Vehicle Fuel Act (St. 1923, p. 571), court held without jurisdiction, equitable or otherwise, to determine merits of disputed indebtedness set up in special defense that county was indebted to state for support of feeble-minded persons, under Pol. Code, §§ 2192, 2193, remedy for adjudication of merits of disputed claims being obtainable by an action at law under section 4078.

5. Counties §214—In county's mandamus proceeding to compel controller's payment of taxes, county's failure to pay state for support of feeble-minded persons held no defense, in view of other remedy (Motor Vehicle Fuel Act; Pol. Code, §§ 2192, 2193).

In proceeding for writ of mandate by county to compel controller to issue warrants to county for its share of taxes under Motor Vehicle Fuel Act (St. 1923, p. 571), controller held not entitled to set up special defense that county was indebted to state for support of feeble-minded persons under Pol. Code, §§ 2192, 2193, in view of latter section confining enforcement of payment of such claims to the state commission in lunacy.

Petition for writ of mandate by the County of San Benito against Ray L. Riley, as Controller of the State of California, to compel delivery to petitioner of certain state warrants under the Motor Vehicle Fuel Act. Writ granted.

See, also, 263 P. 352.

Wyckoff & Gardner, of Watsonville, and A. M. Runnells, Dist. Atty., of Hollister, for petitioner.

U. S. Webb, Atty. Gen., and Charles A. Wetmore, Jr., and R. L. Chamberlain, Deputy Attys. Gen., for respondent.

KNIGHT, J. The county of San Benito has petitioned this court for a writ of mandate to compel the state controller to deliver to the county certain state warrants for the payment of the total sum of \$29,685.24, representing the county's share of moneys collected by the state pursuant to the terms of an act of the Legislature imposing a license tax upon the business of producing, refining, and distributing motor vehicle fuel, known as the Motor Vehicle Fuel Act. Stats. 1923, p. 571.

Answering, the controller expressly admits

the allegations of the county's petition showing that according to the terms of said act the county is entitled to said warrants for the amount claimed, but he has interposed a special defense which in substance sets forth that the county refuses to pay to the state an alleged indebtedness in the sum of \$13,336.44 incurred under the provisions of sections 2192 and 2193 of the Political Code for the support of feeble-minded persons committed to the Sonoma State Home by the superior court in and for that county. The prayer of the answer is:

"(1) That this court, as a court of equity, take up, consider and determine the respective claims of the plaintiff and the defendant as set forth in the pleadings herein, and adjudge the amount due respectively from one to the other. (2) That as a condition precedent to the issuance of any writ of mandate out of this court requiring said defendant to draw the warrants referred to in the pleadings herein, the said plaintiff, the county of San Benito, be required to pay to the controller in accordance with law, the sums so found by this court to be due from the plaintiff for the care and support of the inmates of the Sonoma State Home. * * *"

The county has demurred to the answer upon general and special grounds, among them being that the matters pleaded therein do not constitute a defense, and that in any event this court is without original jurisdiction to hear or determine the controversy pleaded in said special defense. We are of the opinion that the demurrer must be sustained.

The fuel act in question provides, among other things, that all money received by the state controller under its terms shall be deposited in the state treasury to the credit of the "motor vehicle fuel fund," and that after certain refunds are paid one-half of the money remaining shall be paid to the counties in the proportions specified in said act; that in the months of May and November of each year the state treasurer shall make a report to the controller for the preceding six months showing the condition of said fund, "and thereupon the controller shall draw his warrant upon the 'motor vehicle fuel fund' in favor of each county in the state for the amount to which each such county is entitled." And the act further provides: That "all such amounts so paid to the several counties shall be paid into a special road improvement fund. Such fund shall be expended by the county receiving it exclusively in the construction and maintenance of roads, bridges, and culverts in each such county. In the event that any county has not established such a road fund, its proportion of such fund shall be retained by the state until provision for such a road fund has been made, and it shall then be paid over to such county." And, furthermore: That "the controller shall not draw such warrant in favor

of any county which shall not have established such a road fund as is herein required or which shall be delinquent in its annual report to the state department of public works" as in said act required.

[1, 2] It will therefore be seen that there is a specific mandatory duty enjoined upon the controller by the terms of said act to draw warrants on the state fund in favor of the counties for certain amounts, and that the only justification for a refusal to perform such duty is that the county has failed to comply with the conditions of said act as to the creation of the proper county road fund for the reception of the money and in making said reports. Admittedly, the county of San Benito has not defaulted in either of these requirements; and there is no statutory law expressly or by implication vesting authority in the controller to suspend the operation of a mandatory legislative act and thus deprive a county of certain moneys to which it is admittedly entitled, and which are designed to be used for a specified purpose, pending the settlement of a disputed indebtedness between the state and the county, arising under a statute entirely foreign to the particular one involved; and, manifestly, in the absence of such statutory authority he may not do so.

A similar question was presented in the case of *Posados v. City of Manila*, 274 U. S. 410, 47 S. Ct. 704, recently decided by the Supreme Court of the United States, and the law as declared by the decision therein has direct application here. There the insular auditor of the Philippine Islands sought to enforce the settlement of an indebtedness claimed to be due the government from the city of Manila for the use of water by withholding from the city certain warrants in payment of the city's share of the internal revenue to which the city was entitled under the Philippine Administrative Code. In affirming the judgment of the Supreme Court of the Philippine Islands granting to the city a writ of mandate directing the auditor and the internal revenue collector to deliver said warrants to the city, the Supreme Court of the United States, speaking through Mr. Chief Justice Taft, said:

"It is apparent from reading the foregoing sections [sections 490-492, 494, 495, 497 of the Administrative Code] that they are directions by statutory law as to the distribution of the collections made by the internal revenue collector, and that the share to be paid to the city of Manila is fixed thereby, and the exact figure can be ascertained mathematically. This requires no exercise of discretion, judicial or otherwise, after the total amount of the internal revenue receipts are known, and in this case there is no dispute as to that amount. It becomes the ministerial duty of the internal revenue collector to draw his warrant for the share of the city thus fixed by statute. It becomes the duty of the insular auditor, when

such a warrant of the internal revenue collector is presented to him, after ascertaining that the amount for which it is drawn is in accord with the directions of the statute, to countersign the same. *Kendall v. United States*, 12 Pet. 524, 9 L. Ed. 1181; *Wright v. Ynchausti*, 272 U. S. 640, 651, 652, 47 S. Ct. 229, 71 L. Ed. 454. No matter what the power of the auditor may prove to be with reference to the settlement of accounts as between the city of Manila and the metropolitan water board, or what his power with reference to enforcing the settlement so reached by him, nothing in the laws of the Islands is disclosed to us which enables the auditor in the enforcement of such settlements to dispense with or to suspend the operation of positive law in reference to the course which shall be followed in the disposition by the internal revenue collector of the receipts from internal revenue collections which he is directed by the statute to pay to the city. His duty is clearly set forth, and he has nothing to do but to comply with it, having ascertained exactly what the share of the city is under the foregoing provisions."

[3] And so here, there is a statutory distribution of the moneys collected by the state from the motor vehicle fuel taxes, and the proportionate share thereof to which each county is entitled is subject to mathematical ascertainment; therefore, when the amount is ascertained, the controller has not the power to suspend the operation of said act, and it becomes his ministerial duty to draw and deliver his warrant for the amount fixed by the statute, irrespective of what his power and authority may prove to be relating to the settlement of other accounts."

[4] Nor may the equitable powers of this court be invoked in a proceeding of this kind to aid defendant in accomplishing indirectly that which he may not do directly, namely, the withholding of the moneys admittedly due said county under the Motor Vehicle Fuel Act until there has been an adjustment and payment in full of the alleged indebtedness due the state from the county on the Sonoma State Home account, for the reason that in the absence of statutory authority the courts have no more power than the controller to suspend the plain, mandatory provisions of a legislative act. Moreover, this is a special proceeding, and, as in the case of *Posados v. City of Manila*, supra, wherein it was said that the only question involved was "what should be done with the share of the collections made by the internal revenue collector under the sections of the Administrative Code," the only matter presented for

determination here is what shall be done with the collections made by the state under the Motor Vehicle Fuel Act. The question, therefore, as to whether or not the county is indebted to the state for the support of feeble-minded persons committed to the Sonoma State Home is one with which we are not here concerned.

Furthermore, this court, not being possessed of trial court powers, doubtless is without original jurisdiction, equitable or otherwise, to hear or determine the merits of the disputed indebtedness set forth in the special defense. As appears from the allegations of the special defense the state presented monthly claims against the county based upon said indebtedness which were by the board of supervisors rejected. Any adjudication of the merits of said rejected claims must therefore be obtained through the medium of an action at law (Pol. Code, § 4078), which affords either party a right of appeal from the judgment to be rendered therein. The original jurisdiction to hear and determine such an action is exclusively in a trial court.

[5] Finally, it would appear that the two exclusive remedies provided for by section 2193 of the Political Code for the enforcement of the payment of state claims against counties for the maintenance of feeble-minded persons committed to the Sonoma State Home must be exercised by the state commission in lunacy and that neither are available to the state controller. Said section declares that " * * * the state commission in lunacy may require the county treasurer by writ of mandate to pay to the state treasurer upon an order of the controller all amounts found to be due to the state, * * *" or that "said commission may, in its discretion, recover sums due from counties * * * by the presentation of claims against the board of supervisors. * * *" In view of the foregoing provisions, it would seem that in any event the subject-matter of state claims arising under said section may not be resorted to by the controller as a legal excuse for the refusal to perform the statutory duty imposed upon him by said act.

For the reasons hereinabove stated, the demurrer to the answer is sustained, and the peremptory writ of mandate will issue as prayed except as to damages, the statute having made no provision for such allowance.

We concur: TYLER, P. J.; CASHIN, J.

88 Cal. App. 138

McCULLOUGH, Treasurer of County of San Benito, v. RILEY, State Controller.
(Civ. 5900.)

District Court of Appeal, First District, Division 1, California. Dec. 30, 1927.

1. Counties ⚡214—In county's mandamus proceeding for payment of fees, county's indebtedness to state for taxes and school lands held no defense (Motor Vehicle Act [St. 1923, p. 568]).

In county's proceeding for writ of mandate to recover its share of operators' and chauffeurs' license fees collected by state under Motor Vehicle Act (St. 1923, p. 568), controller's allegations that county was indebted to state on account of inheritance and property taxes and for the purchase of school lands held not to constitute a defense.

2. Counties ⚡214—In county's mandamus proceeding to compel payment of fees under Motor Vehicle Act, court was without jurisdiction of defense of county's indebtedness to state arising from other matters (St. 1923, p. 568).

In county's proceeding for writ of mandate to recover its share of operators' and chauffeurs' license fees collected by state under Motor Vehicle Act (St. 1923, p. 568), court held without jurisdiction to determine merits of defense of controller that county was indebted to state for collection of inheritance and property taxes and for the purchase of school lands.

3. Counties ⚡214—In mandamus proceeding, state's claim against county treasurer cannot be set off against county's claim against state for fees collected under Motor Vehicle Act (St. 1923, p. 568).

In county's proceeding for writ of mandate to recover its share of operators' and chauffeurs' license fees collected by state under Motor Vehicle Act (St. 1923, p. 568), claim of state against county treasurer for inheritance and property taxes and purchase of school lands cannot be urged as a set-off to county's claim against the state.

Petition by C. F. McCullough, as Treasurer of the County of San Benito in the State of California, against Ray L. Riley, as Controller of the State of California, for writ of mandate, to be directed to respondent as state controller to compel delivery to petitioner of certain state warrants under the Motor Vehicle Act. Writ granted.

Wyckoff & Gardner, of Watsonville, and A. M. Runnells, Dist. Atty., of Hollister, for petitioner.

U. S. Webb, Atty. Gen., and Charles A. Wetmore, Jr., and R. L. Chamberlain, Deputy Attys. Gen., for respondent.

KNIGHT, J. This proceeding in mandamus was instituted on behalf of San Benito county for the purpose of requiring the state controller to deliver certain state warrants for the payment of the total sum of \$4,876.90

constituting the county's share of the state "Motor Vehicle Fund" collected by the state under the Motor Vehicle Act (Stats. 1923, p. 568). It is a proceeding identical in its nature to and involves the same main legal question presented in the one entitled "County of San Benito, Plaintiff, v. Ray L. Riley, as Controller of the State of California, Defendant," numbered 5899, 263 P. 349, which has this day been decided by this court in favor of the plaintiff therein.

There the county was seeking to recover its share of motor vehicle fuel taxes collected by the state pursuant to the Motor Vehicle Fuel Act (St. 1923, p. 571), and the defense was that the county had refused to pay an alleged indebtedness to the state for the care of feeble-minded persons committed from that county to the Sonoma State Home. Here, as indicated, the county is seeking to recover its share of the operators' and chauffeurs' license fees collected by the state under the Motor Vehicle Act, the terms of which are similar to those of the Motor Vehicle Fuel Act with reference to the mathematical ascertainment of the counties' shares thereof and as to the specific mandatory duty enjoined upon the controller to draw and deliver his warrants therefor to each county, providing the county has complied with the requirements of said act by creating the property county fund for the reception of the money and in making its annual reports.

The controller here, as in the other proceeding, expressly admits the essential allegations of the petition showing that under the terms of the act the county is entitled to the delivery of the warrants for the total amount of money claimed, but he has interposed the defense that the treasurer of the county in whose official capacity this proceeding is being maintained has failed to pay to the state certain sums of money amounting in all to \$5,750.88 claimed to have been collected by him for the state on account of inheritance taxes, property taxes, and the purchase of school lands; and the prayer of the answer is that this court, in the exercise of its equitable powers, adjust the claims of the respective parties and order withheld the warrants due the county until the treasurer pays the alleged indebtedness above mentioned.

[1, 2] In conformity with the conclusion reached in the other proceeding, it must be held here that the matters pleaded by the controller do not serve as a legal excuse for a refusal to perform the mandatory duty imposed upon him by the Motor Vehicle Act, nor do they constitute a defense herein, and, furthermore, that this court is without original jurisdiction to hear or determine the merits of the subject-matter thereof.

[3] The defense pleaded in the present proceeding is subject to this additional infirmity. The money which the state is withholding belongs, according to the terms of the act, to the county and not to the treasurer, the warrant therefor being made payable to the treasurer merely as the county's agent, whereas the liability for the alleged default in payment of the moneys claimed to be due the state as set forth in said special defense is against the treasurer alone, the money having been paid to him under the terms of various statutes as the fiscal agent of the state. The county is not concerned therewith, and, assuming that default occurs in payment of any portion thereof to the state, the county is in no way responsible. That being so, the alleged claim of the state against the county treasurer cannot be urged as a set-off to the county's claim against the state. *Corbett v. Widber*, 123 Cal. 154, 55 P. 764.

Plaintiff's demurrer to the answer is sustained, and the peremptory writ will issue as prayed for the delivery of said warrants and costs.

We concur: TYLER, P. J.; CASHIN, J.

87 Cal. App. 684

CULLINAN et al. v. McCOLGAN. *
(Civ. 6016.)

District Court of Appeal, First District, Division 1. California. Dec. 20, 1927.

Hearing Denied by Supreme Court Feb. 16, 1928.

1. Limitation of actions §199(1)—Where facts are agreed upon or ascertained, it is question of law whether demand is barred by limitations.

Where facts are agreed upon or ascertained, it is a question of law whether the demand is barred by the statute of limitations.

2. Limitation of actions §199(1)—Issue joined on plea of limitations, where evidence conflicts as to when cause of action accrued, is properly submitted to jury.

Where issue is joined on plea of statute of limitations and evidence is conflicting as to when, with reference to filing of complaint, a cause of action accrued, the question is properly submitted to jury as mixed question of law and fact.

3. Limitation of actions §199(1)—Case may not be taken from jury where plea of limitations is interposed and there is supporting evidence.

Case may not be taken from jury where plea of statute of limitations is interposed and there is evidence to support plea.

4. Appeal and error §932(1)—Appellate court would assume that verdict represented reasonable value of attorney's services for claims not barred by limitations.

Where attorney sued client for legal services rendered and client interposed defense of

statute of limitations upon which court instructed jury, and client did not contend that all claims for services submitted to jury were barred, *held* appellate court would assume that verdict represented reasonable value of services which jury found not to have been barred by statute.

5. Attorney and client §165—Attorney representing client, where retainer is general, may be required to set out charge for each distinct matter.

Where retainer is general and attorney advised his client or performed services in number of distinct matters, he may properly be required to set out his charge for each distinct matter.

6. Attorney and client §140—Where services of an attorney relate to one subject-matter, it forms no just measure of value to separate transaction into parts.

When services of an attorney all relate to one subject-matter, it forms no just measure of value of services to separate transaction into parts and have attorney state what charge he made for each separate part.

7. Appeal and error §1033(7)—Where jury was instructed to make no allowance for attorneys' services not performed within limitation period, failure to prove particular service was not ground for complaint by client.

Where attorney testified in detail concerning services rendered and time when rendered, and jury was definitely instructed to make no allowance for any service attorneys had not proved to jury's satisfaction to have been performed within period of limitations, any failure of attorneys to prove particular service resulted in their disadvantage, and client may not complain, especially where he has waived right to raise point that evidence was not sufficient to justify verdict.

8. Partnership §140—Partnership held liable for attorneys' services, rendered on request of deceased partner, where surviving partner admitted attorney was employed for partnership (Code Civ. Proc. § 2055).

Contention of surviving partner that attorney employed by deceased partner was not employed for benefit of copartnership was without merit, where such partner, called as adverse witness, under Code Civ. Proc. § 2055, admitted that deceased partner employed attorney for copartnership business with his knowledge and consent.

9. Partnership §140—Partnership promising to pay held liable for attorney's services, though some of them were rendered for third persons.

Where attorney was employed by deceased member of partnership and some of services were rendered for benefit of third parties but employment was by and on behalf of partnership and partnership promised to pay for services, *held* it was liable for services.

10. Attorney and client $\S$ 130—Attorney need not be successful in litigation to recover compensation on quantum meruit.

Where surviving partner, sued by attorney for services rendered, contended that employment resulted in no benefit to partnership, *held* that it is not necessary that lawyer be successful in litigation and actually recover or preserve property for client before he was entitled to recover full value of services on quantum meruit.

11. Witnesses $\S$ 152—Attorney's testimony as to declarations of deceased partner held admissible in action against surviving partner; "executor or administrator;" "claim or demand against estate of deceased person" (Code Civ. Proc. $\S$ 1880, subd. 3).

Testimony of attorney, in action against surviving partner for services, as to declarations, in absence of surviving partner, made to attorney by partner who died prior to commencement of action, *held* admissible, since action was neither against the "executor or administrator" nor a "claim or demand against the estate of deceased person" within meaning of Code Civ. Proc. $\S$ 1880, subd. 3, in view of sections 1365, 1585.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Claim against Estate; Executor.]

12. Appeal and error $\S$ 1050(1)—Testimony of attorney as to profit made by deceased partner on loan, in action by attorney for services, held not prejudicial.

In action by attorney against surviving partner for services, rendered partnership, testimony of attorney as to profit made by deceased partner on loan, while immaterial as an element in determining value of professional services, was not prejudicial.

13. Pleading $\S$ 139—Court properly refused to permit partner to show attorney's services were in satisfaction of partnership claim, where it was not pleaded (Code Civ. Proc. $\S\S$ 437, 438, 439).

In action for services by attorney against surviving member of partnership, court properly refused to permit partner to prove services of considerable value were rendered under agreement that they were to be taken in pro tanto satisfaction of claim of partnership, under Code Civ. Proc. $\S\S$ 437, 438, 439, where no counterclaim or set-off was pleaded in answer except claim for damages, which was abandoned.

14. Appeal and error $\S$ 932(1)—Where jury was instructed that partnership was liable for services rendered it by attorney only on partnership business, court on appeal must assume jury's award covered only such services.

In action by attorney for services rendered to partnership, where court instructed that partner would have no authority to make co-partnership liable for services, unless service concerned business of partnership, and burden of proving services were of that character was upon plaintiff, *held* that court on appeal can but assume that jury in its verdict awarded compensation only on business with which co-partnership was concerned.

15. Pleading $\S$ 236(2)—Refusal of request to amend answer, made at end of trial after case had been pending for 2½ years, was not abuse of discretion.

Refusal of request of defendant for leave to amend answer at end of trial, after case had been pending for 2½ years, was not abuse of discretion.

16. Appeal and error $\S$ 959(1)—Ruling in granting an amendment to pleading is subject to review only when there is an apparent abuse of discretion.

While court should exercise its power in granting amendments to pleadings freely and liberally in order that substantial merits of cause may be reached and determined, yet when court has exercised its power by granting or refusing an amendment, its ruling is subject to review only when it is apparent that an abuse of discretion has occurred.

17. Pleading $\S$ 236(1)—Application to amend pleading may be denied, where no showing is made to justify court's discretionary power.

An application to amend pleading may be denied, where no showing is made to justify court's discretionary power, or where there is negligence indicating bad faith.

18. Appeal and error $\S$ 1050(1)—Testimony as to value of attorney's services was not prejudicial where cumulative.

In action by attorney against surviving partner for services rendered partnership, testimony of witness as to value of services based on personal observation in certain case was not prejudicial, where it was merely cumulative.

19. Evidence $\S$ 571(7)—Testimony of experts as to value of legal services is not conclusive.

Testimony of experts as to value of legal services is not conclusive, nor does it necessarily control verdict of jury.

20. Trial $\S$ 260(1)—Refusal of requested instructions was proper, where covered by given instructions.

Refusal of requested instructions was proper, where matters were covered by given instructions.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by Eustace Cullinan and Thomas W. Hickey, copartners doing business under the firm name and style of Cullinan & Hickey, against R. McColgan, as surviving partner of Daniel A. McColgan and R. McColgan, copartners doing business under the name of D. A. McColgan, and also under the names Daniel A. McColgan and R. McColgan, for legal services. Judgment for plaintiffs, and defendant appeals. Affirmed.

Keyes & Erskine, of San Francisco, for appellant.

John L. McNab, of San Francisco, for respondents.

CAMPBELL, Justice pro tem. Plaintiffs, engaged in the practice of law, sued defendant Reginald McColgan, as surviving member of a copartnership of which his deceased brother, Daniel A. McColgan, was the other member, for the reasonable value of professional services rendered by plaintiffs to the copartnership. The action was commenced August 19, 1922. The copartnership is admitted by the pleadings, and so is the fact that it was engaged in a general loan and brokerage business. It is also admitted that the copartnership business was done under the names of both partners and also of each partner.

In the first count of their third amended complaint, plaintiffs allege that the partners, within two years immediately preceding the commencement of the action, became indebted to plaintiffs for services rendered, and that the reasonable value of such services so rendered within the two-year period was \$28,525. In a second count of their third amended complaint, plaintiffs alleged that within four years immediately preceding the commencement of the action the two McColgans, as copartners, became indebted to plaintiffs, in the sum of \$38,418.39, balance upon a book account for services and moneys advanced. A third count alleged that the McColgans as copartners became indebted to plaintiffs within four years immediately preceding the action on a balance due of \$38,418.39 upon a mutual, open, and current account for services rendered and money advanced. In a fourth count it is alleged that the defendant, as surviving partner, is indebted to the plaintiffs in the sum of \$38,418.39 for services rendered and moneys advanced by plaintiffs to the copartners at their special instance and request. The fifth count asserts that on or about February 28, 1920, an account was stated between plaintiffs and the copartners by which it was agreed that a balance of \$508.39 was owing for moneys advanced. A sixth count alleges that the copartnership and Reginald McColgan, as surviving partner, are indebted to plaintiffs in the sum of \$37,910, a balance owing on account of services, that the copartners agree to pay the reasonable value of the services, and that the reasonable value was and is \$41,560, of which \$3,650 had been paid, leaving a balance unpaid of \$37,910 on account of services. Each count is supported by the customary averments. The death of Daniel A. McColgan is alleged and admitted in the answer to have occurred May 12, 1921.

In support of their complaint, plaintiffs filed an "amended and further bill of particulars." In this bill of particulars plaintiffs recited the services rendered, and that such services were rendered for and at the request of the McColgan partnership, and set forth the moneys advanced, the payments on account, the facts concerning their

claim, and the charge they made for each separate piece of work. There is a summary and recapitulation in the bill of particulars in which plaintiffs separately list the services completed within two years prior to the filing of the complaint and the services completed within four but not within two years prior to that date.

The bill of particulars, besides being filed, was introduced in evidence as Plaintiff's Exhibit No. 118, and Mr. Cullinan testified to its correctness.

Reginald McColgan filed a verified answer to the third amended complaint, in which he admitted being the surviving member of the copartnership, but, by appropriate allegations, denied the indebtedness either for services rendered or money advanced, and denied that the services were rendered at the instance or request of the copartners, or either of them, denied any promise to pay, denied that the services were worth the amounts alleged or any other amount, denied that plaintiffs had advanced any money for the use or benefit of the copartners, and pleaded the statute of limitations as against each count of the third amended complaint. In addition, the defendant set up a cross-complaint in which he charged plaintiffs with having caused the copartners a loss of \$6,278 by reason of their negligence as attorneys for the copartnership in failing to have the summons served on one William L. McGuire in an action which the copartners commenced against McGuire. To this cross-complaint plaintiffs filed an answer, denying negligence on their part or damage to defendants, alleging that Daniel A. McColgan and Reginald McColgan had expressly instructed them not to have the summons served in that matter and not to proceed further therein. Defendant, however, offered no evidence in support of his cross-complaint, and judgment of nonsuit was entered thereon.

The case was tried before a jury, which rendered a verdict in favor of plaintiffs for \$10,835.19.

At the trial, counsel for plaintiffs announced that plaintiffs had come to the conclusion that their books, as kept, did not constitute what the law defines as an open book account or an open, mutual, and current account, and that, in view of the plea by defendant of the statute of limitations, the plaintiffs wished to withdraw from the consideration of the jury their claim for services in any matter in which the services were not completed within two years prior to the commencement of the action. Plaintiffs also notified the court at the time that by reason of errors respecting dates they had included in group 1 (the two-year group) in the bill of particulars certain matters which ought properly to have been placed in group 2 (the four-year group). As a result of those adjustments, plaintiffs' claim was reduced to

\$26,955.69, of which \$508.39 was a balance on an account stated for moneys advanced, and the remainder was the reasonable value of services alleged by plaintiffs to have been completed within two years.

At the trial, evidence was introduced of services rendered and completed more than two years prior to the commencement of the action for the limited purpose of showing that such services were of a reasonable value in excess of a sum of \$3,650, which was paid to plaintiffs by the McColgans at various dates between October 12, 1917, and July 31, 1920, and by plaintiffs applied in payment for services then earliest in time of completion and not at that time outlawed.

The record contains a stipulation that the examination of jurors and the exhibits may be omitted from the record, "and that appellant has waived the right on appeal herein to raise the point that the evidence is not sufficient to justify the verdict or judgment, or to raise any points other than those stated in the letter of Herbert W. Erskine to Eustace Cullinan, dated June 5, 1925."

Appellant has raised no points on this appeal that were not stated in the letter of his attorney, dated June 5, 1925, and it is admitted that the evidence is sufficient to justify the verdict or judgment.

This limits the points urged for a reversal of the judgment to two general objections: (1) that recovery for some of the services presented to the jury was barred by the statute of limitations; and (2) erroneous rulings of the court.

As to the first point, it may be said that on motion of plaintiffs the court withdrew from the consideration of the jury all services which they deemed might come within the bar of the statute, and the court specifically so instructed the jury. In instruction XVI the jury was told that:

"Counsel for the plaintiffs, believing that the account which had been kept was not sufficient to meet the requirements of the law with reference to being either a book account or an open, mutual, and current account, has not presented the matter from that angle, so that that particular count of the complaint cannot be considered by you in fixing the amount of your verdict. You can consider the items set forth in the count in the complaint which claims that the reasonable value of the services is the total amount that was set forth in the bill, deducting from that amount the amount stated in group 2, and being barred by the statute of limitations, and I understand that in this substituted group, Mr. McNab, that you have included the case of *King v. Crabtree*, *Huster v. McColgan*, *Courtney v. Kettler*, all of which appear in group 1 of the original.

"Mr. McNab: We have conceded, if your Honor please, that they are barred by the statute of limitations.

"The Court: So you are not to consider, in determining the amount of your verdict, anything as being recoverable by the plaintiffs in the action in excess of the amount stated on

this summary here before you, to wit, \$26,955.69, of which a portion of that, the sum of \$508.39, is contained in one other count of the complaint as being on an account stated."

And in instruction XXXIV the jury was instructed:

"That the plea of the statute of limitations is a legal plea as against every claim of the plaintiffs that is barred by the statute of limitations."

And in instruction XXXV:

"You are instructed that the plaintiffs cannot recover for any services they claim to have rendered, and which services were completed more than two years prior to the date on which this action was commenced. This action was commenced on the 19th day of August, 1922."

[1-4] In other words, the court withdrew from the consideration of the jury all services that the plaintiffs performed which were completed more than two years before the commencement of the action, and, further, at the request of defendant, instructed the jury specially that of the remaining services which plaintiffs claimed were not barred by the statute, the plaintiffs could not recover for any the jury might find to have been completed more than two years before the suit was filed. The facts concerning the time when the services were performed were presented to the jury, and we may assume that, in arriving at the verdict awarding plaintiffs \$10,835.19, the jury excluded from its consideration any services that were completed more than two years prior to the commencement of the action. Where the facts are agreed upon or ascertained, it is a question of law whether a demand is barred by the statute of limitations (*Reed v. Swift*, 45 Cal. 255; *Towle v. Sweeney*, 2 Cal. App. 29, 83 P. 74), but where issue is joined on a plea of the statute and the evidence is conflicting as to when, with reference to the filing of the complaint, a cause of action accrued, the question is properly submitted to the jury as a mixed question of law and fact (*Pacific Improvement Co. v. Maxwell*, 26 Cal. App. 265, 146 P. 900; *Towle v. Sweeney*, supra; *Crawford v. Duncan*, 61 Cal. App. 647, 215 P. 573), and the case may not be taken from the jury where the plea of the statute is interposed and there is evidence to support the plea (*Heilbron v. Heinlen*, 72 Cal. 376, 14 P. 24). Appellant does not contend that the claims for all the services submitted to the jury were barred, and we must therefore conclude that the amount of the verdict represented the reasonable value of the services which the jury found not to have been barred by the statute.

Appellant contends that in *Re Miles Baird* there were, among other services, four actions in which the services were performed in 1917 or earlier, and on the theory that each of these was a complete proceeding, the

claim for compensation for services in these matters was barred. The court's instructions concerning the statute of limitations were so clear and definite that, if any services rendered in the Baird matter were barred, the jury must be supposed not to have included compensation for them in the verdict. But there is evidence that none of the services in the Baird matter were in fact completed prior to the two years' period. These four matters were incidental to the main objective of the Baird litigation, so far as the McColgan's were concerned, namely, to establish Daniel A. McColgan's title to Miles T. Baird's interest in the David J. Baird estate, and none of these matters had terminated by the end of 1920, when plaintiffs ceased to represent defendant and his brother in them. The plaintiff Eustace Cullinan testified on this question as follows:

"Mr. McColgan brought me the three complaints and the temporary restraining order and the preliminary restraining order and the writ which has been introduced, and in the course of the conference with him, he told me the story of the Baird Case and his relations with Mr. Baird and the relation of his client, Williams, with Mr. Baird, and he told me he wanted Cullinan & Hickey to represent his interests and the interests of his firm, and incidentally the interest of R. C. Farley, F. W. Morrison, and C. W. Williams, so long as they had an actual interest—so far as they had an actual interest in the entire Baird matter—and these three suits were all a piece of the Baird matter."

The witness further testified that the Baird matter had not been completed, but was still pending, when he gave the substitution of attorney to Mr. O'Connor.

Osborn v. Hopkins, 160 Cal. 501, 117 P. 519, Ann. Cas. 1913A, 1413, quoted by counsel for appellant, was a case of a general employment of an attorney who represented his client in a number of separate matters. The Baird matter, however, was one employment or matter with a single objective—the establishment of McColgan's title in a certain interest in the David J. Baird estate. Incidental to that objective, it became necessary to defend several actions and to prosecute a proceeding under section 1664, Code of Civil Procedure. These actions were not single, distinct matters, but, if they were, none of them had terminated more than two years prior to the commencement of this action, and Mr. Cullinan was required to give them his attention up to the conclusion of his employment, which employment was concluded December 31, 1920. *Hancock v. Pio Pico*, 47 Cal. 161. In *Taft v. Shaw*, 159 Mass. 592, 35 N. E. 88, the Supreme Court of Massachusetts, speaking through Mr. Justice Holmes, says:

"The insolvency proceedings, however, were finished in 1885, so that the claim for services in them is barred if they were rendered under

a separate contract. The plaintiff contends that these services were only incidental to the suit, and were rendered under an entire contract covering both matters. Taft testified that, soon after he had brought the suit, the defendant in it, E. D. Shaw, went into insolvency, and he was consulted by the present defendant, and at his request did what he did in the insolvency proceedings, and that he did it with reference to the suit, and as a part of it. It is true that he also testified that he was consulted by three other creditors, and that it was the understanding, from the time that he went to the creditors' meeting, that the proceedings should be in the interest of all of those four creditors. But this is not inconsistent with the other testimony, and does not necessarily have any bearing on the question of the nature of the contract between Taft and the present defendant. We cannot say that the judge was not warranted in finding that the plaintiff was entitled to recover the full amount of his claim."

See, also, *Rowan v. Chenoweth*, 49 W. Va. 287, 38 S. E. 544, 545, 87 Am. St. Rep. 796; *Riverview Land Co. v. Dance*, 98 Va. 239, 35 S. E. 720; *Elwell v. Roper*, 72 N. H. 254, 56 A. 342, 343.

In *Osborn v. Hopkins*, supra, quoted from by appellant, the attorney was engaged to defend a husband in any actions for divorce or maintenance that his wife might bring. He defended three such actions. Obviously, each action was a separate piece of work. There was no affirmative general objective. In each case the object was to win that case. Had the attorney been employed to obtain a divorce for the husband instead of defending one for him—an affirmative instead of a purely negative service—the situation would have been different. As counsel for respondent suggests, suppose, on the contrary, the attorney was employed to secure a divorce for his client and had brought an action in one jurisdiction and had then abandoned or dismissed it for reasons of convenience, policy, or jurisdiction and commenced an action in another court, another county, or another state, it is clear that each action would not have been deemed a separate service or employment, for all would have been moves to obtain for his client a decree of divorce. The same would be true of services which he might have rendered incidentally in defending the husband against a cross-complaint or another action for divorce the wife might institute as a counter attack, for the wife's success in such litigation would defeat the husband's objective, namely, the procuring of a divorce. The facts in *Osborn v. Hopkins* are not analogous to the facts in the present case, which more nearly parallel those in *Taft v. Shaw*, supra.

[5, 6] Appellant raises the question concerning respondents' employment in *Estate of Baird*, that respondents "abandoned" the proceedings under section 1664 of the Code of Civil Procedure "as being a waste of time."

In regard to this, Mr. Cullinan testified that when he got the proceeding at issue it was obvious that it would be a waste of time to go further with it at that time until Dodie Valencia had either established or failed to establish the claim of her son. Appellant also with respect to the Baird Case complains that respondents "declined to specify the charge for each of the consultations, or the number, nature, or extent of the consultations, but insisted in 'bunching' all services together and insisted on pursuing the same arbitrary method in charging for consultations." Mr. Cullinan testified that he was unable to specify those matters with the particularity desired by appellant's counsel. Appellant, however, was not precluded from proving by his own witnesses the value of each item of service rendered by respondents in the Baird employment or any other employment involved in the action. If Mr. Cullinan could not recall the number of consultations and the particular subject of consultation in each instance, it is hard to see how he could be required to testify regarding them. Both Mr. Cullinan and the expert witnesses who testified in his behalf to the value of all or some of the services performed place a valuation on each separate piece or unit of work to which their testimony related as the various matters are set out in the amended bill of particulars. The rule seems to be that, where the retainer is general and an attorney advises his client or performs services in a number of distinct matters, he may properly be required to set out his charge for each distinct matter. That was done in this case, as the amended bill of particulars and the testimony of Mr. Cullinan and the expert witnesses make very plain. But the authorities seem to be without conflict that, when the services of an attorney all relate to one subject-matter it forms no just measure of the value of the services to separate the transaction into parts and have the attorney state what charge he made for each separate part. In *Moore v. Scharnikow*, 48 Wash. 564, 572, 94 P. 117, 120, the Supreme Court of Washington uses this language:

"The only correct method is to view the service as a whole, since by no other method can one of its most important elements, namely, the result of the service to the client, be taken into account in estimating the value of the service. From the earliest times the courts have made this distinction between a bill of particulars for an attorney's service and bills of particulars of accounts generally."

The court in *Moore v. Scharnikow* cites to the same effect *Randall v. Kingsland*, 53 How. Prac. (N. Y.) 512, *Pierce v. Wilson*, 48 Ind. 298, *Davis v. Johnson*, 96 Minn. 130, 104 N. W. 766, and *Donahue v. Pomeroy*, 65 Hun, 620, 19 N. Y. S. 569, and further says:

"The case of *Plummer v. Weil*, 15 Wash. 427, 46 P. 648, is not an authority for the position

taken by the court below. In that case the appellant sought to recover for services that not only extended over a long period of time, but which related to many distinct matters. The court by its order required the attorney to set out the several matters in which he claimed to have performed services, and the charges made for each separate matter, but there was no requirement that he split up into parts the services performed in any one distinct matter, and make a charge for each several part."

This same rule is followed in the later case of *Thorp v. Ramsey*, 51 Wash. 530, 99 P. 585.

[7] As to the services rendered, Mr. Cullinan testified in detail concerning the service rendered and the time when rendered and that such services were not completed within two years prior to the commencement of the action, not only with respect to the Baird matter but concerning the services rendered in all other cases and matters submitted to the jury, and the jury was definitely instructed to make no allowance for any service that the plaintiff had not proved to the jury's satisfaction to have been performed for the copartnership within the period of the statute. Any failure of plaintiffs to prove the performance of a particular service within the two years or to prove the value of that particular service must have resulted to their disadvantage, and the defendant surely may not complain of it, especially in view of his waiver of the right to raise the point that the evidence is not sufficient to justify the verdict. Since it is conceded that the evidence is sufficient to justify the verdict, a failure to specify the value placed by respondents on each item of service has resulted in no harm to appellant.

[8] As to appellant's contention that he is not liable for services rendered at the request of Daniel A. McColgan, his brother and partner, because respondents have not shown that the decedent, Daniel A. McColgan, in employing respondents, acted within the scope of his authority, it may be said that the third amended complaint alleges and the answer thereto admits the copartnership between Reginald McColgan and Daniel A. McColgan and that they were loan brokers. Reginald McColgan, called as an adverse witness under section 2055, Code of Civil Procedure, admitted that his brother employed Messrs. Cullinan and Hickey for the copartnership on copartnership business and with his knowledge and consent. Mr. Cullinan testified that his employment was by the firm of which Reginald McColgan is the surviving partner, that he was employed to act for the copartnership and that the McColgans were the real parties in interest and the parties whose interests he represented in all the matters in which he sought compensation.

[9] Appellant also asserts that the decedent in employing respondents "for third per-

sons" had no authority to bind the partnership and that the employment in the Baird Contra Costa litigation was employment by Daniel A. McColgan individually and not for services to the McColgan copartnership, that such services were rendered to "Miles T. Baird," and that the appearances as made were made for Miles T. Baird. The testimony, however, shows that in the Baird, as in other matters, D. A. McColgan employed Cullinan & Hickey to act for the copartnership. In the litigation in which respondents appeared, the formal appearance was at times for clients of, or for trustees or dummies for, the McColgans, but all the litigation involved the copartnership interests. But, even if any separate litigation did not involve a copartnership interest of the McColgans, the employment was by and on behalf of the copartnership business, and it was the copartnership that promised to pay for the services. The person liable to compensate an attorney for his services is the one who employs him, not necessarily the one who receives the benefit of the services (*Kelly v. Ning Yung Benev. Ass'n*, 2 Cal. App. 460, 466, 84 P. 321). This is not a case of a partner guaranteeing the obligation of a third party.

[10] The contention that the employment of respondents in the Baird matter resulted in no benefit to the McColgans is without merit. While Mr. Cullinan testified that the services rendered by him were of great benefit, it is not the law that a lawyer must be successful in litigation and actually recover or preserve property for a client before he may become entitled to the value of his services on a quantum meruit. *Foltz v. Cogswell*, 86 Cal. 542, 548, 25 P. 60; *French v. Cunningham*, 149 Ind. 632, 49 N. E. 797. "A lawyer is not an insurer of the result in a case in which he is employed, unless he makes a special contract to that effect, and for that purpose." *Babbitt v. Bumpus*, 73 Mich. 331, 41 N. W. 417, 16 Am. St. Rep. 585. In the Baird matter, as in all other matters in which services were rendered by respondents for the McColgan partnership, the uncontradicted testimony of Mr. Cullinan is that the services were performed at the request and under the eye of D. A. McColgan, who was himself a lawyer, and who was kept informed of every step taken and every paper filed.

[11] Appellant objected to Mr. Cullinan testifying to declarations made to him by D. A. McColgan, who died prior to the commencement of the action, in the absence of appellant, which objections were overruled by the court, appellant claiming that the estate of the decedent would be adversely affected by a judgment against the surviving partner. This is an action against a surviving partner, and is neither against "an executor or administrator" nor "upon a claim

or demand against the estate of a deceased person." So far is a surviving partner from being the same as an executor or administrator of a deceased partner's estate that he is barred from appointment as such (Code Civ. Proc. § 1365), and the executor or administrator has no voice in the settlement of the partnership affairs (Code Civ. Proc. § 1585). Subdivision 3 of section 1880 of the Code of Civil Procedure has always been strictly and literally construed, and has never been extended to cover cases nor parties not within the express terms of the statute. *Merriman v. Wickersham*, 141 Cal. 567, 75 P. 180; *City Savings Bank v. Enos*, 135 Cal. 167, 67 P. 52; *Poulson v. Stanley*, 122 Cal. 655, 55 P. 605, 68 Am. St. Rep. 73; *Booth v. Pendola*, 88 Cal. 36, 23 P. 200, 25 P. 1101; *Maguire v. Cunningham*, 64 Cal. App. 536, 222 P. 838. The California cases cited by appellant are actions against executors or administrators and are not authority that subdivision 3 of section 1880 of the Code of Civil Procedure has application here.

Appellant complains that in the case of *Bell v. McColgan* respondents declined to segregate the services or itemize them or their value or furnish the jury any data or facts upon which it could determine the reasonable value of the services. In *Estate of Seiler* it is contended the alleged services were performed more than two years before the suit was filed, and that respondents were unable to state the nature or extent or furnish any facts upon which the jury could intelligently determine the reasonable value, and also that the services were not rendered for the McColgan partnership but for third persons; that the employment in *Estate of Callaghan* was to render services for third persons; that in *Estates of Jeremiah and John Mahony* the claim is barred by the statute and is being based on an employment by D. A. McColgan and having no relation to the partnership business and also on an employment by D. A. McColgan as agent for Reginald Bell. In *Estate of Monnier* appellant asserts the claim was barred by the statute and based on an employment of respondents by D. A. McColgan to represent the interests of third persons; that the claim in *Estate of Eusebia Woolley* was barred by the statute, and it was therefore error to submit this claim to the jury. In the *Lineker Case*, appellant repeats his claim respecting the segregation of the services, that Mr. Cullinan was unable to place a valuation of each particular item of services rendered; and in *McColgan v. Magee* the same objection is urged. In *Vandall v. Baggott* it is claimed the services were rendered to C. H. Williams and not to the McColgan partnership; and in *Forrest v. Gage* that the claim was barred, and further the services rendered were rendered D. A. McColgan and R.

McColgan as trustees, and therefore the court erred in submitting this claim to the jury.

What has already been said respecting the objections urged against the claim for services in the Baird matter has application to the claims in the cases and matters enumerated, and it may further be said that according to the amended bill of particulars, which was testified in detail by Mr. Cullinan to be correct, none of these matters or cases were concluded more than two years prior to the commencement of the action, and that, where the services were performed in cases or matters in which respondents' formal appearance was for third parties, the contract of employment was with the copartnership. These matters, the dates of employment, and the conclusion of the services, and all matters connected with them, whether or not respondents were appearing in litigation for third parties or under contract of employment by the copartnership or by the copartnership as trustees, were determined by the jury upon the evidence presented and which evidence was sufficient to support its findings.

In *Pacific Improvement Company v. Maxwell*, supra, the court says:

"Issue having been joined on the plea of the statute of limitations, and the evidence upon this phase of the case being conflicting, the question as to when with reference to the commencement of the action the defendant's cause of action on his counterclaim accrued was a mixed question of law and fact, which was properly left to the jury for determination."

See, also, *Crawford v. Duncan*, 61 Cal. App. 647, 215 P. 573.

[12, 13] Under the heading, "Other Erroneous Rulings," appellant complains that the trial court erred in permitting the witness Cullinan to testify, over his objection, to the profit D. A. McColgan made out of the loan in which he was interested in the Forrest-Gage Case, and cites *People v. Supervisors*, 45 N. Y. 202, as authority for his contention. While such evidence may have been immaterial as an element in determining the value of the professional services alleged to have been rendered, we cannot see, even if improperly admitted, how it could have prejudiced appellant. Regarding appellant's contention that the court erred in refusing to permit him to prove that services of considerable value were rendered, the McColgans, under an agreement that they were to be taken in pro tanto satisfaction of the claim of respondents, it may be said that no set-off or counterclaim was pleaded in the answer, except a claim for damages, which was abandoned. Such a counterclaim or offset must be pleaded. Code Civ. Proc. §§ 437, 438 and 439.

[14] Appellant urges error in the court's refusing to permit appellant to show that

part of the consultations for which respondents are seeking to recover compensation were in fact consultations concerning the business of respondents by them intrusted for transaction to the McColgans as their agents. In view of the testimony of Mr. Cullinan, who several times testified that he was seeking compensation only for consultations with D. A. McColgan on the McColgans' business, and the instructions of the court:

"You are instructed that Daniel A. McColgan would have no right or authority to bind or make liable the copartnership composed of himself and the defendant for services rendered by the plaintiffs, unless such services concerned the business of the partnership and were within the scope of the partnership business. The burden of proving that the services rendered were services of the character stated is upon the plaintiff. In the absence of such proof respecting any of the alleged services, your verdict must be in favor of the defendants as to such services."

—we can but assume that the jury in its verdict awarded compensation for consultations only on business in which the copartnership was concerned.

[15-17] Appellant next contends that the court erred in refusing defendant leave to amend his answer, and cites us to a number of cases as holding that, where the trial court abuses its discretion in denying a party to an action leave to amend, the appellate court will order a reversal. In the present case, however, we cannot say that the trial court abused its discretion. While the court should exercise its power of granting amendments freely and liberally in order that all the substantial merits of a cause may be reached and determined, yet, when the court has exercised its power, either by granting or refusing an amendment, the ruling is subject to review only when it is apparent that an abuse of discretion has occurred. *Wixon v. Devine*, 91 Cal. 477, 27 P. 777; *Miner v. Rickey*, 5 Cal. App. 451, 90 P. 718. An application to amend may be denied where no showing is made to justify the exercise of a court's discretionary power, or where there is negligence indicating bad faith. *Tulare Building, etc., Ass'n v. Coleman*, 5 Cal. Unrep. 334, 336, 44 P. 793. The following colloquy, when appellant was a witness, will serve to show that the court did not abuse its discretion:

"Q. Did you ever—were you and your brother—were you carrying on any business or doing any, or performing any services for Cullinan & Hickey during this period?

"Mr. McNab: What period?

"Mr. Erskine: Q. During the period covered by this general consultation fee, \$500. A. Well, I will tell you, he came to me one day and he wanted to get—

"Mr. McNab: Just a moment. This is a matter which counsel stated in his opening statement he expected to prove, but the answer of

the defendant in this case distinctly denies that any services were performed, distinctly denies that he or the partnership ever at any time authorized Cullinan to perform any services, and does not plead the payment even, denies that the amount which we allege was paid \$3,600, even denies that was paid. It does not set up any claim to payment, and it does not set up any counterclaim of any kind or make any claim whatever, save one, and that is the cross-complaint, a suit for \$6,000 damages against Mr. Cullinan for the alleged failure to serve a summons in one matter. Now any testimony of that character, I respectfully submit, cannot be introduced here.

"The Court: I will sustain the objection.

"Mr. Erksine: My purpose was—

"Mr. McNab: We know your purpose.

"Mr. Erskine (continuing)—was to show that there was an arrangement here at least that some of these services performed that I referred to, performed by McColgan, were in payment, and an offset on the claim now made, and that some of the consultations that they allege were had, were had about Cullinan & Hickey's own business.

"The Court: That cannot be done under the answer. There is no offset claimed.

"Mr. Erskine: Will your honor allow me at this time to amend my answer?

"The Court: No; I cannot do that. It is too late. This comes at the end of the trial after the case has been pending for two years and a half, and to set up a plea of payment, which is waived, if there ever was one, under the provisions of the Code."

The facts stated by Mr. McNab, counsel for plaintiffs, in his objection, are fully borne out by the record, and we therefore think the present case falls under the conclusion of "inexcusable negligence" reached in *Tulare Building Assn. v. Coleman*, supra.

[18, 19] Appellant's next objection is that the court, in permitting the witness Williams to testify on the basis of his personal observation as to the reasonable value of the services of respondents in the case of *Bell v. McColgan*; that opinion testimony as to the value of services must be restricted to the services in evidence and cannot extend to personal observations of the witness unless the facts he observed are first detailed by him. In answer to this contention, it may be said that, apart from the testimony of the witness Williams, there is the testimony of the value of the services by Mr. Cullinan, Nathan Moran, Louis V. Crowley, and Louis S. Beedy, and the testimony of Mr. Williams was merely cumulative, and it cannot be said under the circumstances that appellant was in any way prejudiced. Furthermore, the testimony of experts as to the value of legal services is not conclusive, nor does it necessarily control the verdict of the jury. As was said by Mr. Justice Field in delivering the opinion of the court in *Head v. Hargrave*, 105 U. S. 45, 26 L. Ed. 1028:

"It was the province of the jury to weigh the testimony of the attorneys as to the value of

the services, by reference to their nature, the time occupied in their performance, and other attending circumstances, and by applying to it their own experience and knowledge of the character of such services. To direct them to find the value of the services from the testimony of the experts alone, was to say to them that the issue should be determined by the opinions of the attorneys, and not by the exercise of their own judgment of the facts on which those opinions were given."

And in *Spencer v. Collins*, 156 Cal. 298, 307, 104 P. 320, 323, the court says:

"The testimony of experts is, of course, admissible to prove the value of attorneys' services [citing authorities]. But the opinions of the experts in such cases are not binding upon the jury, who may apply to the testimony 'their own experience and knowledge of the character of such services.'"

See, also, *Estate of Duffill*, 188 Cal. 552, 206 P. 42; *Estate of Iser*, 52 Cal. App. 405, 198 P. 1014.

Appellant complains of the court's refusal to give instructions requested by him embracing the following principles of law: For any services rendered by plaintiffs to a third person and not to the partnership composed of Daniel A. McColgan and the defendant, even if rendered at the request of Daniel A. McColgan, and he agreed to pay for or become responsible for or guaranteed payment of the same to plaintiffs, the defendant is not liable; that a partner has no right or authority to bind or make liable the partnership nor his copartner for services rendered a third person nor to guarantee or become surety for the payment of the same, unless the authority to do so is in writing and subscribed by his copartner in such a manner as to be binding on the partnership; that plaintiffs cannot recover for services rendered by them in any instance where Daniel A. McColgan or the defendant was named trustee in a deed of trust and the services were rendered the trustee as such; that Daniel A. McColgan had no authority to bind the partnership as to any matter foreign to the partnership, nor could he make any admissions bringing such matters within the scope of the partnership business; that plaintiff Eustace Cullinan cannot recover in any matter, suit, or litigation concerning any deed of trust in which he was designated as a trustee; that, if plaintiffs were employed by the partnership in any specific litigation, such services included all incidental advice and consultations, and such advice and consultations cannot be made the basis for a separate charge; that the jury cannot award plaintiffs compensation for consultations or advice in the absence of any evidence as to the specific nature or character of the consultations or advice in each instance and of the reasonable value of each of the specific consultations; that plaintiffs are restricted

by the allegations of their complaint to professional services, and cannot recover for services of a nonprofessional nature, such, for instance, as trips to Santa Barbara or elsewhere to examine lands and determine their value; that, in determining the value of services, the jury cannot take into consideration the matter of defendant's wealth nor the amount of profit in any particular transaction; that the jury should disregard and give no weight to the testimony of the witness Cullinan respecting the acts, declarations and statements of Daniel A. McColgan, deceased, such being incompetent against the surviving partner; that plaintiffs cannot recover on a quantum meruit for services that were of no benefit to the partnership; that Eustace Cullinan cannot recover compensation for services rendered in preparation for defense of himself as a party defendant in the case of *Lineker v. McColgan et al.*

Answering the objection that plaintiffs cannot recover for any services rendered where Eustace Cullinan performed services as trustee or appeared in an action in which by reason of being a trustee he was made a party, or be allowed compensation where Daniel A. McColgan was named as a trustee in a deed of trust, it may be said that, while plaintiff Eustace Cullinan was a nominal party to the action as trustee, the McColgans were also parties, and respondents represented them as their attorneys and are suing for services rendered directly to them, and the instructions that were given made such fact sufficiently plain to the jury, and the same may be said with respect to representing them in the matter in which Daniel McColgan was a trustee in the deed of trust.

The objections that the defendant's wealth could not be taken into consideration by the jury and that the jury should disregard declarations made by the deceased partner and that compensation could not be awarded for consultations in the absence of evidence as to the reasonable value of each specific consultation have already been sufficiently discussed.

[20] As to the objections that the court refused to give the other instructions summarized, it may be said that such portions of the requested instructions as are proper and material are sufficiently covered in other instructions given. The jury was instructed:

"That Daniel A. McColgan would have no right or authority to bind or make liable the copartnership composed of himself and the defendant, for services rendered by the plaintiffs, unless such services concerned the business of the partnership and were within the scope of the partnership business. The burden of proving that the services rendered were services of the character stated is upon the plaintiffs. In

the absence of such proof respecting any of the alleged services, your verdict must be in favor of the defendant as to such services."

This disposes of the points raised by appellant, and, from what has been said, it follows that in our opinion the record contains no error calling for a reversal of the judgment. The equities of the case seem to be with respondents. There can be no doubt but that respondents rendered considerable service for which they have not been compensated. The issues presented were fairly tried, and the amount of the verdict is not disproportionate to the value of the services rendered.

The judgment is affirmed.

We concur: TYLER, P. J.; CASHIN, J.

88 Cal. App. 233

HULING v. SECCOMBE et al. (Civ. 3393.)

District Court of Appeal, Third District, California. Jan. 4, 1928.

1. Quieting title $\S$ 10(2)—Plaintiff claiming land under redemptioner at mortgage foreclosure had no title since redemption inured to redemptioner's prior grantee (Code Civ. Proc. $\S$ 701; Civ. Code $\S$ 1106).

In action to quiet title, plaintiff claiming title under former owner who redeemed land after mortgage foreclosure had no title, since under Code Civ. Proc. $\S$ 701, and Civ. Code, $\S$ 1106, redemption by former owner inured to redemptioner's former grantee.

2. Estoppel $\S$ 70(1)—Record owners did not forfeit title by failure to sue to cancel deed from redemptioner at mortgage foreclosure to plaintiff's ancestor (Code Civ. Proc. $\S$ 701; Civ. Code, $\S$ 1106).

Where defendants had record title through deed from prior grantee of plaintiff's predecessor in title, and where redemption of land from mortgage foreclosure by plaintiff's predecessor inured under Code Civ. Proc. $\S$ 701, and Civ. Code, $\S$ 1106, to prior grantee, and after redemption redemptioner conveyed land to plaintiff's ancestor, defendants as record owners did not forfeit title by failure to sue to cancel deed to plaintiff's ancestor.

3. Adverse possession $\S$ 88—Payment of taxes on vacant lot held not to show adverse possession (Code Civ. Proc. $\S$ 323).

In action to quiet title to vacant and uncultivated lot, evidence as to payment of taxes thereon by plaintiff held not to show his adverse possession, within Code Civ. Proc. $\S$ 323.

4. Adverse possession $\S$ 24—Occasional cutting of grass or weeds on vacant lot is insufficient basis for claim of adverse possession.

Occasional cutting of wild grass or weeds on unoccupied, uninclosed, uncultivated lot is insufficient basis for claim of adverse possession.

5. Adverse possession $\Leftrightarrow$ 85(1)—Burden is on one occupying vacant lot to affirmatively establish his adverse possession (Code Civ. Proc. § 321).

Where legal title to vacant city lot was in defendants, plaintiff's occupation thereof would be deemed to be in subordination to defendants' title, and under Code Civ. Proc. § 321, burden was on plaintiff to affirmatively establish his adverse possession.

6. Adverse possession $\Leftrightarrow$ 13—"Adverse possession" must be based on notice to legal owner and be open, notorious, exclusive, visible, and not consistent with record title.

"Adverse possession" must be based on either actual or constructive notice to legal owner, and in either case must be open, notorious, exclusive, visible, and not consistent with record title, and must indicate an occupant other than record owner, and be sufficient to put prudent man on inquiry.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Adverse Possession.]

7. Trial $\Leftrightarrow$ 358—Where findings irreconcilably conflict, judgment must be reversed.

Where findings are irreconcilably in conflict, judgment must be reversed because of impossibility to determine which findings controlled in rendering judgment.

8. Appeal and error $\Leftrightarrow$ 616(1)—Notice to clerk to prepare proceedings is not necessary part of transcript to be certified by trial judge (Code Civ. Proc. §§ 953, 953a).

Since clerk is proper officer, under Code Civ. Proc. § 953, to certify correctness of notice of appeal, where appeal was perfected under section 953a, notice to clerk to prepare proceedings was not a part of transcript to be certified by trial judge, and hence motion to affirm judgment because transcript did not contain notice to clerk will be denied.

Appeal from Superior Court, Los Angeles County; Walter Guerin, Judge.

Action by Edward E. Huling against A. H. Seccombe and others. From a judgment for plaintiff, defendants appeal. Reversed.

C. F. Seccombe, Pascal H. Burke, and Burrel D. Neighbours, all of Los Angeles, for appellants.

Wirt C. Smith and Frank H. Snyder, both of Glendale, for respondent.

THOMPSON, Justice pro tem. This is an appeal from a decree quieting title to a certain lot situated in Long Beach, Cal. Appellant contends that the findings and judgment are not supported by the evidence.

Much of the evidence was stipulated. The respective parties claim title through a common ancestor. The property in question is an unimproved vacant lot in the suburb of Long Beach, which has never been used, inclosed, occupied, or cultivated. It was without buildings, fences, or street improvements. The only evidence tending to show adverse

possession on the part of respondent or his predecessor in title was the payment of taxes for the required length of time and the possible clearing away of weeds from the lot on one occasion. February 2, 1905, William Clague was the owner of the lot. On March 30, 1908, he executed and delivered to Emma D. Davis his promissory note for \$2,700 secured by mortgage on said premises. April 14, 1910, for a valuable consideration Clague executed and delivered his deed of conveyance of said lot to John H. Warner. June 17, 1910, Warner deeded it to Henry Freedman. On the last-named date foreclosure proceedings upon said mortgage were commenced by Emma D. Davis against Clague, Freedman, and others. Subsequently the action was dismissed as to Freedman. Upon proceedings duly had a decree of foreclosure was entered August 10, 1910, and a month later the sheriff sold the property to the mortgagee, Davis, under the decree of foreclosure. Fourteen days later Freedman executed a deed of conveyance of this property to one Foreman, who, in turn, quit-claimed the tract to appellants. June 11, 1911, Clague formally redeemed the property, and subsequently conveyed it to the father of respondent, Edward E. Huling, who claims title through a decree of distribution duly made in his father's estate. This action to quiet title was then instituted November 21, 1923.

[1] It thus appears that the record title was in appellants. Having formally conveyed the premises to Warner by deed dated April 14, 1910, Clague had thereby divested himself of all title and had none to convey to the deceased.

A judgment debtor has the right to redeem land from a mortgage foreclosure, notwithstanding the fact that he previously transferred his title to another. Code Civ. Proc. § 701; Yoakum v. Bower, 51 Cal 539; Bateman v. Kellogg, 59 Cal. App. 464, 479, 211 P. 46. The effect of redemption, however, is to satisfy the mortgage debt and discharge the lien. Where redemption from foreclosure sale is accomplished by the mortgagor himself, it cancels the mortgage sale. 2 Jones on Mortgages (7th Ed.) 642, § 1051d. The redemption of property by a mortgagor after a foreclosure sale adds nothing to his title, but the redemption inures to the benefit of his former grantee. Civ. Code, § 1106; 2 Jones on Mortgages, supra, 644, § 1051d; Witham v. Blood, 124 Iowa, 695, 100 N. W. 558. In Bateman v. Kellogg, supra, it is said:

"When Woodruff redeemed [the property], the foreclosure sale to Stickney was terminated (Code Civ. Proc. § 703), thereby leaving the legal title to the land the same as if no mortgage had been given. Therefore his redemption could not have the effect, either in law or in equity, of transferring appellant's title to him."

It necessarily follows that whatever benefits were acquired by Clague by virtue of his redemption of the mortgaged premises inured to the benefit of his former grantee Warner, and thence to his grantees, and hence Clague had no title to convey to Huling, and respondent is therefore not the owner of the record title.

[2] Nor did the record owners forfeit their title by failure to institute proceedings to cancel the deed from Clague to Huling. "There are no equities in favor of a party seeking by adverse holding to acquire the property of another. Hence the rules, that user measures the extent of a prescriptive right, and every statutory requirement of the acquisition of lands by adverse possession must be fulfilled." 1 Cal. Jur. 492, § 3. In the case of Secret Valley Land Co. v. Perry, 187 Cal. 420, 202 P. 449, which was an action to quiet title, Mr. Justice Sloane approvingly quoted the following language:

"Both parties are claiming under a record title from a common source, and the only question is superiority. Limitation or lapse of time does not perfect a defective record title in the absence of possession. If the situation of these two parties had continued ten, fifteen, or twenty years longer, and the question should then arise, as now, as to which title of record is superior, a plea of limitations would not avail for either party against the other. Appellants show that they have legally paid taxes on the land. * * * One cannot acquire title to the land of another by paying the taxes on it, nor will a claim of title under a void deed, although recorded, ripen into a fee by lapse of time, nor will limitations run against the owner of record in favor of a claimant not in possession, nor is it incumbent upon the owner to sue for cancellation of a void deed, or to take steps to remove a cloud upon his title. * * * A mere claim of title even of record, unaccompanied by adverse holding, will not start the statute.' * * * A defendant holding the legal title, or a paramount claim to the legal title, is not called upon to take action against a hostile claim which is not of a nature to ripen into a valid adverse title."

[3, 4] The record in the instant case is insufficient to sustain a finding of adverse possession in respondent. The evidence is undisputed to the effect that the lot in question was vacant during ten years prior to the commencement of this action, and was unoccupied, uncultivated, and unused. It contained no improvements and had no sidewalks or street improvements whatever. During the winter it was usually flooded with water, and in summer time it was overrun with weeds. The only evidence tending to show adverse possession consisted of the payment of taxes by respondent. He testified that once he offered it for sale, but he does not state when, to whom, or how he offered it for sale. He also claims to have once cut the weeds from the place, but the evidence as to this circum-

stance is unsatisfactory. In this regard respondent testified:

"I haven't been to that property for 10 months, maybe more.

"Q. What acts of ownership or control have you seen your father perform? A. Once I went there with him myself and helped clean the weeds off the property; I can't tell you what year that was. * * * So far as I know, he (my father) never offered it for sale. * * * Once since that time, I had the weeds cleaned off. * * * I offered to sell it about 4 years ago."

Upon the contrary, two witnesses who had lived adjacent to the property testified that the lot was never occupied, cultivated, or used, and that they had observed no acts or evidence of ownership on the part of any one. Respecting the cutting of weeds, Mr. Seecombe testified:

"I moved there [adjoining the property] in 1914 or 1915. * * * I never seen anything done to it at all, * * * [except] long ago, the fire department was down there and put a grass fire out on it. * * *

"Q. Did you ever see any one cut any weeds on it? A. No, sir; I never did. * * *

"Q. Did the lot show that the weeds had been cleared off of it? A. No; I never noticed it, * * * in fact, I never seen any weeds cut off of there at any time one way or another. * * * It was a swamp. * * * It used to be full of water every winter."

This is an insufficient showing upon which to rest a claim of adverse possession. The mere occasional cutting of wild grass or weeds will not suffice to base a claim of adverse possession. 2 C. J. 67, §§ 24-26.

[5] Having failed to establish a legal title to the lot in question, there is no presumption in favor of respondent's possession of the premises, and even though he actually occupied the property, it would be deemed to be in subordination to the legal title held by another, and the burden would be upon respondent to affirmatively establish all the necessary elements constituting adverse possession. Code Civ. Proc. § 321. But the evidence is undisputed that the premises were not in fact actually occupied by any person whomsoever. Nor can the property be deemed to have been possessed or occupied pursuant to the provisions of section 323, Code of Civil Procedure, for it was not cultivated or improved; it was not fenced or inclosed; it was not used to supply fuel, or fencing timber, or pasturage, or for any use whatever. The record in this case is devoid of evidence of any acts on the part of respondent to indicate a claim of adverse possession, with the exception of the payment of taxes for the required length of time.

[6] Adverse possession must be based upon either actual or constructive notice to the legal owner. Even though the possession relied upon is constructive, it must nevertheless be "open, notorious, exclusive, visible,

and not consistent with the record title. * * * It must indicate not alone who the occupant is, but it must indicate an occupant other than the record owner." 1 Cal. Jur. 534, § 28. The circumstances must be sufficient to put a prudent man upon inquiry. The payment of taxes alone is not sufficient upon which to rest a claim of adverse possession. 1 Cal. Jur. 551, § 40, p. 556, and section 46; 2 C. J. 69, § 30; McGrath v. Wallace, 85 Cal. 626, 24 P. 793.

[7] The findings of facts are in irreconcilable conflict. The first finding of fact is "that all the material allegations of the plaintiff's complaint herein are true." The second finding of fact is "that all the material allegations of the defendant's answer herein are not true." This is a negative pregnant, and leaves the inference that all of the material allegations of the defendants' answer are true, except perchance one of them. The third finding of fact is "that the plaintiff is the owner in fee" of the real property described, while the fourth finding of fact is "that the plaintiff's claim of title * * * to said real property is unfounded and without right." Where findings are irreconcilably in conflict the judgment must be reversed, for the reason that it is impossible, under such circumstances, to determine which findings controlled the court in rendering its judgment. Los Angeles Land Co. v. Marr, 187 Cal. 126, 200 P. 1051; Estep v. Armstrong, 91 Cal. 659, 27 P. 1091; Learned v. Castle, 78 Cal. 454, 18 P. 872, 21 P. 11; 2 Cal. Jur. 1030, § 612.

[8] The appeal was perfected in this case pursuant to section 953a, Code of Civil Procedure. Respondent claims that the judgment should be affirmed because the transcript of proceedings which is certified by the trial judge does not contain a copy of notice to the clerk to prepare the proceedings pursuant to said section. This notice, in the language required by that section, however, was duly served and filed with the clerk within the time prescribed by law, and is properly certified by the clerk as a part of the record on appeal. This procedure complies with the statute. Section 953a, supra, provides that this method of presenting the proceedings on appeal is "in lieu of preparing and settling a bill of exceptions." Under our statute, a notice of appeal was never required to be included in a bill of exceptions. The foregoing section specifies exactly what shall be included in the transcript of proceedings. The notice of intention to appeal and to prepare the transcript is not included therein. The request for the transcript was properly included in the notice of appeal. This section provides that:

"Any person desiring to appeal * * * (shall) file with the clerk * * * a notice stating that he desires or intends to appeal,

* * * and requesting that a transcript of the testimony, * * *" etc., be prepared.

The clerk is the proper officer to certify to the correctness of the notice of appeal. Code Civ. Proc. § 953; Estate of King, 49 Cal. App. Dec. 153;¹ Martin v. Pac. Gas & Elec. Co., 195 Cal. 544, 234 P. 321. None of the cases cited by the respondent in this regard hold that this notice is a necessary part of the transcript of proceedings which must be certified by the judge. All of these cases cited by respondent have reference to the necessity of including instructions given to the jury or refused, or the including of other matters specifically mentioned in that section. The record on appeal in this case is therefore sufficiently authenticated.

The judgment is therefore reversed.

We concur: FINCH, P. J.; HART, J.

88 Cal. App. 331
ARMSTRONG v. KUBO & CO.
(Civ. 3336, 3337.)

District Court of Appeal, Third District, California. Jan. 13, 1928.

1. Bailment ⇨35—One contracting with government for transportation of mails held entitled to maintain action against purchaser for full value of mail parcels allegedly stolen from delivery truck by employee.

Person under contract with government for transportation of mail from post office to railway depots, whose employee operating mail truck part time allegedly stole parcels of mail therefrom, held entitled to maintain action against persons to whom parcels were sold for recovery of full value of such stolen property, where contractor had turned over to agent of postal department value of parcels for purpose of making settlement with the various consignors of the stolen mail.

2. Bailment ⇨35—Bailee may maintain actions against third parties in respect to property.

Every bailee or person clothed with exclusive right of possession has a temporary or qualified ownership in property to extent of enabling him to maintain actions in respect thereto against third parties.

3. Action ⇨28—Owner may waive tort and sue in contract to recover value of property wrongfully taken and conveyed.

One whose property has been stolen may waive the tort and sue in contract to recover value of the property so wrongfully taken and conveyed.

4. Bailment ⇨35—Complaint alleging that defendants were indebted for goods stolen from plaintiff's possession while held under contract with government stated good cause of action.

Complaint by one under contract with government for transportation of mail, alleging that defendants became indebted to plaintiff for rea-

⇨For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

¹For opinion on hearing by Supreme Court, see 248 P. 519.

sonable value of goods, wares, and merchandise stolen and taken to defendants' place of business without plaintiff's consent, which defendants did thereafter unlawfully convert and dispose of, *held* to state good cause of action as against general objection, since plaintiff could waive tort and sue for value of property so stolen and converted.

5. Bailment §35—Findings as to value of articles received by defendants through purchase of stolen mail held not sustained in bailee's action to recover their value.

In action by one transporting government mails from post office to depots under contract, for value of parcels of mail allegedly stolen by plaintiff's employee and sold to defendants, finding as to articles of merchandise received by defendants from plaintiff's employee *held* not sustained by evidence as to certain articles claimed.

6. Appeal and error §1050(1)—Admission of lists of stolen mail held not prejudicial in action to recover value thereof from purchaser, based entirely upon testimony of alleged thief.

In action by one transporting government mails under contract, to recover value of stolen mail from persons purchasing parcels of mail allegedly stolen by plaintiff's employee, admission of lists of merchandise abstracted from mails, if erroneous, *held* not prejudicial, since action rested entirely upon employee's testimony.

Appeal from Superior Court, Yuba County; Eugene P. McDaniel, Judge.

Actions by J. L. Armstrong against Kubo & Co. Judgments for plaintiff, and defendant appeals. Judgments modified and affirmed.

Robert H. Schwab, of Sacramento, and W. E. Davies, of Marysville, for appellant.

Ray Manwell, of Marysville, for respondent.

PLUMMER, J. Plaintiff filed two complaints in the court below against the defendant, had judgment against the defendant in both actions, and, as the evidence in the actions are the same, both are presented to us for consideration upon one transcript.

In action No. 5819 in the trial court the complaint alleges as follows: That within one year last past the defendant became and now is indebted to the plaintiff in the sum of \$653, lawful money of the United States of America, being the balance due the plaintiff from the said defendant for the reasonable value of goods, wares and merchandise stolen and taken from plaintiff by defendant and carried away to defendant's place of business without the plaintiff's consent or permission. That the value of said goods, wares and merchandise was the sum of \$653. Also, that all of said goods, wares and merchandise were taken and carried away by the defendant from the possession of the plaintiff without plaintiff's consent or permission, between the 23d day of January, 1926, and the 12th

day of June, 1926, at Marysville, in the county of Yuba, state of California, and that the defendant did thereafter unlawfully convert and dispose of the same to its own use, to the damage of the plaintiff in the said sum of \$653.

In action No. 5854 the charging portions of the complaint are to all intents and purposes identical with the complaint in action No. 5819, the only difference being that the value of the property is alleged to be the sum of \$1,005.41. In action No. 5819 the plaintiff had judgment in the sum of \$53.10, and in action No. 5854 judgment went for plaintiff in the sum of \$643.32. No demurrer was filed by the defendant to either one of the plaintiff's complaints. Upon appeal, however, it is insisted that the plaintiff's complaints do not state a cause of action; that the form of action as presented by the record cannot be sustained; and, further, that the evidence is insufficient to support the findings of the trial court.

The record shows that the plaintiff in the year 1926 had a contract with the United States government to transport mail from Yuba City, Sutter county, and Marysville, Yuba county, post offices, to the Southern Pacific Railway, Northern Electric Railway, and Western Pacific Railway depots in said cities, and to receive from said trains United States mail and transport the same to said post offices. The mail was transported in a screened automobile truck belonging to the plaintiff. The truck was operated by the plaintiff in the daytime, and during the night by an employee of the plaintiff named Edgar Goldstone. During the period of time mentioned, a number of packages of mail consisting of goods, wares and merchandise shipped or transported by mail, were extracted from the mails, or, rather, stolen by the said Edgar Goldstone, and sold to the defendant in this action. It appears that Kubo & Co. consisted of a Japanese named Kubo and a Japanese named Hashimoto. The store conducted by Kubo & Co. was situated in the town of Marysville, about 75 feet from the United States post office therein. A number of the articles extracted from the mails consisted of insured parcels shipped to various persons at the places named, and were sold to the defendant in this action. The circumstances show beyond question that the defendant had full knowledge that all the articles received from Goldstone were stolen by him. The different packages delivered by him to the defendant bore the names and addresses of the consignees in most instances, and were delivered under such circumstances as to unavoidably force the conclusion that the defendant was, to all intents and purposes, an accomplice in the various thefts. Two actions were begun against the defendant to recover the value of the property taken from

the mails by Goldstone and sold to the defendant. This is accounted for by reason of the fact that when the first action was begun it had not then been discovered that the goods referred to in the second action had also been stolen from the mails by Goldstone while employed by the plaintiff, and sold to the defendant. When this discovery was made the second action was begun. When the extent of the thefts by Goldstone had been discovered and the value of the parcels stolen ascertained, the plaintiff in this action turned over and paid to an agent of the United States Postal Department the full value of all the stolen parcels for the purpose of making settlement with the various consignors of the parcels that had been stolen. After making such settlement the plaintiff instituted said actions to recover the value of the goods unlawfully converted by the defendant. Can such actions be maintained? We think so.

[1, 2] The law seems to be well settled that every bailee or person clothed with the exclusive right of possession has a temporary or qualified ownership in the property to the extent of enabling him to maintain actions in respect thereto against third parties. *Bode v. Lee*, 102 Cal. 583, 36 P. 936; *Roberts v. Burr*, 135 Cal. 156, 67 P. 46; 3 R. C. L. p. 85; 6 C. J. 1107. Other cases might be cited, but the foregoing are sufficient. In the case of *Bode v. Lee*, supra, it appears that a number of boxes of tin had been left with the proprietors of a warehouse by different consignors, and the court, in speaking of an action by the warehouse owners against one who had wrongfully obtained possession of said boxes of tin, used the following language (we are quoting from the syllabus):

"The proprietors of a bonded warehouse, who are the bailees of boxes of tin left in the warehouse by several different bailors, have a single cause of action to recover for fraudulent conversion of the tin by persons obtaining it through embezzlement by an employee of the warehouse with whom they had conspired for the purchase of the tin," etc.

This case is almost identical with the one at bar.

In 3 California Jurisprudence, p. 377, we find the following:

"Despite the general principle that an action of assumpsit is based upon a contract, express or implied, in some instances such an action may be maintainable as founded upon an implied contract when in fact there is no contract at all. For instance, if B stole A's watch, A could treat the theft as a contract of sale and sue in like manner *ex contractu*, though in fact there was no foundation whatsoever for the fiction other than the need of broadening A's remedies. In other cases of assumpsit upon implied contract, the contract may lie at the base of the wrong or may have enabled the perpetrator to have accomplished his wrong. In short, it may be pronounced as a general rule, repeatedly

sanctioned by the courts of California, that where personal property is wrongfully converted, the owner may waive the tort and sue in assumpsit."

Again, on page 379 of the same volume, quoting from section 7:

"In many jurisdictions the doctrine that where the personal property is wrongfully converted, the injured party may waive the tort and sue in assumpsit is limited to cases where the wrongdoer has sold the property or otherwise converted it into money, in which event the plaintiff may maintain an action for the proceeds. But in California, as in a number of other states, a broader rule enables one whose goods are wrongfully taken and used by another to sue in assumpsit for their value as for goods sold and delivered."

This latter statement of the law is clearly set forth in the case of *Bechtel v. Chase*, 156 Cal. 707, 106 P. 81, where, after speaking of the limited amount which may be recovered in assumpsit, this broader rule is stated:

"In this state, however, as in a number of others, a broader rule enables one whose goods are wrongfully taken and used by another to sue in assumpsit for their value, as for goods sold and delivered"—citing *Roberts v. Evans*, 43 Cal. 380; *Lehmann v. Schmidt*, 87 Cal. 15, 25 P. 161; *Chittenden v. Pratt*, 89 Cal. 178, 26 P. 626.

In *Corey v. Struve*, 170 Cal. 170, 149 P. 48, the court, in considering this question, thus states the law:

"While the complaint does allege that the property was 'converted' by the defendants, we think that the action was in reality one in assumpsit for the value of the property sold, or perhaps it might be more aptly characterized as one in the nature of a suit for money had and received. In this state, one whose goods are wrongfully taken and used by another may sue in assumpsit for their value, as for goods sold and delivered (citing the cases which we have heretofore referred to), but we are not here greatly concerned about the particular form of the action. In this state we have but one form of action which has no special designation, and it cannot be defeated, as at common law, because not properly named"—citing *Faulkner v. First National Bank*, 130 Cal. 263, 62 P. 463.

In the case of *French v. Robbins*, 172 Cal. 670, 158 P. 188, relied upon by the appellant, the action was not for the value of the goods wrongfully converted, but for money had and received by reason of the sale of property belonging to the plaintiff and necessarily required proof as to the money received by the defendant, and is not authority here. Likewise, the case of *Hallidie v. Enginger*, 175 Cal. 505, 166 P. 1, urged upon our attention by the appellant, is not pertinent to this action. The question there presented and determined was when a writ of attachment would lie, and not whether a plaintiff could or could not recover from one who had stolen his property, the value of the goods stolen. Again, the case of *Lehmann v. Schmidt*, 87 Cal. 15, 25 P. 161,

does not support the appellant's contention. The opening sentence of the opinion in that case is in the following words:

"The authorities are clear upon the proposition that when one person converts to his own use the personal property of another, the latter may waive the tort, and sue in assumpsit for the value thereof"—citing several authorities.

[3, 4] These cases are sufficient to clearly establish the law in this state that one whose property has been stolen by another may waive the tort and sue and recover the value of the property so wrongfully taken and conveyed. We think each complaint states a good cause of action, at least as against a general objection.

[5] It is finally urged that the testimony is insufficient to support the findings in that it does not show the articles of merchandise received by the defendant through the activity of Goldstone. In order to understand the testimony to which we are about to refer, we will first state that a United States inspector submitted two lists of merchandise which had been abstracted from the mails by Goldstone during the period of time involved in said actions. These lists were in the hands of the attorneys for the respective parties during the examination of the witness Goldstone, and were submitted to him by counsel for inspection, and his testimony was all directed to the various articles mentioned therein. With this explanation we may examine the testimony to ascertain to what extent it supports the findings of the trial court. The witness Goldstone testified in substance as follows: That he began operations the last part of March and continued the same up to about the 18th of June, 1926. That he took different parcels from the mails and sold them to Kubo and Hashimoto. That the store conducted by Kubo & Co. was situated on Oak street in the city of Marysville, about 75 feet from the post office therein. That he did not dispose of any articles taken to any one excepting to Kubo & Co. When shown the lists just mentioned, on direct examination, the witness stated he could not positively identify any particular article; that whenever he had a chance to put a package over he took it from the mails and delivered it to Kubo & Co. The direct examination of the witness does leave the testimony in doubt as to whether or not all of the stolen parcels mentioned in the lists as being taken from the mails by Goldstone were delivered to Kubo & Co., but the cross-examination we think clears up this matter sufficiently to support the findings of the trial court, excepting as hereinafter stated. With the lists of the property stolen as hereinbefore referred to, shown to the witness, on cross-examination said witness testified as follows:

"It is impossible for me to identify any of these packages here because they are not like

the way I delivered them. Sometimes I tore open the box, tore off the top; sometimes he'd tear it off later. I didn't have a talk with the inspector. When the list was presented to me the first time I had nothing to do with making it up.

"Q. Now then, just what was your method of taking these parcels from the mail; just what did you do? A. I just took them and handed them over to him. * * * I did not take them right from the mail truck to the store. All would depend on what train it came on. I would place the package on the truck and drive around the block and hop it off. I would drive the mail truck up in front of the store. I was paid for every package that I delivered. * * *

"Q. By the time you made your deliveries to Kubo and you made your deliveries to Hashimoto—you testified to this this afternoon that you would make your deliveries of these packages to either Kubo or Hashimoto—that you would say 'I have a package?' A. Not all the time; just passed by the store, and when the train came in I would drive around. The only time I would tell him was when the 3:15 came in. Most of the stuff came on the 3:15; some at 6:20. * * * That stuff, I got it after work; leave it on the mail truck; I would leave it outside. I would stay around until I had a chance to drive up to his store on the side of the post office. It is about 75 feet from the post office. I would deliver it at night; sometimes around 9 o'clock; sometimes at 11 o'clock. Sometimes I would hold it over until I saw him in the morning. After I got through my work I would drop around and say I had a package. The packages that came in at 3:15 I put in my room; then I would take it out on the truck.

"Q. Is that true of all these packages? A. I didn't, as I say, all the time, but most of the time, some of the time, but not all of the time. * * * I didn't keep these packages in the mail truck all the time. Sometimes I took them to my room. Sometimes it would be 4 or 5 days or a week after I received the goods before I delivered them. I never did keep these parcels more than 24 hours in my room. I didn't do anything until he told me he wanted cigarettes. I would pick up a package when he wanted it. I would take up a package and let him know I got it, and that is the way it goes. When I went to his place to get a drink of soda, he would say, 'Got any Strikes or Chesterfields?' * * * It would be 2 or 3 days and I would drop in the following night and give him a package. I never sold any articles to anybody else. There were no articles in my room at the time I was arrested which I had taken from the mail. I never delivered any auto tubes, auto tires, hams, candies, ice cream cartons or pimento loaves to Kubo & Co."

[6] There being no other testimony in the record as to parcels described as auto tubes, auto tires, hams, candies, ice cream cartons and pimento loaves, the value of those items allowed in the judgments referred to must be stricken therefrom. Thus, in action No. 5819 the plaintiff is allowed for the value of parcels in the sum of \$60.16 in excess of what is shown by the testimony, and in action No. 5854 the plaintiff has been allowed for the value of parcels in excess of that shown by the testimony in the sum of \$151.30. It fol-

lows, therefore, that the judgment in action No. 5819 must be reduced to the sum of \$593.07, and the judgment in action No. 5854 must be reduced to the sum of \$492.02. And it is so ordered. The objection to the admission of the lists in evidence need not be considered by reason of the fact that if any error was committed therein, it in no wise affected the judgment, as the cause of action rests entirely upon the testimony of Goldstone.

It is therefore ordered that the judgment in action No. 5819 be modified to award the plaintiff the sum of \$593.07, and action No. 5854 be modified so as to award the plaintiff the sum of \$492.02, and, as so modified, the judgments will be affirmed.

Appellant is allowed its costs on appeal.

We concur: FINCH, P. J.; HART, J.

83 Cal. App. 313

LEY v. BISHOPP. (Civ. 6170.)★

District Court of Appeal, First District, Division 1, California. Jan. 13, 1928.

Hearing Denied by Supreme Court March 12, 1928.

1. Evidence ⇐587—Circumstantial evidence in civil case, to be sufficient, need not exclude every reasonable conclusion other than that drawn by jury.

Circumstantial evidence, to sustain a verdict, in civil cases in order to be sufficient, need not rise to that degree of certainty which will exclude every reasonable conclusion other than that drawn by the jury.

2. Physicians and surgeons ⇐18(9)—In action against dentist for injuries from improper bridge casts, case held for jury.

In action by a patient against a dentist for mouth burns, allegedly resulting from an improper mixture used in bridge casts, by person temporarily employed at defendant's office, case held for the jury.

3. Physicians and surgeons ⇐15—Noncompliance by physician or surgeon with implied contract that he possesses usual skill and knowledge, resulting in injury, renders him liable.

A physician or surgeon who undertakes to treat a patient impliedly contracts that he possesses the skill and knowledge ordinarily possessed by members of his profession, and that he will use ordinary care and skill in the application of such knowledge to accomplish the purpose for which he is employed; hence noncompliance with such implied contract, resulting in injury to a patient, renders the physician or surgeon liable.

4. Appeal and error ⇐1001(1)—Reviewing court cannot disturb jury's conclusion, if reasonably supported by evidence.

A reviewing court cannot disturb the conclusion reached by a jury, if such conclusion be reasonably supported by the evidence.

5. Evidence ⇐150—In malpractice action against dentist for alleged improper mixture in bridge casts, permitting evidence of experiment, held proper in view of restriction placed thereon by court.

In an action by a patient against a dentist for malpractice, wherein the patient alleged that he had suffered mouth burns because of an improper mixture used by dentist's employee in the preparation of bridge casts, permitting an expert witness to make tests which were not shown to be tests of the particular mixture used, held proper, where court informed the jury that no attempt was being made to show that the defendant used the particular mixture used by the expert in his experiments, but that the tests were merely for the purpose of throwing light upon the experts' testimony.

6. Evidence ⇐150—Admitting evidence of experiments rests largely in court's discretion.

Admitting evidence of experiments rests largely in the trial court's discretion.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by George W. Ley against H. B. Bishopp. Judgment for plaintiff, and defendant appeals. Affirmed.

W. I. Gilbert and W. H. Dehm, both of Los Angeles, for appellant.

Arthur A. Weber, of Santa Monica, for respondent.

CASHIN, J. An action to recover damages for injuries alleged to have been caused by the negligence of the defendant. A jury returned a verdict for the plaintiff in the sum of \$750, and from the judgment entered thereon the defendant appeals.

It is contended as grounds for reversal that the verdict is unsupported, and that the trial court erred in denying a motion for nonsuit, and by permitting certain tests to be made in the presence of the jury.

The defendant, a dental surgeon, was employed by the plaintiff to prepare for the use of the latter four removable bridges, and in the course of making certain casts or impressions for that purpose it was alleged that, due to the defendant's negligence, plaintiff's mouth was burned, causing him severe pain and a serious illness.

The evidence shows that the casts used were not prepared by the defendant or by a licensed dentist but by a person temporarily employed at the office of the defendant for that purpose. It was testified that the casts were composed of a mixture of plaster of paris and potassium sulphate, to which water was added, and that the combination of these substances produces heat. The plaintiff described the effect when the mixture was applied and the extent and character of his injuries, his testimony in the latter respects being corroborated by that of his wife; and a physician by whom he was examined on

the same day testified that the condition observed appeared to have been caused by burns. Expert witnesses differed in opinion as to the degree of heat which such mixtures might produce, but it sufficiently appears from the testimony that the result would be affected by the temperature of the water and the proportions of the other ingredients used. There was also a difference of opinion as to the temperature which would cause injury, but the testimony reasonably supports the inference that the addition of water at too high a temperature to improper proportions of the other substances mentioned would generate heat sufficient to have an injurious effect.

The defendant contends that the conclusion of the jury as to the cause of the injuries was based upon circumstantial evidence; and that, if other conclusions might reasonably be drawn therefrom, that of the jury cannot be sustained. Reliance is placed upon *Wilbur v. Emergency Hospital Ass'n*, 27 Cal. App. 751, 151 P. 155, and *Hopkins v. Heller*, 59 Cal. App. 447, 210 P. 975, where, citing with approval the case of *Neal v. Chicago, R. I. & P. Ry. Co.*, 129 Iowa, 5, 105 N. W. 197, 2 L. R. A. (N. S.) 905, it was held that a theory cannot be said to be established by circumstantial evidence even in a civil case, unless the facts relied upon are of such nature and so related to each other that it is the only conclusion that can fairly or reasonably be drawn therefrom. In *Estate of Wallace*, 64 Cal. App. 107, 220 P. 682, the above rule was approved; but the Supreme Court, in denying a petition for a transfer said:

"* * * We do not wish to be understood as approving the statement of the rule by the District Court of Appeal as to the method of weighing circumstantial evidence when applied to a reviewing court on appeal. The rule is stated and applied in the recent cases of *Estate of Loucks*, 160 Cal. 551, 554, 555, 117 P. 673, Ann. Cas. 1913A, page 868, *People v. Tom Woo et al.*, 181 Cal. 315, 184 P. 389, and *Mah See v. North American Acc. Ins. Co.*, 190 Cal. 421, 213 P. 42, 26 A. L. R. 123."

In *People v. Tom Woo*, supra, an appeal from a judgment of conviction on a criminal charge, it being contended that the evidence—which was circumstantial—was insufficient to sustain the verdict, the court said:

"The principal question on this appeal is whether the evidence is sufficient to justify the verdict against the appellants. * * * In passing upon this question we will not attempt to determine the weight of the evidence, but will decide only whether upon the face of the evidence it can be held that sufficient facts could not have been found by the jury to warrant the inference of guilt. For it is the function of the jury, in the first instance, and of the trial court after verdict, to determine what facts are established by the evidence, and before the verdict of the jury, which has been approved by the trial court, can be set aside on appeal on the ground we are discussing it must be made clearly to appear that upon no hypothesis whatever

is there sufficient substantial evidence to support the conclusion reached in the court below."

[1] As the rule is stated in other jurisdictions, circumstantial evidence in civil cases, in order to be sufficient, need not rise to that degree of certainty which will exclude every reasonable conclusion other than that drawn by the jury. *Midland Valley Ry. Co. v. Taylor*, 85 Okl. 95, 204 P. 1102; *Meier v. Northern Pacific Ry. Co.*, 51 Or. 69, 93 P. 691; *Pittsburgh, C. & St. Louis Ry. Co. v. Hoffman*, 57 Ind. App. 431, 107 N. E. 315, 231; *Hashman v. Wyandotte Gas Co.*, 83 Kan. 328, 111 P. 468; *Farber v. Boston Ins. Co.*, 215 Mo. App. 564, 256 S. W. 1079; *St. Louis, B. & M. Ry. Co. v. Moss* (Tex. Civ. App.) 203 S. W. 777.

[2] In addition to evidence tending to show that the mixture under certain conditions might do harm appears the testimony of the plaintiff who experienced its effect; and this with that of the witnesses who observed the condition after its use sufficiently supports the conclusion of the jury as to the fact and cause of the injury.

[3] The implied contract of a physician or surgeon who undertakes to treat a patient is that he possesses the skill and knowledge ordinarily possessed by members of his profession, and that he will use ordinary care and skill in the application of such knowledge to accomplish the purpose for which he is employed. *Houghton v. Dickson*, 29 Cal. App. 321, 155 P. 128. If, however, he fails to conform to the proper standard, and an injury results to the patient, or if such injury is caused by a want of proper skill or care on the part of his agents or assistants, he will be liable. *Mernin v. Cory*, 145 Cal. 573, 79 P. 174; *McCollum v. Barr*, 38 Cal. App. 411, 176 P. 463; *Mullins v. Du Vall*, 25 Ga. App. 690, 104 S. E. 513; *Klitch v. Betts*, 89 N. J. Law, 348, 98 Atl. 427; *Smith v. Swinehart*, 209 Ill. App. 175.

[4] In the present case the testimony shows that the injury followed the use of the mixture; and while the question whether its effect was due to a lack of skill or care on the part of the defendant or his assistant in its preparation, or to some other cause, was one respecting which different inferences might be drawn, the conclusion reached by the jury finds reasonable support in the evidence and cannot be disturbed. *Wilbur v. Wilbur*, 197 Cal. 1, 239 P. 332; *People v. Stafford Packing Co.*, 193 Cal. 719, 227 P. 485.

[5, 6] The court permitted an expert to make tests for the purpose of showing the effect of using in its preparation different proportions of the ingredients of the mixture and water at different temperatures. It is contended that the proportions and the temperature of the water used in certain tests were different from those which, according to the testimony of defendant's assistant, were used in the mixture in question, and

that the tests were consequently misleading. The jury, however, was not bound to accept this testimony as conclusive; and as the court explained:

"These tests are merely for the purpose of throwing light upon the testimony of the experts as to the various degrees of heat which can be attained in different methods of mix or by using different degrees of temperature of water. Of course, it is not the purpose of the tests to show that in this particular case the defendant used the particular mixture that is being demonstrated."

In view of the explanation of their purpose the tests were not misleading, and the facts shown were relevant to the issues. The admission of evidence of this character is largely within the discretion of the trial court (*Maris v. Crummeys, Inc.*, 55 Cal. App. 573, 204 P. 259), and in the present case no abuse of discretion is shown.

The motion for nonsuit was properly denied, and, the verdict being supported by the evidence, the judgment is affirmed.

We concur: TYLER, P. J.; KNIGHT, J.



88 Cal. App. 322

DEACON v. BRYANS. (Civ. 4873.)

District Court of Appeal, Second District, Division 2, California. Jan. 13, 1928.

1. Appeal and error ⇨1011(1)—If evidence conflicts, trial court's findings will not be disturbed.

If record discloses a substantial conflict in evidence, trial court's findings will not be disturbed.

2. Evidence ⇨594—Testimony of witness need not be accepted as true merely because there is no direct evidence contradicting it.

Testimony of witness need not be accepted as true merely because there is no direct evidence to contradict it, since it within itself may bear earmarks of falsity, or other facts at trial may justify inferences or presumptions establishing conflict therewith.

3. Evidence ⇨178(8)—After plaintiff testified instruments sued on could not be found, evidence was admissible to prove their execution, delivery, and contents.

Where plaintiff sued on lost notes, his testimony that, subsequent to death of maker, search was made, and instruments could not be found, was foundation for admission of evidence to prove contents of instruments and their execution and delivery.

4. Lost instruments ⇨23(3)—Witness' description of lost note, sued on, held inadequate as identification thereof.

In action on lost note, alleged to be of value of \$5,000, payable in monthly installments, with acceleration of maturity clause, testimony of witness who qualified as to his familiarity with

maker's signature, being insufficient as to details of note, was inadequate as identification of note sued on.

5. Lost instruments ⇨23(3)—In proving lost instrument, evidence of contents should be sufficient to show without reasonable doubt its substantial parts.

In proving a lost instrument, evidence of contents should be sufficient to show without reasonable doubt its substantial parts.

6. Lost instruments ⇨23(3)—In suit on lost instrument, evidence must be sufficient to identify instrument as being one sued on.

In addition to need for evidence to prove substantial parts of document lost, there must be sufficient evidence to identify instrument as being the one on which suit is brought.

7. Lost instruments ⇨23(3)—Testimony of witness as to contents of lost note held insufficient to identify note described with instrument sued on.

In action on lost note for \$5,000, testimony of witness familiar with maker's handwriting, and claiming to have seen note that it was in usual legal form, and that he recognized sameness of note with other notes of maker, held insufficient as to contents to identify it with note sued on.

8. Appeal and error ⇨843(2)—Where finding that description was insufficient to identify lost note was supported by evidence, determination whether parts of note were material was unnecessary.

In action on a lost note, where trial court's finding that description of note by witness did not identify it with note sued on was one of fact, determination whether certain parts of a note are material was not required.

9. Lost instruments ⇨23(3)—Existence of note for \$966 sued on as lost instrument was not proved, where only evidence showed note for something over \$600.

Where note sued on as a lost instrument was alleged to be for \$966, existence of note was not proved, where no witness testified to having seen note for approximately that sum; one witness only having claimed to have seen a note something over \$600.

10. Witnesses ⇨178(3)—Where cross-examination of party was waiver of incompetency, sustaining objections to questions on redirect examination as to incidents before deceased's death was error (Code Civ. Proc. § 1880).

In action against executor to recover on notes of testatrix as lost instruments, defendant, by cross-examining plaintiff as to incidents occurring before death of deceased, waived incompetency of plaintiff as witness under Code Civ. Proc. § 1880, and hence rulings sustaining objections to questions to witness on redirect examination on material issues and incidents occurring before death of deceased were prejudicially erroneous.

11. Lost instruments ⇨23(3)—Evidence held not to sustain finding that deceased executed note for \$3,000, sued on as a lost instrument.

In action against executor on note of deceased for \$3,000 alleged to have been lost, evi-

dence held not to sustain finding that testatrix executed note for amount sued on as alleged.

12. Evidence $\Rightarrow$ 471 (29)—Testimony of witness that notes were in same form as Plaintiff's Exhibit A was not inadmissible as witness' conclusion.

In action to recover on notes as lost instruments, testimony of witness that notes he saw in possession of plaintiff were in same form as Plaintiff's Exhibit A was not inadmissible as witness' conclusion, since witness was testifying as to a fact.

Appeal from Superior Court, San Diego County; W. P. Cary, Judge.

Action by Daniel A. Deacon against E. F. Bryans, as executor of the last will and testament of Helene D. Henrich, deceased. From judgment for plaintiff on one count only of the complaint, both parties appeal. Reversed and remanded for new trial.

Wright & McKee, of San Diego, for Deacon.

Arthur F. H. Wright and Heskett & Weinberger, all of San Diego, for Bryans.

CRAIG, Acting P. J. Both parties appeal from the judgment rendered. The plaintiff does so, claiming that he should have recovered on all four counts contained in the complaint. The defendant insists that the evidence does not warrant any judgment against him. In each count a cause of action is stated upon a promissory note alleged to have been executed by Helene D. Henrich, deceased, and of whose estate Bryans is the executor. Each note is alleged to have been lost or stolen from the plaintiff, and to have long since been due and payable and unpaid. The principle of the note described in the first count is said to have been \$5,000; that mentioned in the second count, the same amount; that in the third, \$966, and that in the fourth, \$3,000. Judgment was rendered for plaintiff on the fourth count, and for the defendant on the other three, as to which the findings are that it is not true that the said Helene D. Henrich executed the notes set forth therein.

[1, 2] The plaintiff-appellant insists as one of his grounds for reversal that these findings are unsupported by, and contrary to, the evidence. We begin an examination of the record, keeping in mind the familiar rule that, if a substantial conflict in the evidence is disclosed, the findings of the trial court will not be disturbed on appeal. Also, that the testimony of a witness need not be accepted as true, merely because there is no direct evidence to contradict it. It may within itself bear the earmarks of falsity, or other facts brought out during the trial may justify inferences or presumptions which may be sufficient to establish that conflict which will result in sustaining the judgment

appealed from upon the ground now under consideration. This, we think, is such a case.

[3, 4] The theory of the plaintiff was that the notes had been lost. On direct examination he testified that, subsequently to the death of Helene D. Henrich, search was made, and the instruments could not be found. Having thus laid a foundation, evidence was admissible to prove the contents of the instruments and the execution and delivery of them, as alleged in the complaint. The plaintiff failed to produce such testimony, at least of the character which would warrant this court in saying that the trial judge was compelled as a matter of law to believe and accept it. One witness, William Kittner, called by the plaintiff, did not recall having seen any notes signed by Mrs. Henrich. Another witness, Humphreys, had seen notes bearing a signature purporting to be that of Helene D. Henrich, but he did not pretend to know her signature or to say that those appended to the notes concerning which he testified were signed by her.

Only one witness claimed to know the signature of the deceased. This was E. C. Jennings. Having qualified as to his familiarity with her signature, he said that the plaintiff had shown him four notes, each bearing the signature of Helene D. Henrich. He gave some detail of the contents of the notes, but not sufficient to remove reasonable doubts which may well have been entertained by the trial judge that these were the same notes described and relied upon by the plaintiff in his complaint.

The allegations of paragraph II of the first count are:

"That on or about the 19th day of March, 1921, at the city of San Diego, in said county and state, the said Helene D. Henrich, for a valuable consideration, made, executed, and delivered to the plaintiff her certain promissory note in writing, by the terms of which the said Helene D. Henrich thereby agreed to pay to plaintiff, at his place of business at No. 851 Seventh street, in said city of San Diego, the sum of \$5,000, at the rate of \$100 per month, together with interest on the principal at the rate of 7 per cent. per annum, payable monthly, said installments of principal and interest being payable upon the 19th day of each and every month thereafter, until the whole of said principal and interest should be fully paid, and providing further that, in case said payments of principal and interest or any of them should not be paid when due and payable according to the terms and tenor of said promissory note, then, the whole of said principal and interest should become immediately due and payable at the option of the holder of said note, and said promissory note further provided that, in case suit should be commenced or an attorney employed to enforce the payment thereof, then, in that event, the said Helene D. Henrich agreed to pay to plaintiff an additional sum of 10 per cent. on said principal and accrued interest as attorneys fees in such suit."

[5, 6] The witness Jennings, upon whose testimony plaintiff must rely, described no such instrument as among those which he saw in possession of the plaintiff in May, 1922, the date upon which he testified that he saw certain notes. It is true that it is an unquestioned requirement that in proving a lost instrument evidence of the contents should be sufficient to show without reasonable doubt its substantial parts. Counsel for plaintiff argue that the parts not shown are not material, and hence that the proof was sufficient. But, in addition to the need for evidence to prove the substantial parts of the document lost, in order that certainty may exist as to its terms, the further and equally important purpose is to identify the instrument as being the one upon which suit has been brought, for it would not do to sue on one cause of action and prove another, regardless of the certainty of the proof upon the material parts of that other. As to the \$5,000 notes, the witness Jennings merely remembered that one was typewritten, and that the other was on a stationer's form. In one answer he said that the typewritten note was "for \$10,000 or \$5,000"; that it was a "promise to pay Daniel A. Deacon"; and was signed "Helene D. Henrich." We need not employ time and space to point out that this description is wholly inadequate as an identification of the note set forth in the first count. Not only is the identification insufficient, but material terms stipulating place, time, and manner of payment of the note, are unmentioned by the witness. It is true that he said this note was the same as a certain printed form, which form was, over objection of the defendant, introduced as Plaintiff's Exhibit A. But an inspection of this exhibit reveals that it conflicts with the note set up in the first count as to manner of payment, and, of course, the form supplies no information as to the time or place of payment.

[7] We proceed to consider the cause of action alleged in the second count. Paragraph II thereof reads:

"That on or about the 12th day of August, 1921, at the city of San Diego, and state of California, the said Helene D. Henrich, for a valuable consideration, made, executed, and delivered to the plaintiff her certain promissory note in writing, by the terms of which she promised and agreed to pay to plaintiff at his place of business at No. 851 Seventh street, San Diego, Cal., on or before the 12th day of August, 1922, the sum of \$5,000, with interest thereon at the rate of 7 per cent. per annum from said date until paid, said note further providing that, in case suit should be commenced, or an attorney employed to enforce the payment thereof, then the said Helene D. Henrich agreed to pay an additional sum of 10 per cent. on said principal and interest as attorneys' fees in said suit."

As to the \$5,000 notes, the witness Jennings, in addition to his testimony above quoted, stated, referring to the one on the

printed form, "It was for \$5,000," and that the maker promised to pay Daniel A. Deacon \$5,000, and that it was in the usual legal form. Again, he said this note was in the same form as Exhibit A, and that he recognized the sameness, because he had signed notes on this identical form. But, as customary, the form in question leaves many elements blank, and concerning all such items the mind of the witness was also blank. He could not remember the date of any of these notes; nor when they became due; nor whether Helene D. Henrich's name was the only one appearing on the front of the notes. He had no recollection as to the rate of interest, if any, provided, or whether there was a provision for compounding interest if not paid when due; or whether or not the notes contained an acceleration clause, or provision for attorneys' fees in case of suit brought to collect; nor did the witness remember where the notes were made payable. If, as Jennings testified, the notes were upon a form identical with Exhibit A, they were payable "to the order of" Deacon, but the allegation of count II of the complaint is that the note therein sued upon was payable "to the plaintiff."

[8] With such incompleteness in the proof of the execution of the particular note described in the second count, and such dissimilarity between the contents of the note which the evidence tended to establish as having existed (and which both sides during the trial and in the briefs on appeal assume was the same note as that declared on in the second count if it was any one of those sued upon), the trial court would have been entirely justified in concluding that the note thus proved was the one alleged in said count. Such a conclusion is consistent with the court's findings. The question involved is one of fact, and there is substantial evidence to support the finding. Under these circumstances the case presented does not require a determination as to whether or not certain of the parts of a note are material—a question much discussed in the briefs. It is easily conceivable that a conflict upon a matter immaterial to the validity of a note might fully justify the conclusion that two descriptions of notes do not identify the same instrument. For example, suppose it were alleged in the complaint that the lost note was on a form printed only by a certain publisher, and a witness shown a printed blank put out by another publisher had identified it as the one employed for the note which he had seen. Here, if the trial court should hold that the proof was insufficient to show the note described in the complaint to have ever existed, it is clear that its decision would be upheld, although the evidence may have shown that a note was executed and may have proven every material part thereof. The evidence would have indicated a different note from that sued upon. This

question of identity must always be one of fact. It is one which clearly arose in the decision of the issues presented on the second count in this case and in weighing the evidence offered in plaintiff's attempt to establish it.

[9] It is quite clear that the evidence failed to prove the existence of the note sued on in the third count. Without pointing out other deficiencies in that regard, it is sufficient to mention that the note described in the pleading is alleged to be one for \$966. No witness testified to having seen a note for even approximately that sum; the nearest approach being that the witness Jennings thought the principal of one of the notes which he claimed to have seen was something over \$600.

[10] It is urged that the trial court erred in sustaining objections to the plaintiff's testifying to certain events and conversations which took place prior to the death of Helene D. Henrich. Plaintiff concedes that, under section 1880 of the Code of Civil Procedure, ordinarily these rulings would have been required. However, he insists that the defendant waived the objection allowed by this section. It appears that, during the cross-examination of Deacon, counsel for defendant asked a number of questions having to do with the loss of the notes the answers to which necessarily concerned incidents happening before the demise of the maker. The questions and answers are as follows:

"Q. When did you make your last search for the alleged notes in question? A. About three weeks ago.

"Q. When did you make your first search for them? A. After the deceased—do you want me to answer, before the deceased died?

"Q. Well, I say, when did you make the first search for the notes? A. The first search I made was—let me see—May 31, 1922.

"Q. Where did you make the search? A. In my office.

"Q. Did you have a safe? A. Yes, sir.

"Q. Did you look in the safe for them? A. I did.

"Q. Did you make a thorough search at that time to see if you could find them? A. I did.

"Q. How long before that had you missed them? A. I don't remember.

"Q. Well, approximately how long? A. Oh, not more than a couple of hours.

"Q. The same day? A. The same day.

"Q. The search was made at your office? A. Yes.

"Q. Had you been keeping them in the safe? A. I had up to the time I took them to the apartment house.

"Q. That was the 31st of May, 1922? A. The last—yes, a year ago."

Helene D. Henrich died on November 30, 1922.

The provisions of section 1880 of the Code of Civil Procedure applicable here read as follows:

"The following persons cannot be witnesses:
* * * Parties or assignors of parties to an

action or proceeding, or persons in whose behalf an action or proceeding is prosecuted, against an executor or administrator upon a claim, or demand against the estate of a deceased person, as to any matter or fact occurring before the death of such deceased person."

It cannot be doubted that the incompetency of the plaintiff may be waived by an executor. *Kinley v. Largent*, 187 Cal. 71, 200 P. 937. That such a waiver results when the representative of the estate of the deceased interrogates a plaintiff concerning what took place before the death of the deceased has also been decided in *McClenahan v. Keyes*, 188 Cal. 574, 206 P. 454.

However, the defendant contends that anything which the plaintiff may have testified on cross-examination concerning the loss of the notes did not make him a competent witness as to any transaction occurring before the death of the deceased and concerning the making, existence, or delivery of the notes, and it is pointed out that the matters upon which the plaintiff was cross-examined had to do only with the circumstances surrounding their alleged loss. *Bagley v. Eaton*, 10 Cal. 126, is cited as authority for the position thus taken, and as holding that, where the testimony adduced relates to matters merely preliminary and incidental, the provision of section 1880 of the Code of Civil Procedure does not apply. At the time of the decision rendered in *Bagley v. Eaton*, said section had not been enacted. The common-law inhibition as to any party to an action testifying was then the rule, but, since that section became the law, a number of decisions have indicated the views of the Supreme Court upon the question here presented. We think the net result of these is to establish the rule that the language of the section is to be applied literally; that the parties prohibited from being witnesses cannot be witnesses—that is, cannot testify at all "as to any matter or fact occurring before the death of such deceased person," whether incidental, preliminary, or otherwise. To this effect are *Blood v. Fairbanks*, 50 Cal. 420, and *Moore v. Schofield*, 96 Cal. 486, 31 P. 532. It is true that there is some apparent conflict in our authorities. In *Roche v. Ware*, 71 Cal. 375, 12 P. 284, 60 Am. Rep. 539; *Colburn v. Parrett*, 27 Cal. App. 541, 150 P. 786, and *Tipps v. Landers*, 182 Cal. 771, 190 P. 173, the right of a plaintiff to identify books kept during the lifetime of the decedent is upheld, but these decisions are limited by the holding in *Stuart v. Lord*, 138 Cal. 672, 72 P. 142, and *Colburn v. Parrett*, *supra*, that the party can go no further than to identify his books, and is not permitted to testify as to their correctness.

We conclude that, in cross-examining Deacon as to incidents occurring before the death of the deceased, the defendant waived the incompetency of the witness under the

provision of section 1880 of the Code of Civil Procedure, and hence that the subsequent rulings of the trial court sustaining objections to questions on redirect examination having to do with other material issues and incidents occurring before the death of Helene D. Henrich were prejudicially erroneous.

[11] As we have stated, judgment was rendered in favor of the plaintiff on the fourth count. This is the one alleging a note in the principal sum of \$3,000. It cannot be disputed that the amount of a note is one of the parts which are material. Here we have the situation that the witness Jennings did not testify that either of those which were shown him by the plaintiff was \$3,000. In this respect his testimony was as uncertain as it was concerning the note set up in the third cause of action. On the other hand, although the witness Humphreys stated that one of the notes exhibited to him was in the amount of \$3,000, this witness could not say that any of these notes bore the signature of Helene D. Henrich. He did not profess to know her signature, and hence it must be conceded that his testimony cannot be accepted alone as proof of a material and necessary part of the note. Although the court

found that the deceased executed a note for \$3,000 as alleged, the record presents not a conflict of evidence as to this count, but an entire lack of competent evidence to sustain the finding.

[12] No error was committed by the ruling permitting the witness Jennings to testify that the notes which he saw in possession of the plaintiff were in the same form as Plaintiff's Exhibit A. In answering this question the witness was not testifying to his conclusion any more than every statement of a fact is in one sense a witness' conclusion. The question thus presented is not distinguished from that of *Kenniff v. Caulfield*, 140 Cal. 34, 43, 73 P. 803, where it was held proper to permit a witness to state that a blank form of deed exhibited to him was the same as he had used in making the conveyance in question.

There are other points presented by the appellants, but, in view of our decision upon those herein discussed, it will be unnecessary to consider them.

The judgment is reversed, and the case remanded for a new trial upon all four counts.

We concur: THOMPSON, J.; VALENTINE, Justice pro tem.

88 Cal. App. 344

STARR v. LEE et al. (Civ. 5944.)★

District Court of Appeal, First District, Division 2, California. Jan. 14, 1928.

Hearing Denied by Supreme Court March 12, 1928.

1. Damages ⇨79(4)—Actual damages by delay in commencing drilling of oil well held so uncertain or speculative as to require that sum stipulated be held liquidated damages (Civ. Code, § 1671).

Evidence in action on contract, providing for payment of sum sued for on failure to commence drilling oil well within certain time, held to show actual damages to be so uncertain or speculative as to require that such provision be held one for liquidated damages under Civ. Code, § 1671.

2. Damages ⇨79(1)—Sum agreed to be paid on breach of contract generally will be held liquidated damages, where actual damages are uncertain or purely speculative (Civ. Code, § 1671).

If actual damages by breach of contract are uncertain or purely speculative, and contract furnishes no data for their ascertainment, provision for payment of stated sum in case of breach will generally be held one for liquidated damages, rather than a penalty, under Civ. Code, § 1671.

3. Damages ⇨76—Whether contract calls for liquidated damages or penalty must be determined from circumstances when made (Civ. Code, § 1671).

Whether contract is to be construed as calling for liquidated damages under Civ. Code, § 1671, or a penalty, must be determined according to circumstances at time contract was made, and fact that conditions at time of breach were so changed that it would then be practicable and not difficult to fix actual damages does not affect character of contract.

4. Damages ⇨163(3)—Substantial damage by breach of contract need not be shown in action for liquidated damages (Civ. Code, § 1671).

In action for liquidated damages, under Civ. Code, § 1671, for breach of contract, it is unnecessary to show that substantial damage resulted from breach.

5. Appeal and error ⇨882(11)—Defendant, on whose objection plaintiff's evidence of damage was excluded, cannot complain of judgment for liquidated damages for want of evidence of any damage (Civ. Code, § 1671).

Defendant, on whose objection plaintiff's evidence of damage sustained by breach of contract was excluded as immaterial and irrelevant, cannot say that judgment for liquidated damages under Civ. Code, § 1671, should be reversed for want of evidence that any damage resulted.

Appeal from Superior Court, Los Angeles County; Elliot Craig, Judge.

Action by E. G. Starr against M. E. Lee, K. Lundeen, and another. Judgment for plain-

tiff, and defendant Lundeen appeals. Affirmed.

George M. Pierson and D. H. Laubersheimer, both of Los Angeles, for appellant.

Charles W. Fournl, of Los Angeles, and Harry G. Sodicoff, for respondent.

NOURSE, J. Plaintiff sued upon a contract whereby the defendants agreed to pay him the sum of \$5,000 if they failed to commence the drilling of an oil well before a fixed day. Plaintiff had judgment, and the defendant Lundeen alone has appealed on a type-written transcript under section 953 et seq., Code of Civil Procedure.

At the time of the execution of the undertaking, plaintiff held a lease from the title owners of a lot of land 30x130 feet located in the Signal Hill oil field in the county of Los Angeles. This lease called upon plaintiff to "spud in and commence the actual drilling of a well" within 40 days after delivery to him of a certificate showing title to the premises vested in the lessors, to continue drilling with reasonable diligence until oil was found in paying quantities, or until the well should reach a depth of 3,500 feet, and to pay the lessors as royalties 16½ per cent. of the proceeds received from the sale of all oil, gas, or other hydrocarbon substances extracted. On December 9, 1922, plaintiff and defendants Lundeen and Lee executed an "oil and gas contract" whereby these defendants agreed to commence the drilling of a well upon the premises and to perform all the provisions of plaintiff's lease which were to be performed by him and to pay plaintiff 30 per cent. royalty, out of which he was to pay the royalties stipulated to the original lessors. The undertaking upon which the suit is based was executed the same day, and, as a part of the same transaction, the plaintiff gave to the defendants certain writings wherein he specified the time for the commencement of work as 30 days after "I show you clear title" and also an easement to the 30x60 feet west of the lot described. This date was left blank at the time of signing the oil and gas contract and also in the undertaking, but the date "25th of January, 1923," was later inserted by agreement; that date being 30 days after certificate of title and easement were shown to defendants. The defendants actually commenced to "spud in" on February 7, 1923, 13 days after the time called for in their contract, and, in order to protect himself from a forfeiture of the lease, plaintiff procured from the owners of the land an extension of time for performance under his lease.

At the beginning of the trial, plaintiff amended his complaint by adding the allegation that at the time of entering into the undertaking "it was impracticable or extremely difficult to estimate the amount of damages which would accrue to plaintiff by reason of the default or failure of defendants Lee and Lundeen to spud in an oil well on said proper-

ty as required, * * * for the reason that there was not then, nor at any other time or now, any method or means by which it may be ascertained as to the amount of oil that would be lost to plaintiff by reason of the delay" and for the further reason that plaintiff's lease with the owners of the property would expire on February 3, 1923, unless said work had been commenced. The issue was thus drawn whether the undertaking came within the provisions of section 1471 of the Civil Code permitting the parties to a contract to liquidate the damages for its breach when, from the nature of the case, it would be impracticable or extremely difficult to fix the actual damages. The trial court found that the allegations of the complaint touching this issue were true, and gave judgment for plaintiff on the theory that the damages had been liquidated in a proper case.

[1] On the appeal from the judgment, the appellant states his grounds to be that the findings are not supported by the evidence and that the findings do not support the judgment. He does not specify any particular finding which he claims to be unsupported and does not state wherein the findings as a whole fail to support the judgment. The respondent has taken up the burden of printing the evidence tending to show that the contract came within the rule of section 1671, Civil Code. It was shown that the time within which appellant and his associate were to commence drilling was but 10 days prior to the time when respondent was required to commence drilling under his lease with the owners; that respondent had executed, and deposited in escrow, a quitclaim deed conveying to the owners all his interest in the lease if he failed to commence drilling by the date fixed in the lease; that the land was located in a newly discovered oil field where drilling operations were proceeding at a feverish pace, many wells being located within 40 or 50 feet of each other on small town lots, four or five being within a radius of 200 feet of the property covered by the contract in suit; that two wells within 250 feet of this property were producing 2,000 barrels of oil a day; and that in operations of this kind the well first reaching the oil strata often drained the oil from that level, and this made it necessary to drill later wells to a greater depth at an increased expense. On the direct issue of the feasibility of estimating damages for delay in drilling an expert witness testified that there was no method by which such damage could be estimated, because wells in close proximity often drain each other and the one first completed has the advantage in that it opens up certain channels and starts a flow in its direction, but that this is not always true; that "there is no way of telling exactly, or anywhere near exactly, how much of one well's oil another well takes." The appellant has not cited any evidence in conflict with this,

and merely rests on the statement that this finding is not supported.

[2] The case comes within the rule that, if the actual damages are uncertain, or are of a purely speculative character, and the contract furnishes no data for their ascertainment, the provision will, as a rule, be held to be one for liquidated damages. 8 R. C. L. p. 569; *Escondido Oil, etc., Co. v. Glaser*, 144 Cal. 494, 500, 77 P. 1040; *Huggins v. Daley* (C. C. A.) 99 F. 606, 609, 48 L. R. A. 320. In the latter case the court, speaking of the peculiar character of a contract for boring an oil well, said:

"There is, perhaps, no other business in which prompt performance is so essential to the rights of the parties, or delays so likely to prove injurious—no other class of contracts in which time is so much of the essence. There is no other branch of mining where greater damage is done by delay. Coal and precious metals lie either in horizontal veins or in pockets. They remain where they are until removed. Oil and gas are the most uncertain, fluctuating, volatile, and fugitive of all mining properties. They lie far below the surface, beyond the control of human will, and beyond the reach of any legal process, whence they may flow unrestrained if the owner of adjoining land bores a well down to the strata which holds them; and there is no law which can provide adequate, or indeed any, compensation for such results. This is a matter of common knowledge, and 'courts will generally take notice of whatever ought to be generally known within the limits of their jurisdiction.' *Greenl. Ev.* § 6."

[3-5] The character of the contract, whether it is to be construed as calling for liquidated damages or a penalty, is to be determined according to the circumstances existing at the time the contract was made, and the fact that at the time of the breach conditions have so changed that it would then be practicable and not difficult to fix the actual damage does not affect the character of the contract. *Hanlon Drydock, etc., Co. v. McNear*, 70 Cal. App. 204, 210, 232 P. 1002. It is also unnecessary, in a case of this kind, to show that substantial damage resulted from the breach. 8 R. C. L. p. 578; *Rispin v. Midnight Oil Co.* (C. C. A.) 291 F. 481, 34 A. L. R. 1331; *Davidson v. Hughes*, 76 Kan. 247, 91 P. 913, 914. We find authorities holding that recovery cannot be had when the evidence shows that no damage at all resulted from the breach, but the rule is not available to the appellant because, when respondent attempted to prove damage, he was foreclosed by appellant's objection that it was immaterial and irrelevant. Appellant cannot now say that the judgment should be reversed because this evidence was not admitted. *Harp v. Harp*, 136 Cal. 421, 424, 69 P. 28.

In his reply brief, the appellant has advanced new grounds upon which he insists that the judgment must be reversed. Without exception the arguments are based upon false premises unsupported by evidence from

the record. They are all to the same effect—that because such and so is the case the contract is not one coming within the purview of section 1671 of the Civil Code permitting the liquidation of damages. We have discussed the rules of law applicable to the facts as they appear from the evidence which has been brought to our attention and these require an affirmance of the judgment.

Judgment affirmed.

We concur: KOFORD, P. J.; STURTEVANT, J.

SMITH v. CARLSTON. (Civ. 6049.)★

District Court of Appeal, First District, Division 2, California. Jan. 7, 1928. As Modified Jan. 24, 1928.

Hearing Granted by Supreme Court March 5, 1928.

1. Contracts ⇨147(3)—Interpretation of contract depends upon intent, ascertained from entire contract and subject-matter.

In interpreting contracts, function of court is to ascertain mutual intention of parties from writing, if possible, and intention is determined by giving force and effect to entire contract with reference to subject-matter of contract.

2. Contracts ⇨143—Language expressing incidental matters is restricted to main purpose of agreement.

Words in contract which express incidental matters will be restricted to main purpose of contract, as courts only have power to construe contract of parties and no power to make new contract.

3. Corporations ⇨123(14)—Maker who had not paid notes held not entitled to recover agreed value of collateral sold, notwithstanding payee's agreement to return security or pay for it.

Contract consisting of promissory notes, with recital of deposit of collateral security which maker empowered payee to sell and of separate agreement relative to renewal of notes, which provided payee would make payment to maker for shares of stock assigned as collateral at specified rate per share if they were sold or not returned to her, *held* contract for loan of money secured by deposit of collateral security, under which maker was not entitled to recover agreed value of shares of stock assigned as collateral and sold where notes had not yet been paid.

4. Corporations ⇨123(14)—Contract consisting of notes and agreement for payment or return to maker of collateral held not severable, so as to permit recovery of value of stock sold.

Contract consisting of notes with deposit of stock as collateral security, which payee was authorized to sell, and of agreement that payee should pay over to maker so much of stock assigned as collateral as was sold or not returned to her at specified rate, *held* not severable so as to permit maker's recovery of value of shares of stock sold without proof of payment of notes.

5. Corporations ⇨123(17)—Court must assume payee complied with contract by returning collateral, where complaint to recover agreed value of collateral did not deny it.

In action by maker of original and renewal notes to recover agreed value of stock pledged as collateral, court was required to assume that additional shares of stock pledged were returned to maker not later than the due date of the original notes, where contract provided for return at such time and complaint contained no allegation to the contrary.

6. Corporations ⇨123(22)—Payee delivering up collateral was not bound by contract to pay for or return collateral, on taking repledge thereof to secure renewal notes.

Where contract in connection with giving of notes and pledging of stock as security provided for return of additional shares before due date of original notes, return of such shares under contract discharged payee from liability to pay agreed value thereof under another covenant of contract, when shares were subsequently re-deposited as security for renewal notes.

7. Corporations ⇨123(17)—Complaint of maker of notes seeking recovery of price of collateral sold held subject to special demurrer for failure to show whether collateral was pledged before contract sued on was discharged.

Complaint of maker of notes in action to recover value of collateral security sold, under contract requiring its return or payment of agreed price, *held* subject to special demurrer for failure to show whether sale occurred by reason of pledge given to secure original notes or by reason of pledge given to secure renewal notes at time when defendant's liability under contract was discharged.

Appeal from Superior Court, Alameda County; J. D. Murphey, Judge.

Action by Evelyn Ellis Smith against J. F. Carlston. From a judgment for defendant, plaintiff appeals. Affirmed.

James F. Peck and John H. McDaniels, both of San Francisco, and W. B. Bunker, of Oakland (C. M. Peck, of Oakland, of counsel), for appellant.

Fitzgerald, Abbott & Beardsley, of Oakland, for respondent.

STURTEVANT, J. The plaintiff commenced an action against the defendant to recover a judgment for money. Thereafter the plaintiff filed an amended complaint. The defendant pleaded thereto by filing a general and special demurrer. The demurrer was sustained, with leave to amend. The plaintiff having failed to amend within the time allowed, a judgment was entered against her, and she has appealed, bringing up the judgment roll.

As stated by the plaintiff, the question presented on the appeal involves the construction of certain writings. On January 17, 1922, the plaintiff executed and delivered

documents which she calls Exhibits A, C, and D. Exhibit A was as follows:

"Exhibit A.

"\$8,487.00 Oakland, Calif., Jan. 12, 1922.

"On or before one year from date, without grace, for value received, I promise to pay to the order of J. F. Carlston, at my office in the city, the sum of eighty-eight thousand four hundred and eighty-seven and no/100 dollars, payable in United States gold coin, with interest in like gold coin, from date until paid at the rate of six (6) per cent. per annum, payable June 30th and December 31st; and if not so paid to compound and become a part of the principal, and bear interest thereafter at the same rate.

"Evelyn Ellis Smith.

"And as collateral security for the payment of the above note, and the interest to grow due thereon, I have deposited with J. F. Carlston the following property, to wit: Cert. 79 for 50,000 shares West End Cons. Mining Co. stock; Cert. 225 for 25,000 shares West End Cons. Mining Co. stock; Cert. 8366 for 25,000 shares West End Chemical Co. stock.

"And should said note or any part thereof, or the interest to grow due thereon, remain due and unpaid after the same should have been paid, according to the tenor of said note, *I hereby irrevocably authorize and empower said J. F. Carlston, or his assigns, to sell and dispose of the above described property, or any part thereof, at public or private sale, with or without previous notice to me of any such sale, and from the proceeds arising therefrom, to pay the principal, interest, charges, and the cost of sale, and the balance, if any, to pay over to me or my representatives, upon demand. In case of deterioration of any of the above securities, or fall in the market value of the same, I hereby promise and agree to reduce the amount of said note, or to increase the security in proportion to such deterioration or decrease of value in default of which this note shall be considered due under the above stipulation. On the payment of the above note, interest and charges, according to the terms thereof, this agreement shall be void, and the above described securities returned to me.* Evelyn Ellis Smith."

Exhibit D is a promissory note in exactly the same form and words except it is for the principal sum of \$75,000. It purports to be secured by the same securities.

Exhibit C is as follows:

"Exhibit C.

"1. This agreement, made and entered into by and between J. F. Carlston of the city of Oakland, county of Alameda, state of California, party of the first part, and Evelyn Ellis Smith, of the same city, county and state, party of the second part, witnesseth:

"2. That the said Evelyn Ellis Smith has been requested by the said J. F. Carlston to execute two promissory notes; one in the amount of seventy-five thousand dollars (\$75,000), payable on or before one year after date, dated January 12, 1922; one for eighty-eight thousand, four hundred eighty-seven dollars (\$88,487), payable on or before one year after date, dated January 12, 1922, as a renewal of three notes heretofore given by Evelyn Ellis Smith to the said J. F. Carlston, as follows:

"3. One for fifty-five thousand, eight hundred and 84/100 dollars (\$55,800.84), payable on demand, dated February 25, 1921; two for fifty thousand dollars (\$50,000) each, payable on demand dated February 25, 1921. Said last three notes are secured, first by a promissory note of the F. M. Smith Securities Company, dated February 28, 1918, for the amount of one hundred thirty-four thousand, five hundred eighty-six and 62/100 dollars (\$134,586.62), which said Securities Company note is itself secured by 1,980 shares of stock of the Realty Syndicate; 100 shares of preferred stock of Oakland Traction Company; second by 100,000 shares stock of West End Consolidated Mining Company; and

"4. Whereas the said J. F. Carlston has requested that the above two notes to be given as a renewal of the said three notes now outstanding, be secured by additional shares of stock, to be divided as follows: Fifty thousand (50,000) shares West End Consolidated Mining Company and fifty thousand (50,000) shares West End Chemical Company stock, which last named one hundred thousand shares of stock are hereinafter referred to as '100,000 additional shares.'

"5. Now, therefore, it is hereby agreed by and between the parties hereto, that in consideration of said Evelyn Ellis Smith granting the request of J. F. Carlston, the said J. F. Carlston will on or before the due date of the said two renewal notes to be executed as above, accomplish a renewal of the said two notes for a further similar period of one year, making the last named expiration date two years from the date hereof; and it is further agreed by the said J. F. Carlston, that in addition to extending the time as hereinbefore stated, he will, and hereby does guarantee and agree to release from the pledge so securing said notes and return to said Evelyn Ellis Smith the 100,000 additional shares of stock at such time as the said notes shall be paid by said Evelyn Ellis Smith, or at such time as said notes shall be returned to said J. F. Carlston, and under any circumstances said 100,000 additional shares shall be released and returned to Evelyn Ellis Smith not later than the due date of the said notes executed herewith.

"6. That said J. F. Carlston further, in consideration of the premises, agrees and guarantees that should the said 100,000 additional shares, or any thereof, be sold under the said pledge thereof by any person whomsoever, that the said J. F. Carlston will account to and pay to the said Evelyn Ellis Smith for such of the said 100,000 additional shares as are so sold or as are not returned to her as herein agreed, at the rate of three dollars (\$3.00) per share for each share of said 100,000 additional shares of stock which may be so sold or which may not be returned to her, as aforesaid.

"7. The said J. F. Carlston further agrees to immediately deliver to said Evelyn Ellis Smith upon the execution of said two notes herewith the above-mentioned note of the F. M. Smith Securities Company and the collateral securing it.

"Executed in duplicate.

"In witness whereof, the said parties hereto have hereunto set their hands and seals this 17th day of January, 1922.

"[Signed] J. F. Carlston. [Seal.]

"[Signed] Evelyn Ellis Smith. [Seal.]"

On December 31, 1922, the plaintiff executed and delivered two promissory notes, Exhibits B and E. Those notes are in exactly the same form as Exhibits A and D, but are dated December 31, 1922, and each is payable on demand. Each purports to be secured by the same security as Exhibits A and D. The complaint recites that Exhibits A and D were surrendered on December 31, 1922, and Exhibits B and E were thereupon executed and delivered. (The italics and the number to paragraphs are ours.)

In her complaint the plaintiff alleged that the defendant "never returned to plaintiff the said 100,000 shares of stock. * * *" In her brief she makes the contention that the promise of the defendant "was one for alternative performance, i. e., to return the shares or to pay \$3 per share." Thereupon she argues that she was entitled to judgment in the sum of \$300,000.

[1] The statement quoted from the brief is not sustained by the record. It is but the conclusion of the plaintiff, drawn from the recitals contained in the written instruments which have been hereinabove set forth.

[2] In so far as a sale is concerned, the statement contained in paragraph 6 of Exhibit C, "that the said J. F. Carlston will pay * * * \$3 per share," stands alone and it is in no way fortified as showing or tending to show a sale as of any date. The function of interpretation is at all times to ascertain the mutual intention of the parties. That intention will be ascertained from the writing, if possible. To accomplish that result the court will endeavor to give force and effect to every part of the contract. However broad may be the terms of a contract, it extends only to those things concerning which it appears that the parties intended to contract. Where there are several provisions or particulars, such a construction is, if possible, to be adopted as to give effect to all. The rules forbid the seizure upon some isolated provision in order to compel a certain result. 6 Cal. Jur. 258, § 165. The incident follows the principal, and not the principal the incident. Looking back at the instruments which we have set forth, it is at once apparent that the parties were attempting to form an agreement regarding the borrowing of money on promissory notes secured by collateral. Although as an incident the instrument contained a covenant by the defendant that under certain circumstances he "will pay," those words will be restricted to the main purpose of the contract. As courts have power to construe, but have no power to make, contracts for the parties, the passage relied on may not be construed into a sale of any kind. In the case of *Westcott v. Thompson*, 18 N. Y. 363, the facts were that a brewer sold 67 barrels of ale to a retailer, upon an agreement that the barrels should be returned after the ale should be drawn from

them, but if any were not returned, the retailer should pay \$2 apiece for them. The court held that the property in the barrels remained in the brewer, and that the agreement to pay \$2 apiece for them if not returned was intended to fix the damages for the loss of such as the retailer should be unable to return. In the case of *Wilmington Trans. Co. v. O'Neil*, 98 Cal. 1, 32 P. 705, the Wilmington Company rented to O'Neil a lighter at \$50 per month. Among other things, it was provided that if the lighter should be "lost or damaged to the extent that it cannot be put in the same good condition as when received, the party of the second part, to pay the party of the first part, the sum of \$3,500 for said lighter Wilmington." There, as here, it was contended that the contract provided for a sale. Regarding such a contention, at page 7 (32 P. 707) the court remarked:

"I therefore think the sum of \$3,500 was not intended as a penalty, but was intended as stipulated damages, unless the agreement may be construed to be a sale of the lighter on the condition that it should be lost, which seems absurd. * * * If the property in the lighter remained in the plaintiff until it 'was lost and destroyed,' how could it pass to the defendant after the lighter was totally lost—sunk to the bottom of the ocean, or totally consumed by fire? If it could pass under such circumstances, I think the agreement fails to express an intention to that effect."

The court cited with approval *Westcott v. Thompson*, supra.

In the case of *D. M. Osborne & Co. v. Joselyn*, 92 Minn. 266, 99 N. W. 890, the Supreme Court of Minnesota was considering a contract which, among other things, contained this covenant:

"The party of the first part (plaintiff) sells and the party of the second part (defendants) buys the Osborne Columbia corn harvesters listed," etc. (Italics ours.)

After considering the terms of the entire contract, "taking it up by its four corners, * * *" the court reached the conclusion that the instrument created the relation of principal and agent and was not a contract to buy and sell.

In cases involving loans, secured by collateral deposits, similar questions have been presented. In nearly every one of the cases the facts disclosed that there were detached statements which, if they stood alone, would indicate a sale. However, the courts have repeatedly held that the contract must be construed as a whole and from that we must ascertain the main purpose of the contract and not rest our determination on one or two detached statements. In *re Grand Union Co.* (C. C. A.) 219 F. 353; *Western Underwriting & Mortgage Co. v. Valley Bank* (C. C. A.) 237 F. 45, 50; *Mitchell v. Cramp* (C. C. A.) 8 F.(2d) 481; *Shelley v. Byers*, 73 Cal. App.

44, 60, 61, 238 P. 177; *Hughes v. Harlam*, 166 N. Y. 427, 60 N. E. 22, 24; *Continental Credit Co. v. Ely*, 91 Conn. 553, 100 A. 434, 437; *Barker Piano Co. v. Commercial Security Co.*, 93 Conn. 129, 105 A. 328, 330; *American Lumber Co. v. Quiett Mfg. Co.*, 162 N. C. 395, 78 S. E. 284.

That the parties, in the action which we are considering, might have created an alternative contract if they had used appropriate language to that effect, will not be disputed. Some contracts of that kind are cited by the plaintiff. *Stevens v. Hertzler*, 109 Ala. 423, 19 So. 838; *Pearson v. Williams*, 24 Wend. (N. Y.) 244; *Baker v. Wentworth*, 17 Me. 347; *Austin v. Seligman (C. C.)* 18 F. 519; *Bianchi v. Nash*, 1 M. & W. 545; *Tennessee River Transp. Co. v. Kavanaugh*, 93 Ala. 324, 9 So. 395; *Haskins v. Dern*, 19 Utah, 89, 56 P. 953; *Guss v. Nelson*, 200 U. S. 298, 26 S. Ct. 260, 50 L. Ed. 489. In each and all of the cases just cited it will be found that the contract of the parties contained appropriate language of sale or conveyance, which language led the court to the conclusion that, among other things, one of the purposes of the contract was to sell or convey.

The plaintiff says the stock was mining stock and subject to great fluctuation. That fact is of no help in deciding the case. If the stock was worth not to exceed \$3 when Exhibit C was written, and if it was worth \$30 when "the due date of the said notes executed herewith" (paragraph 5) arrived, it would scarcely be argued that then and under those circumstances the defendant would be entitled to demand that the plaintiff pay her notes, principal, and interest, and that she accept \$300,000 for stock which at that time would be worth ten times that amount. Nevertheless, such arguments have been made. In the case of *Taylor v. Burns*, 8 Ariz. 463, 76 P. 623, the court was considering a written instrument. The facts in favor of the appellant were stronger than the facts in this case. In that case the writing, among other things, contained the covenant "that the said party of the first part * * * sells to the said party of the second part. * * *" At page 624 (8 Ariz. 467), it is said:

"The only question involved is the construction to be given the agreement between Taylor and Burns. The contention of the appellant is that the agreement amounted to a sale to him of the mines for a given and valid consideration expressed in the instrument. The contention of counsel for the appellees is that, from the instrument as a whole, it clearly amounts to nothing more than a power of attorney authorizing Taylor to negotiate the sale of the claims upon the terms stated in the agreement, revocable at will. Upon the latter contention, it was admitted by the appellant that, if the instrument was revocable at the will of Burns, such revocation was made by Burns on February 27, 1903.

"It is a settled rule of construction of instruments of this character that the intention of the parties must govern, as this intention is evi-

denced by a consideration of the entire instrument. *Williams v. Paine*, 169 U. S. 76, 18 S. Ct. 279, 42 L. Ed. 658. 'The elementary canon of interpretation is not that particular words may be isolatedly considered, but that the whole contract must be brought into view and interpreted with reference to the nature of the obligations between the parties, and the intention which they have manifested in forming them.' *O'Brien v. Miller*, 168 U. S. 287, 18 S. Ct. 140, 42 L. Ed. 469. Tested by this rule, the agreement cannot be construed as a conveyance."

Later the case was appealed to the United States Supreme Court. 203 U. S. 120, 27 S. Ct. 40, 51 L. Ed. 116. Mr. Justice Brewer, writing the opinion, at page 125 (27 S. Ct. 41), said:

"Nowhere in the instrument does the party of the second part assume any obligations, except the general one in the third paragraph, by which both parties mutually agree to aid each other in the negotiation and sale of the mining claims. *The instrument does not in terms grant or convey.* The nearest approach to a word of conveyance is 'sells.' This is more apt in describing the passing of the title of personal than of real property. Not that this is decisive, for not infrequently it is held to manifest an intent to convey the title to the property named, whether real or personal. *But when the purpose of the transaction is stated the word will ordinarily have no more effect upon the title than is necessary to accomplish the purpose.*" (Italics ours.)

The plaintiff disclaims any attempt to plead a cause of action as for damages. All such theories therefore may be passed without further discussion. No claim is made that the plaintiff was attempting to plead a cause of action sounding in equity. If it were made, the opinion written by the United States Circuit Court of Appeals in *Western Underwriting & Mortgage Co. v. Valley Bank*, supra, would be a complete answer. In that case, after holding that the contract was not one of sale but was one of deposit for security, the court continued, and at page 50 the court said:

"* * * and, under any theory of this case, the complainant cannot recover assets remaining in the Valley Bank until it has first repaid to that bank the amount due as a deficiency on account of the debts of the Union Bank & Trust Company paid by the Valley Bank."

[3] Finally, we will assume that plaintiff was attempting to plead a cause of action based on a covenant. Taking the documents which were executed January 17, 1922, together, and looking at them as a whole, it is clear that the contract was one for the loan of money secured by the deposit of collateral as security for the repayment of the money so loaned, and that, until the money was repaid, neither the collateral nor the proceeds would be returned to the plaintiff. The repayment of the money loaned was clearly a condition. However, the plaintiff does not

allege that she has paid the notes or any part thereof, nor does she allege that she has duly performed all the conditions on her part. This omission on her part was fatal. *L. A. Gas & Elec. Co. v. Amal. Oil Co.*, 156 Cal. 776, 778, 106 P. 55. We are aware that it is her contention that she claims that she was relying on paragraph 6 of Exhibit C. In so doing she assumes the contract was severable. Whether it was, or was not, is a question of interpretation.

[4] The intent of the parties is to be ascertained from a consideration of the language employed and the subject-matter of the contract. *L. A. Gas & Elec. Co. v. Amal. Oil Co.*, supra. We have no hesitancy in saying that the contract before us was not severable in the respect in which the plaintiff contends. By the expressed language of each note the defendant was authorized to receive and hold, and, under certain circumstances, to sell, the collateral. Wherein paragraph 6 provides that, not later than the due date of the notes executed herewith, "the defendant will pay," the language is no stronger than had it been "the defendant will return." Neither covenant changed the expressed covenants of the notes that the defendant took and held the collateral as security and that he had the power to sell.

Whether looked upon as an action for damages, or in equity, or an action on the contract, the complaint did not state facts sufficient and the demurrer was properly sustained.

[5-7] The defendant earnestly contends that each and every ground stated in his special demurrer was sound. We think it is not necessary to consider each attack. However, the defendant calls to our attention the fact that notes Exhibits B and E have been executed in place and stead of notes Exhibits A and D. He then argues that there has been a novation. The plaintiff replies that the notes first mentioned are the renewal notes provided for in paragraph 5 of Exhibit C. Conceding such to be the facts, we will pass to a consideration of at least one of the attacks made by the special demurrer. The last attack was:

"It does not appear and cannot be ascertained therefrom whether it is meant to allege that the sale referred to in paragraph V thereof was made by persons to whom defendant had pledged the stock referred to in said paragraph, or whether it is meant to allege that said sale was made by persons to whom said defendant had assigned one of the notes executed to him, and if so, which one of said notes."

If we read with care all of the papers hereinabove set forth, it is apparent that Exhibit C provides that the "additional shares" will be returned "not later than the due date of the said notes executed herewith" (that is, Exhibits A and D). Nothing to the contrary

being alleged, we must assume that they were so returned. Furthermore, on the face of the papers it would appear that the "additional shares" were returned and thereafter that they were redeposited as security on the later notes, Exhibits B and E. But the return of the "additional shares" at the time Exhibits B and E were executed, would wholly discharge the defendant under his covenants contained in Exhibit C. It was therefore material to the defendant to know whether the sale referred to in paragraph 5 of the complaint occurred by reason of the pledge given to secure the earlier notes, Exhibits A and D, or Exhibits B and E. The demurrer was interposed for the purpose of bringing forth that information. It follows that the ruling on the demurrer was properly made for the additional reason just stated.

The judgment is affirmed.

We concur: KOFORD, P. J.; NOURSE, J.

88 Cal. App. 290

HERZ v. HEREFORD. (Civ. 4635.)

District Court of Appeal, Second District, Division 2, California. Jan. 10, 1928.

1. Judgment $\S$ 393—Court could not, on motion to vacate judgment, change findings of fact no matter by whom they were prepared (Code Civ. Proc. $\S\S$ 663, 663a).

Where, in action to quiet title, findings of fact, conclusions of law, and judgment for plaintiff were signed by trial judge, he exceeded his jurisdiction in motion under Code Civ. Proc. $\S\S$ 663, 663a, to set aside judgment as not supported by findings, by changing findings, no matter by whom findings were prepared.

2. Pleading $\S$ 245(6) — After findings were signed, trial court could not grant time to plaintiff to amend complaint.

In action to quiet title, where findings of fact, conclusions of law and judgment for plaintiff were signed by judge and filed, judge was not empowered, after findings were signed, to grant time to plaintiff to amend complaint, and order therefor was void.

3. Quieting title $\S$ 10(1) — Defendant was entitled to judgment, where neither complaint nor findings showed plaintiff's ownership or right to possession or use of land.

In action to quiet title, defendant was entitled to judgment, where there was no allegation in complaint, nor any finding that plaintiff owned land or had right to possession, nor was there finding of nonpayment of rental or reasonable value of use and occupation.

Appeal from Superior Court, Imperial County; M. W. Conkling, Judge.

Action by George Herz against C. D. Hereford. Defendant's motion to set aside judgment for plaintiff was denied, and he appeals. Order reversed with instructions.

H. E. Gleason, of Los Angeles, for appellant.

Jas. W. Glassford, of El Centro, for respondent.

STEPHENS, Justice pro tem. Findings of fact, conclusions of law, and judgment for plaintiff were signed by the trial judge in this case and duly filed. Thereafter defendant, appellant herein, moved the court to set aside the judgment entered and to enter in its stead judgment for defendant on the ground that the judgment was not supported by the findings. Sections 663, 663a, Code Civ. Proc. At the conclusion of the presentation of this motion, and on the 15th day of June, 1923, the court made the following order:

"The motion of the defendant to vacate the judgment herein coming on to be heard, and it appearing to the court that the findings and judgment herein were prepared and submitted by the attorney for defendant, and that the defects in the complaint therein were never called to the attention of the court by the defendant's attorney until after the entry of judgment herein, and that the complaint herein should have been amended before entry of judgment to conform to the facts proved, and that defendant's demurrer to the third cause of action of plaintiff's complaint should have been sustained, now, therefore, the plaintiff, in open court consenting, it is ordered that the findings of fact, conclusions of law and judgment herein are hereby vacated, and the demurrer to plaintiff's complaint is sustained and plaintiff is given ten days to amend the same."

That the trial court was in error when it stated in its order that the defects of the complaint had never been called to its attention is established. A demurrer to the effect that neither alleged cause of action attempted to be stated in the complaint contained allegations of fact sufficient to state a cause of action was interposed, and, by statement of counsel for each party in their briefs, was argued to the court but before another judge.

[1, 2] While the order does not specifically deny the motion presented, it is inconsistent therewith and is in effect a denial thereof. The defendant appeals from the parts of said order which refuse to enter judgment in his favor on the findings of fact and which purport to set aside the findings of fact and to allow plaintiff ten days to amend his complaint.

The court exceeded its jurisdiction in making said order. It could not set aside or change its findings, no matter by whom they were prepared, and it follows, of course, that it had no power after findings were signed to grant time to plaintiff to amend his complaint, and such order as to these two points was void. Akley v. Bassett, 189 Cal. 625, 635, 209 P. 576; Dahlberg v. Girsch, 157 Cal. 325, 107 P. 616; Hole v. Takekawa, 165 Cal.

372, 375, 132 P. 445; Stanton v. Superior Court (Cal. App.) 253 P. 973.

[3] There is no allegation in the complaint, nor is there any finding, that plaintiff owned the land or had any right to its possession, nor is there any finding as to nonpayment of the rental or reasonable value of use and occupation of the land. Richmond Wharf & Dock Co. v. Blake, 181 Cal. 454-457, 185 P. 184; Imperial Valley L. Co. v. Globe G. & M. Co., 187 Cal. 352, 354, 202 P. 129; Stringer v. Davis, 30 Cal. 318, 321.

That part of the order appealed from is reversed, and the lower court is instructed to make and enter conclusions of law that the defendant is entitled to a judgment for his costs, and to enter a judgment accordingly.

We concur: CRAIG, Acting P. J.; THOMPSON, J.

88 Cal. App. 281

CLINTON v. YATES et al. (Civ. 5913.)★

District Court of Appeal, First District, Division 2, California. Jan. 10, 1928.

Rehearing Denied Jan. 30, 1928.

1. Appeal and error ⇨1011(1)—Trial court's findings on conflicting testimony are not disturbed on appeal.

Finding of trial court, based on conflicting testimony, cannot be disturbed on appeal.

2. Evidence ⇨471(1)—Evidence of witness' conclusions is inadmissible.

Testimony involving conclusions of witness should not be admitted.

3. Continuance ⇨12—Failure to grant continuance for illness of party, impairing her ability to testify, held not error, where no motion for continuance was made.

Failure to grant continuance because of alleged illness or nervousness of party rendering her unable to testify coherently held not abuse of discretion, especially where no motion for continuance was made.

4. Appeal and error ⇨966(1)—Continuance ⇨7—Motion for continuance is addressed to sound discretion of trial court, whose decision is disturbed only for abuse of discretion.

Motion for continuance is addressed to sound discretion of trial court, and its decision can only be disturbed on appeal upon showing of abuse of discretion.

Appeal from Superior Court, Alameda County; T. W. Harris, Judge.

Action by E. J. Clinton against H. N. Yates and another. Judgment for plaintiff, and defendants appeal. Affirmed.

R. M. Estcourt, of San Francisco, for appellants.

Arthur Joel, of San Francisco, for respondent.

BURROUGHS, Presiding Justice pro tem. [1] This action is based upon a promissory note. Appellants admit the due execution and delivery of said note, but claim it was given without consideration. The undisputed evidence shows that in April, 1925, the respondent leased to the appellants for a term of two years a house; that in the house were certain household goods such as carpets, draperies, chairs, tables, etc.; that the respondent and appellants inventoried said goods and placed a separate value on each article, the total value being \$642; that the appellants purchased said personal property, giving therefor the promissory note here sued upon. It further appears without conflict that said goods were of the reasonable value of said sum. Mrs. Yates, one of the appellants, testified that there was a further agreement which was a part of the consideration of said note, said agreement being that respondent was to give appellants a lease of said premises for five years, but respondent has failed and refused to do so. This testimony was contradicted by the respondent and his witnesses, and the trial court resolved the conflict in favor of the respondent. The rule, that the finding of the trial court under such circumstances will not be disturbed, is so well settled that it seems unnecessary to cite authority; however, *Moss v. Smith*, 181 Cal. 519, 185 P. 385, and *Estate of Johnson*, 182 Cal. 642, 189 P. 280, are among the later cases so holding.

[2] Appellants also refer to certain alleged errors in sustaining objections to questions which were propounded to a witness. There is no attempt made by counsel to point out wherein the rulings were prejudicial, but we have examined each assignment and find no error. Nearly all of the questions to which the objections were sustained called for the conclusion of the witness, and the objections thereto were properly sustained. Appellants

were afforded every opportunity to present their case, and were not precluded from introducing any fact material to the issues.

[3, 4] Appellants contend that, because of the alleged illness or nervousness of Mrs. Yates, she was unable to testify coherently, and the court should have granted a continuance of the trial. The record does not disclose that a motion for a continuance was made, but, even if such a motion had been seasonably and properly made, its decision would have rested in the sound discretion of the court, and could only be disturbed by this court upon a showing of an abuse in the exercise of such discretion.

No reason has been shown why the judgment should be disturbed. The judgment is therefore affirmed.

We concur: STURTEVANT, J.;
NOURSE, J.

HIMOVITZ v. JUSTICE'S COURT OF SIXTH
TP., KERN COUNTY, et al. (L. A. 5211.)

District Court of Appeal, Second District, Division 1, California. April 2, 1926.

On petition for rehearing.

For former opinion, see 77 Cal. App. 95, 246 P. 82.

PER CURIAM. It is contended by petitioner that this court erred in holding that an appeal lies from an order of the justice's court made after judgment. We did not intend to so decide. In referring to "an appeal heard on a statement of the case," under the provisions of section 980, Code of Civil Procedure, we meant, of course an appeal from the judgment. The opinion is amended by striking from the first paragraph thereof the words "(respondent herein)."

The petition for rehearing is denied.

2. Venue ⚡70—Counter affidavit that plaintiff's witnesses would testify that plaintiff purchased and agreed to remove property sued for held not to warrant retention of case in county (Code Civ. Proc. § 397, subd. 3).

On application under Code Civ. Proc. § 397, subd. 3, for change of venue for convenience of witnesses testifying in support of defendant's title to property sued for by abandonment or failure to remove fixtures within time allowed by agreement between plaintiff's and defendant's transferors, plaintiff's counter affidavit, averring that its transferors would testify as to such agreement and sale of property to plaintiff and denying materiality and relevancy of testimony of defendant's witnesses, *held* not to warrant retention of case in county of venue for convenience of plaintiff's witnesses.

3. Venue ⚡52(1)—Denial of change of venue for convenience of witnesses residing in another county held abuse of discretion (Code Civ. Proc. § 397, subd. 3).

Where affidavits in support of, and opposition to, change of venue for convenience of witnesses, under Code Civ. Proc. § 397, subd. 3, showed that all material witnesses for defendant resided in another county, wherein transaction arose and plaintiff corporation, demanding jury trial, had its principal place of business, and counter affidavit did not aver that plaintiff's witnesses resided without such county or would be inconvenienced by trial in county wherein suit was brought, denial of motion was abuse of discretion, though depositions of defendant's witnesses could be taken.

Department 1.

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Action by the Bartholomae Oil Corporation against the Associated Oil Company. From an order denying a motion for a change of venue to another county, defendant appeals. Reversed.

Frederick W. Smith and G. Randolph Miller, both of Whittier, for appellant.

Joseph E. Bien, Werner Olds, and Frederick Olds, all of San Francisco, for respondent.

203 Cal. 176

BARTHOLOMAE OIL CORPORATION v. ASSOCIATED OIL CO. (S. F. 12054.)

Supreme Court of California. Jan. 20, 1928.

1. Venue ⚡68—Testimony that plaintiff failed to remove property sued for within time agreed held material on application to change venue for witnesses' convenience (Code Civ. Proc. § 397, subd. 3).

Testimony of witnesses, familiar with property alleged to have been converted by defendant and premises on which located, in support of allegations of answer that such property was affixed to premises, and became property of defendant's vendors on plaintiff's failure to remove it within time agreed held material on application for change of venue to county of such witnesses' residence, under Code Civ. Proc. § 397, subd. 3, as tending to negative plaintiff's claim of ownership and establish defendant's title, whether on theory of abandonment or failure to remove fixtures.

SEAWELL, J. Defendant, Associated Oil Company, a corporation having its principal place of business in the city and county of San Francisco, appeals from an order of the court below denying its motion for a change of venue to the county of Los Angeles in an action brought against it in the superior court of the city and county of San Francisco by the Bartholomae Oil Company, a corporation having its principal place of business in the city of Los Angeles. The motion was made after issue had been joined by the filing of an answer and after plaintiff had demanded a jury trial, and was based upon an affidavit whereby defendant sought to show that the convenience of material witnesses

would be served by the change. Code Civ. Proc. § 397, subd. 3.

[1] The complaint alleges the conversion by defendant of a certain oil derrick and pipe and fittings, to the damage of plaintiff in the sum of \$6,050. Defendant in its answer set up ownership in itself, and in "three separate and affirmative defenses" set forth certain facts upon which it relied to establish its title. The property alleged to have been converted was located upon property known as the "Whittier sewer farm," situate in the city of Whittier, county of Los Angeles, and, according to the allegations of the answer, was property affixed to and permanently resting upon the premises which became the property of the individuals from whom defendant purchased it upon the failure of plaintiff to remove it from said real property within the 90-day period allowed by the terms of "an agreement and partial assignment" entered into between defendant's transferors and the persons through whom plaintiff derived title, although all other property upon said premises was removed within the time allowed.

Defendant in its affidavit for a change of venue offered to prove the facts concerning the failure of plaintiff to remove the property here sued for, upon which it relies to establish its title, by witnesses therein named who reside in the county of Los Angeles, and who, it is averred, are professional and business men who would be greatly inconvenienced by coming to San Francisco for trial. According to the averments of the affidavit, the witness Goodell was assistant superintendent of the Whittier sewer farm on which the property sued for was located and observed the premises every day; the witness Thomas is superintendent of the Santa Fé Springs Division of the defendant and inspected the property on the premises in April, 1924, on which date all other property had been removed; the witness Ainsley is head rig builder for defendant and also inspected the property in April, 1924, and will testify to its value being less than the amount named in the complaint; the witness Kemmerer, a city trustee of Whittier and chairman of the sewer farm committee, visited the premises and inspected them frequently; the witness Hanawalt, as general foreman in charge of construction of a city sewer system on the property, resided on the premises and worked there daily between June 4, 1923, and April 8, 1924; the witness Smullin, in the business of drilling oil wells, the witness Crossen, a well driller and rig builder, and the witness Kohler, formerly general superintendent of the La Habra Midway Oil Company, all of whom are familiar with the property here sued for, will testify to its reasonable value.

By these witnesses defendant desires to prove the allegations of its answer. The

evidence is clearly material, since it would tend to negative plaintiff's claim of ownership and establish defendant's title, whether defendant's defense be regarded as founded upon the theory that the property was of the kind designated as fixtures, to which plaintiff lost title by a failure to remove it from the premises within the 90-day period, or as based on the proposition that, irrespective of the principles of the law relating to fixtures the property became vested in defendant's transferors by virtue of an abandonment.

[2] Respondent in its counter affidavit avers that A. C. Harvey and W. H. Braun, its transferors, are material witnesses on its behalf, and that said witnesses reside in the county of Alameda, and hence are more conveniently situated with reference to San Francisco than Los Angeles. However, the facts which plaintiff avers that it expects to prove by said witnesses would not in any wise defeat or affect a title acquired by defendant in the manner set forth in the answer. By said witnesses plaintiff avers that it expects to prove a certain agreement between Harvey and Braun, its transferors, and defendant's transferors and the sale to it of the property here sued for. Defendant itself in its answer alleges the execution and recordation of the agreement between Harvey and Braun, on the one hand, and its transferors on the other, and it could well admit the sale to plaintiff without weakening its proposed defense. The convenience of said witnesses cannot therefore serve as a reason for retaining the case in San Francisco. The counter affidavit consists largely in a denial of the materiality and relevancy of the testimony concerning the failure to remove the property herein sued for, but this testimony we deem pertinent to the most important issue in the case, to wit, plaintiff's loss of title by a failure to remove the property. Plaintiff states no theory of the facts in rebuttal of defendant's defense which would render immaterial the facts defendant expects to prove. Neither does it claim that defendant can prove the facts concerning the failure to remove the property by other witnesses than those named, who reside in the county of Los Angeles, nor offer to prove by witnesses of its own, for whom San Francisco would be a more convenient place of trial than Los Angeles, the falsity of the facts concerning which defendant avers its witnesses will testify.

[3] From the showing made by the parties in their affidavits and from the record, upon which alone the motion was made and denied, it appears that all witnesses upon behalf of defendant who will be required to testify to material facts reside in the county of Los Angeles. Plaintiff has failed to aver that witnesses who will testify to facts aiding its case reside without the county of Los Angeles

or would be inconvenienced if San Francisco, rather than Los Angeles, were the place of trial. The transaction arose entirely within the county of Los Angeles, and it is plaintiff, with its principal place of business in Los Angeles and the party demanding a jury trial, which is resisting the transfer. We are of the view that under the circumstances the denial of the motion for a change of the place of trial from the city and county of San Francisco to the county of Los Angeles constituted an abuse of discretion, and that the order should be reversed. See *Carr v. Stern*, 17 Cal. App. 397, 120 P. 35, and *Thompson v. Brandt*, 98 Cal. 155, 32 P. 890. "It is true, of course, that, should the trial be had in San Francisco, their depositions [that of nonresident witnesses] could be taken, if their personal attendance could not be secured, still it is manifestly always more satisfactory and desirable, in jury cases in particular, to present the testimony first hand to those who must determine the questions of fact than to submit the same through depositions. * * *" *Carr v. Stern*, supra.

The order appealed from is reversed.

We concur: CURTIS, J.; PRESTON, J.

203 Cal. 206

OLSON v. WHITTHORNE & SWAN.
(S. F. 12145.)

Supreme Court of California. Jan. 25, 1928.

1. Negligence ⇨121(2)—Res ipsa loquitur doctrine is inapplicable unless instrumentality was under defendant's control and nature of injury points to negligence as probable cause.

Res ipsa loquitur doctrine is not applicable unless the instrumentality causing the injury was under defendant's control and the injury was of such a nature that it probably would not have occurred but for defendant's negligence.

2. Negligence ⇨121(2)—Res ipsa loquitur doctrine is inapplicable to unexplained accident which might have been due to causes for which defendant was not responsible.

Res ipsa loquitur doctrine does not apply where an unexplained accident might have been caused by plaintiff's negligence or have been due to one of several causes, for some of which the defendant was not responsible.

3. Negligence ⇨121(3)—Res ipsa loquitur doctrine held inapplicable where store patron was struck by one swinging door while holding other open for another.

Res ipsa loquitur doctrine held inapplicable where plaintiff was struck by the rebound of one swinging door of defendant's store while she was holding the other open for a lady following immediately behind her.

4. Negligence ⇨67—Patrons of stores having swinging doors are chargeable with exercise of ordinary care.

Customers and patrons of stores having swinging doors are chargeable with the exercise of ordinary care in their use.

5. Negligence ⇨66(2)—Plaintiff struck by one swinging door of store while holding other open for another held contributorily negligent.

Where plaintiff was struck by the rebound of one swinging door of defendant's store while holding the other open for a lady who was following immediately after her, trial court held justified in concluding that, on any theory of defendant's responsibility, plaintiff was guilty of contributory negligence.

6. Negligence ⇨80—Where plaintiff struck by swinging door of store was contributorily negligent, she could not recover, regardless of defendant's negligence.

Where plaintiff struck by swinging door of defendant's store was contributorily negligent, she could not recover whether or not defendant was also negligent, and regardless of whether res ipsa loquitur doctrine was applicable.

Department 2.

Appeal from Superior Court, Alameda County; E. C. Robinson, Judge.

Action for damages for personal injuries by Mary J. Olson against Whitthorne & Swan. Judgment for defendant, and plaintiff appeals. Affirmed.

John H. Tolan and Ben F. Woolner, both of Oakland, for appellant.

Snook & Brown and Thomas J. Ledwich, all of Oakland, for respondent.

SHENK, J. This is an appeal from a judgment of nonsuit in an action for damages for personal injuries. The defendant conducts a retail dry goods store in a building bounded by Washington, Tenth, and Eleventh streets, in the city of Oakland. On the Tenth street side of the store there are two swinging doors, used for the purposes of entrance and exit by the patrons of the store. These doors are about 7 feet back from the property or building line, and leading thereto from the sidewalk is a cement passageway. On each side of this passageway are show windows. Each of the swinging doors is 2 inches thick, 3 feet wide, and 7 feet high. They are made of wood with an oak veneer, have heavy plate glass panels and weigh from 120 to 130 pounds each. They are admittedly of standard construction and are equipped with Rixon spring checking devices. Each door swings out and in for the accommodation of customers, and may be swung open to a position of 90 degrees or at right angles to the threshold line.

On Saturday, the 13th day of June, 1925, the plaintiff had made some purchases at the store and was proceeding to pass out of the

Tenth street entrance through the right-hand door. Instead of continuing to pass through and beyond this door she paused to hold the door open for a lady following immediately behind her. In doing so the plaintiff stepped into the swing area of the left-hand door, through which a third lady was hastily proceeding. The rebound of the left-hand door struck plaintiff, and she thereby received the injuries complained of.

The evidence on behalf of the plaintiff consisted of her own testimony and that of a city building inspector. The plaintiff testified that she had used these swinging doors on many occasions and was familiar with their operation. The building inspector testified as to certain experiments made by him a few days before the commencement of the trial. From these experiments he stated that the doors, when opened, had a tendency to come back on their own rebound and "break" from 4 to 6 inches from the center line. That is to say, the opened doors swung back across the center line from 4 to 6 inches and then stopped "dead still." He further testified that the rebound was the same when the doors were pushed back to the full 90 degrees. It seems to be the theory of the plaintiff that the spring was not adjusted at the proper tension on the day of the accident. It was stipulated that the doors at the time of the accident were generally in the same condition as at the time of the experiments nearly a year later, but there was no evidence as to the tension of the adjustable door springs and their rebound on the day in question. There was no proof of negligence on the part of the defendant in the installation, maintenance, operation, or supervision of the doors, nor of any defect in anything connected therewith at the time of the accident.

[1-4] The plaintiff contended in the trial court, and now contends, that the doctrine of *res ipsa loquitur* should apply to the situation presented on her behalf. We think this is a case to which the doctrine is not applicable. To render the doctrine applicable "it must be shown that the instrumentality causing the injury was under the control of the defendant, and that the injury was caused by some act incident to that control," and the injury "must be of such a nature that it ordinarily would not have occurred but for the defendant's negligence." 19 Cal. Jur. 708, 710. It does not apply "where an unexplained accident might have been caused by plaintiff's negligence, or been due to one of several causes, for some of which the defendant is not responsible." 19 Cal. Jur. 710, 711. Swinging doors in buildings and stores are installed

and maintained for the accommodation of those who have occasion to enter such buildings. The operation of such doors is not within the exclusive control of the owner of the building or proprietor of the store. Customers and patrons take a very distinct part in their operation and are chargeable with the exercise of ordinary care in their use. Injury may occur in their operation from a lack of such care on the part of the persons who use them, and for whose negligence the owner or proprietor would be in no wise responsible. In the present case the injury to the plaintiff may have been caused by the negligent operation of the left-hand door shown by the evidence to have been hurriedly used by the third lady when it rebounded and struck the plaintiff (Smith v. Johnson, 219 Mass. 142, 106 N. E. 604, L. R. A. 1915F, 572, Ann. Cas. 1916D, 1234; Pardington v. Abraham, 93 App. Div. 359, 87 N. Y. S. 670, affirmed in 183 N. Y. 553, 76 N. E. 1102), or it may have been caused by the plaintiff's own negligent use of the right-hand door.

[5, 6] The trial court on the motion for a nonsuit ruled against the contention of plaintiff that the doctrine of *res ipsa loquitur* applied, and further held not only that no negligence was proved as against the defendant, but that if such negligence might be inferred from any of the evidence the plaintiff was guilty of contributory negligence as a matter of law. We think the court was justified in concluding that on any theory of defendant's responsibility in the matter the plaintiff was so guilty of contributory negligence. She testified that she was familiar with the operation of these particular swinging doors, had used them many times prior to the accident, and knew of their rebound. Notwithstanding this familiarity and knowledge, she placed herself in a position of danger for reasons which were entirely personal to herself. Assuming, however, that the doctrine of *res ipsa loquitur* might justify an inference of negligence on the part of the defendant, and assuming further that the plaintiff had affirmatively proved negligence on the part of the defendant, still, if the plaintiff be, as here, properly found guilty of contributory negligence, such contributory negligence would defeat a recovery. The evidence fails to disclose the breach of any legal duty which the defendant owed to the plaintiff.

We therefore find no error in the order granting the motion for a nonsuit. The judgment is affirmed.

We concur: RICHARDS, J.; LANGDON, J.

203 Cal. 204

PHELAN v. HILDA GRAVEL MINING CO.★
(S. F. 12075.)

Supreme Court of California. Jan. 28, 1928.

Rehearing Denied Feb. 27, 1928.

1. Brokers $\S$ 54—To earn commission, real estate agent is required to produce purchaser able to perform.

To earn a commission on the sale of real estate, the agent is required in all cases to produce a purchaser who is able to perform; it not being sufficient that he has found a willing purchaser.

2. Brokers $\S$ 42—That corporation has authorized director to sell realty does not make director immune from act requiring broker's license (St. 1919, p. 1252).

The fact that a corporation has authorized one of its directors to sell real estate of the corporation does not make such director immune from the provisions of St. 1919, p. 1252, requiring real estate brokers to have licenses.

3. Brokers $\S$ 42—Director is not "owner" of corporation's realty within purview of brokers' licensing act so as to be exempt from necessity of procuring license to sell real estate (St. 1919, pp. 1252, 1259, $\S$ 2, 20).

The director of a corporation is not an owner of the corporation's real estate within the meaning of St. 1919, pp. 1252, 1259, $\S$ 2, 20, so as to preclude the necessity for his obtaining a broker's license in order to be permitted to sell the corporation's real estate on commission.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Owner.]

Department 1.

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by Richard Phelan against Hilda Gravel Mining Company, to recover commissions for securing a purchaser for a mine property. Judgment for defendant, and plaintiff appeals. Affirmed.

George F. Witter, of Oakland, for appellant.
Frederic Appelman, of San Francisco, for respondent.

SEAWELL, J. The defendant was, during the year 1924, a mining corporation organized under the laws of this state, with its principal place of business in the city and county of San Francisco, for the purpose of extracting gold from gold-bearing gravel. The mine is situate in the county of Sierra. Appellant, with others, had long been an owner of stock and a director of said corporation, which apparently had not proved remunerative to its stockholders. Its sale seems to have been under serious consideration by the stockholders and officers, and plaintiff, who was a strong advocate of disposing of said mine, and who also was well acquainted with the

past operation thereof, submitted to the board of directors, of which he was a member, on August 2, 1924, a proposed plan or proposition of sale. His suggestion was that the corporation "bond the property for \$94,655, being \$1 a share for all the outstanding stock"; require a cash payment for the value of all movable equipment on the property; demand a payment of \$1,000 at the end of six months from date of contract; demand the sum of \$2,500 every six months thereafter, together with 25 per cent. of the gross output of the mine until the sum of \$94,655 was paid. It was further suggested that a commission of 12½ per cent. be allowed to any one who should make a sale on the terms above outlined. In his communication he expressed the hope of making a sale on the terms above set forth, if provided with a sketch showing the latest developments and improvements and the results of the operation of the mine and if privileged to send prospective purchasers to see the gold that had been extracted from the mine.

The communication was read at a regular meeting of the board of directors at which all members were present, except Director Richard Phelan. A motion was made and unanimously carried by which the secretary was "authorized to advise Mr. Phelan in writing of the acceptance of his suggestion." Two days thereafter, to wit, August 4, 1924, the secretary of said corporation wrote to Mr. Phelan as follows:

"As secretary, I am instructed to advise that, with the exception of the 12½ per cent. commission figure, your suggestion was approved and the bonding terms as set forth are acceptable should you or anyone else be able to secure someone who would agree to those terms. As to the commission, it is decided that the amount of 10 per cent. would be paid any one consummating a sale on that basis."

Plaintiff immediately began negotiations for the sale of said mine with C. E. Shillingford, who testified that he was, or had been, a real estate agent and broker, and about a year preceding the transaction under consideration had turned his attention to the sale and development of mining properties. His testimony showed that he had not the financial ability to finance the purchase, but that he was dependent upon negotiations with others for financial aid. In a letter written to Shillingford, September 1, 1924, Mr. Phelan said:

"The price of the mine is \$95,000, payable as follows: \$1,000 after inspection, if accepted; \$1,000 six months thereafter, and \$1,000 twelve months after signing papers; then \$2,500 every six months thereafter, together with 25 per cent. of the gross output from the mine, the same to apply on the purchase price of \$95,000 until the full sum is paid."

On the following day Shillingford, according to his testimony, affixed to the Phelan letter the following reply:

"I accept the terms as above mentioned and am ready to deposit \$1,000 in any bank you desire, the money to be turned over to you when your company delivers to said bank an agreement conforming to the terms mentioned herein properly signed and executed by the president and secretary of your company."

Shillingford testified that he had had some prior conversations with Mrs. Clara F. Pixley touching the proposition of the bonding of said mine. Mrs. Pixley, upon whom Shillingford relied, was not shown to the satisfaction of the court to have been financially able to comply with the terms of the proposed contract of sale. Shillingford seemed to know but little as to her business calling, although he testified that she was his partner, or was to become a partner with him in the operation of the mine. The agreement between Shillingford and Mrs. Pixley, as told by him, was that Mrs. Pixley was to put up the first \$2,500 payment, and she was to own a one-fourth interest in the mine, and Shillingford was to retain a one-fourth interest for himself, and the one-half remaining interest was to be the fulcrum with which the money necessary to "finance the property" was to be raised. He was also to become the superintendent of the mine. He made no effort to show that he had the financial ability to meet the payments as provided by the contract, but relied upon Mrs. Pixley to whom he wrote a letter on September 2d, in which he repeated the terms set forth in the Phelan letter to Shillingford. In his letter he requested Mrs. Pixley to send him her check for \$1,000 and to place \$1,500 in a bank subject to his order. He further wrote that he would place the check with Mr. Phelan, and requested her to accompany him to the mine at her earliest convenience so the deal might be closed, as the gravel had recently showed stronger in gold than it had ever showed before. On September 4th Mrs. Pixley replied:

"Your letter of September 2d received. I was glad to hear that you had been able to get a proposition from Mr. Phelan. I am inclosing my check for a thousand dollars, and I will arrange to give you the other \$1,500 as you need it. I will try to have my affairs in shape so that we can go up and look at the property next Sunday."

Mrs. Pixley inclosed with said letter a check drawn on the Mercantile Trust Company of California, dated September 4th, and payable to the order of C. E. Shillingford in the sum of \$1,000. The directors in the meantime had decided that \$95,000, in view of recent reports to the effect that the gravel was yielding a much heavier output of gold,

was too low a price for the mine. On the 4th day of September Phelan resigned as a director. On September 5th the board met and offered to make a contract with Phelan for a commission on the basis of a \$150,000 sale of the mine. The right of a director of the corporation to collect a commission on the sale of the corporation property had for some time past been a matter of doubt in the minds of all the directors, including Phelan. His resignation removed what was believed to be a legal obstacle to his right to collect a commission. The offer to enter into a new contract with Phelan was refused, and in a spirit of disappointment and disgust he said that he wanted to get out of the corporation, and offered his stock for sale, which was immediately purchased by one of the directors. The check of Mrs. Pixley had been given to him, but neither he nor Shillingford had ever offered it to the board of directors. Some time after this transaction the instant action was commenced. Mrs. Pixley was asked if she had sufficient money on deposit to meet the \$1,000 check, and replied that she did not know, but she could have had it in 20 minutes. She finally admitted that she did not have that sum in a checking account, but said that she had it in the bank. No officer of the bank on which the check was drawn was produced to show the financial ability of Mrs. Pixley to meet the checks or to comply with the terms of the contract. The burden was upon the plaintiff to show that Shillingford was able by himself or through financial connections to perform his part of the contract. Counsel argues that all that was required of Phelan in order to earn said commission, provided he was not disqualified by virtue of his office as director or the fact that he was not a licensed real estate broker, was to obtain some one who would agree to the terms of the contract, irrespective of said person's ability to perform the same.

[1-3] Such a contention is wholly fallacious, and requires no argument to combat it. To earn a commission on the sale of real estate, the agent is required in all cases to produce a purchaser who is able to perform. The court found that the plaintiff failed to introduce said C. E. Shillingford or any other prospective purchaser to defendant corporation or to any of its officers, and, further, that the plaintiff was not, and never had been, a licensed real estate broker or salesman, as provided by the act defining real estate brokers and salesmen and providing for the licensing of the same. Stats. 1919, p. 1252. The court's conclusion from the facts found was that the plaintiff failed to secure a bona fide purchaser for the real property of defendant. We are of the opinion that Phelan was not qualified under the said act regulating real estate

agents and brokers to demand a commission as the agent of the corporation. That he may have been clothed with authority to contract for the sale of the corporation's property as its representative or attorney in fact may be conceded, but a delegation of that authority would not immune him from the provisions of an act which was designed to operate uniformly upon all persons who engage themselves to act as real estate agents or salesmen for compensation. He was not the owner of the corporation real property by virtue of his office as a director. Neither his office nor his contract converted him into an owner of the corporation's real property within the meaning and intent of the clause of section 2 of said act, which exempts the owner of real property from a compliance with the provisions of said act in cases of sales made by him. A director, who as an individual contracts for the payment of commissions on the sale of the corporation's real property, would not be relieved of any burden that the law imposes upon all persons who engage in a similar service. Appellant was at no time a licensed real estate broker. He cannot therefore maintain the action. Stats. 1919, p. 1252, § 20.

Another objection raised by respondent in resisting the payment of appellant's demands is that a director of a corporation is the representative of all the stockholders, and the interests of the stockholders forbid that he should place himself in a position where his personal interests would conflict with the duty he owes to those whom he officially represents. This case puts to a test the soundness of a policy which would permit a director of a corporation to enter into a contract whereby his personal interests, greatly outweighing his interests as a stockholder, would likely influence his action to the detriment of the other stockholders. In the instant case, the directors of the corporation came to the view that \$95,000 was far below the figure that could and should be obtained for its property. The interest of Phelan was greater as a real estate broker than it would have been as a stockholder. He was a member of the board of directors, and the wisdom of selling the corporation property at the price of \$95,000 was one that should have received the unbiased consideration of a full board of directors.

From what we have said, it is unnecessary to consider whether or not the acts and statements of Mr. Phelan at the meeting of the board of directors, held September 5th, amounted to an abandonment of the said contract.

The judgment is affirmed.

We concur: CURTIS, J.; PRESTON, J.

PEOPLE v. SHANNON. (Cr. 3026.)★

Supreme Court of California. Jan. 13, 1928.

Rehearing Denied Feb. 9, 1928.

1. Homicide ⚡253(1)—Evidence held sufficient to support conviction for first degree murder.

Evidence held sufficient to support conviction for murder in the first degree.

2. Homicide ⚡332(2)—Conviction for murder held conclusive, where supported by evidence.

Conviction for murder in the first degree held conclusive, where there was ample evidence to support it.

3. Criminal law ⚡1035(5)—Where defendant did not challenge jury panel in trial court, he could not raise objection to it on appeal (Pen. Code, § 1060).

Under Pen. Code, § 1060, where defendant in prosecution for murder did not interpose any challenge to jury panel before jury was sworn in trial court, he could not raise an objection to it on appeal.

4. Criminal law ⚡1128(4)—On appeal from murder conviction where defendant claimed error because no women were included in jury panel, unauthenticated affidavit held insufficient to properly present question.

On appeal from conviction for first degree murder where defendant claimed error because no women were included in jury panel, unauthenticated affidavit of county board of supervisors that women were not included in panel for year in which defendant was tried held insufficient to present question for review.

5. Jury ⚡79(3)—Defendant on trial for murder had no constitutional right to have women on jury.

Defendant in prosecution for murder held not to have a constitutional right to trial by jury composed of both men and women.

6. Criminal law ⚡409—Statements of defendant not amounting to confession, although damaging, held admissible, without preliminary proof showing absence of inducements or coercion.

On prosecution for murder, proof of statements of defendant made to sheriff and district attorney not amounting to a confession, although they were of an incriminatory nature, held admissible, without the necessity of preliminary proof showing the absence of promises, inducements, or coercion.

7. Homicide ⚡309(3)—On murder trial, evidence held insufficient to present manslaughter issue, and refusal of instructions submitting that issue was therefore proper.

On prosecution for murder, evidence held to show that defendant was either guilty of murder or not at all, and hence refusal to give instructions defining manslaughter and submitting form of verdict finding defendant guilty of manslaughter was proper.

8. Criminal law $\Rightarrow$ 822(4)—Instruction on murder trial admonishing jurors as to duty "in trying issues of fact" held proper, construed as a whole.

On prosecution for murder, instruction admonishing jurors as to their duty "in trying the issues of fact that [were] presented by the allegations of the information and the defendant's plea thereto" held proper, when construed as a whole.

In Bank.

Appeal from Superior Court, Amador County; C. P. Vicini, Judge.

Willard C. Shannon was convicted of murder in the first degree, and he appeals. Affirmed.

A. L. Pierovich, of Jackson, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

WASTE, C. J. The defendant was convicted of the crime of murder in the first degree, and the death penalty was imposed upon him. He has appealed from the judgment and from the order denying his motion for a new trial.

[1, 2] The evidence amply supports the judgment of conviction. The defendant, Shannon, who had already served two terms in the state prisons for forgery and for passing a fictitious check, assumed the name Walter C. Leslye and, claiming to be the manager of a mine in Alpine county, pretended to be desirous of purchasing an automobile for the purpose of carrying the mine pay roll from the bank, and to use generally. By means of these and other false pretenses, he induced Harold W. Lage, an automobile salesman connected with a Stockton house, to accompany him in a Lincoln automobile to the location of the supposed mine. On that trip, on December 31, 1926, the defendant shot and killed Lage. Assuming the name of the dead man, he registered at the hotel, used Lage's business cards and personal effects, and wrote and passed a number of checks under the name of Lage. He then traveled various roads up and down the state of California, seeking to avoid arrest, during which journey he sent telegrams, using Lage's name, to the latter's wife and to his employer. He was finally apprehended in Salt Lake City about a month after the murder.

It is the contention of the appellant that the prosecution introduced no evidence to show that he was present at the time of the killing of Lage. He has not correctly stated the record. After the defendant's arrest and before trial, and again when on the stand as a witness in his own behalf, the defendant admitted being at the place where Lage was killed. He attempted in each instance to place the actual killing of the salesman on two "pals," whose names he refused to di-

vulge, and who, he claimed, were planning with him to rob the Bank of Amador. In another statement, made to the sheriff and district attorney of the county, the defendant claimed that Lage denounced him and his friends as "a bunch of crooks," and, drawing a pistol, threatened them with arrest; that, in the struggle between Lage and himself for the possession of the pistol, it was discharged twice, shooting Lage through the head and through the neck, whereupon he and his "pals" hid the dead body. They then "beat it." He repudiated this story later when on the witness stand, with the exclamation that he lied when making the statement, and did not expect any one to believe it. The jury rejected defendant's version of the killing, and accepted the evidence supporting the prosecution's theory of the crime. Its estimate of the evidence was approved by the trial court when it denied the motion for a new trial. There being ample evidence to support it, we cannot disturb the finding of the court and jury. *People v. Erno*, 195 Cal. 272, 283, 232 P. 710.

[3-5] The appellant's first contention is one which we would pass without notice, were it not raised in a case in which the extreme penalty has been imposed. He claims that a constitutional right to "a trial by a jury of men and women" was violated through the action of the board of supervisors of Amador county in failing to include the names of any women in the list of trial jurors selected for the year 1927. He filed in this court, long after his appeal was taken, an affidavit of a member of the board of supervisors of Amador county, from which it appears that, because the courthouse of that county was improperly equipped to serve the wants of jurors of both sexes, the supervisors deemed it unwise and inexpedient at that time to impose jury duty on women. For that reason they were not included in the panel for 1927. For two reasons the point is not properly before us for consideration. It appears that the defendant did not interpose any challenge to the panel before the jury was sworn in the trial court, and it is, therefore, too late to present the objection here. *Pen. Code*, § 1060; *People v. Oliveria*, 127 Cal. 376, 380, 59 P. 772. The unauthenticated affidavit presented in this court for the first time does not serve to properly bring the matter to our attention. Assuming, however, that the point is properly before us, there is nothing in the state or Federal Constitutions, or in any statute, which guarantees one accused of a crime a trial by a jury composed of men and women, or of only men, or of only women, or of any definite proportion of either sex. His right is to a fair and impartial jury, and not to a jury composed of any particular individuals. *People v. Durrant*, 116 Cal. 179, 199, 48 P. 75. He cannot complain if he is tried by

an impartial jury, and can demand nothing more. *Brown v. New Jersey*, 175 U. S. 172, 175, 20 S. Ct. 77, 44 L. Ed. 119.

Appellant has asserted in his brief that the people of Amador county were "highly incensed over the tragedy" that had taken place in their community, and that such "adverse attitude" on the part of the public was shared by members of the jury, and deprived the defendant of a fair trial. No motion for a change of place of trial appears to have been made by the defendant, and the record of the proceedings on impanelment of the jury has not been brought here. We find nothing in the record of the trial of the case which in any way warrants the assertion of the appellant that he was not given a fair and impartial trial by the jury selected to try him.

[6] It is next contended by the appellant that the court committed prejudicial error during the trial of the case by admitting certain statements and confessions purported to have been made to the sheriff and the district attorney by the defendant, the objection being that they were not freely and voluntarily made. The trial court permitted a full and fair examination into the matter before admitting the evidence, from which it appears that sufficient preliminary proof of the voluntary nature of the statements was made. However, had there been any doubt as to that matter, the conversations were properly admitted. While there was much of an incriminatory nature in the statements the defendant made to the officers, in none of the conversations, during which it is claimed the alleged confessions were made, did the defendant admit he was guilty of the murder of the deceased. A statement or an admission which amounts to less than a confession is admissible without the necessity of showing the absence of promises, inducements, or coercion. *People v. Le Roy*, 65 Cal. 613, 4 P. 649. The defendant, it is true, admitted facts which, while they themselves did not amount to a confession, did, when connected with other facts, tend to prove his guilt. Proof of such admissions is competent without preliminary proof. *People v. Ammerman*, 118 Cal. 23, 32, 50 P. 15.

[7] It is urged that the court erred in refusing to give certain instructions requested by the defendant defining manslaughter, and in refusing to submit to the jury a form of verdict finding the defendant guilty of the crime of manslaughter. It is the contention of the appellant that the testimony of the sheriff, that in one of the conversations he had with Shannon after his arrest the defendant stated that the shooting of Lage occurred during the struggle for possession of the pistol, was sufficient, if believed, to warrant the jury in returning a verdict of manslaughter. Assuming that the jury did be-

lieve that the defendant told the truth in that conversation, he carefully avoided any statement in it from which it would appear that he had the pistol in his possession when it was discharged, or that any act of his actually caused the shooting. Furthermore, when on the stand, he repudiated the story of the alleged accidental shooting. The record discloses no possible theory upon which to rest an argument that the defendant was guilty of manslaughter. Under the evidence, he was guilty of murder, or not at all. The instruction was therefore properly refused. *People v. Lee Gam*, 69 Cal. 552, 11 P. 183; *People v. Chaves*, 122 Cal. 134, 140, 54 P. 596.

[8] Appellant complains of the giving of an instruction in which the trial court admonished the jurors as to their duty "in trying the issues of fact that [were] presented by the allegations of the information filed by the district attorney and the defendant's plea thereto." The giving of the identical instruction as a whole was approved in *People v. Wolff*, 182 Cal. 728, 739, 190 P. 22.

The judgment of conviction and the order denying the motion for a new trial are and each is affirmed.

We concur: PRESTON, J.; CURTIS, J.; SHENK, J.; RICHARDS, J.; SEAWELL, J.; LANGDON, J.

203 Cal. 153

PEOPLE v. JOHNSON. (Cr. 3055.)★

Supreme Court of California. Jan. 19, 1928.

Rehearing Denied Feb. 16, 1928.

1. Homicide §354—Court must impose death penalty where verdict of first degree murder is returned without assessment of punishment.

Where verdict of jury finding defendant guilty of first degree murder does not assess punishment at life imprisonment, court must impose the death penalty.

2. Criminal law §572—Testimony not excluding possibility that defendant committed murder held of no value as alibi evidence.

Testimony on murder trial not excluding possibility that defendant was present at time and place of murder held of no value as alibi evidence.

3. Homicide §253(2)—Circumstantial evidence held sufficient to sustain conviction for first degree murder.

Circumstantial evidence held sufficient to sustain conviction of first degree murder, even when tested by instruction charging that jury should acquit defendant if, considering facts and circumstances proved to be true, defendant could be innocent on any rational hypothesis.

4. Criminal law §823(6)—Instruction that alibi evidence should be carefully scrutinized held not prejudicial, in view of balance of charge and absence of real alibi evidence.

Instruction warning jury that alibi evidence is sometimes fabricated and that it should be

carefully scrutinized *held* not prejudicial in the absence of any real evidence of alibi, and in view of the rest of the court's charge, especially an instruction given at defendant's request charging that, where a defendant relies upon the defense of alibi, he need only prove it sufficiently to create in the minds of the jury a reasonable doubt of guilt.

5. Criminal law ⚡459—Admitting witness' testimony on murder trial as to caliber of bullet held no error, where witness showed some expert knowledge and jurors themselves could probably have determined whether bullet fitted defendant's pistol.

Admitting witness' testimony on murder trial as to caliber of bullet found near scene of crime *held* no error, where witness showed some expert knowledge as to the weight and measurement of pistol bullets, and, both the bullet and defendant's pistol being in evidence, jurors themselves could probably have determined whether bullet fitted pistol.

6. Criminal law ⚡472—Admitting embalmer's testimony on murder trial as to how long deceased had been dead when he examined body held no error.

Admitting testimony of deputy coroner, who was an embalmer of 8 years' experience, to give his opinion on murder trial as to how long deceased had been dead when he examined body *held* no error.

7. Homicide ⚡269.—On murder prosecution, question of malice, express or implied, held for jury (Pen. Code, §§ 188, 190).

Under Pen. Code, §§ 188, 190, question on murder trial, of express or implied malice *held* for jury.

8. Homicide ⚡253(1)—Where defendant did not claim that homicide was justifiable or excusable or that proof tended to show it was manslaughter only, crime held first degree murder (Pen. Code, § 1105).

Under Pen. Code, § 1105, providing that on murder trial, where the homicide was proved, the burden of proving circumstances of mitigation or justifying or excusing it devolves upon defendant, unless state's proof tends to show homicide amounted to manslaughter only or was justifiable or excusable, where defendant did not claim that homicide was justifiable or excusable or that it amounted to manslaughter only the crime was first degree murder.

9. Criminal law ⚡406(3)—Defendant's statements not amounting to confession need not be proved to have been freely and voluntarily made before they are admissible.

Defendant's statements not amounting to confession need not be proved to have been made freely and voluntarily in order to make them admissible on murder trial.

10. Criminal law ⚡1088(6)—Observations of trial court denying motion for new murder trial held not properly part of record.

The observations of the trial court made at the time he denied defendant's motion for a new trial for murder *held* not properly a part of the record on appeal.

11. Criminal law ⚡1160—Where no errors appear in record on appeal from murder conviction, appellate court must affirm, notwithstanding trial court's observations made when he denied motion for new trial.

Where no errors appear in record on appeal from murder conviction, appellate court must affirm judgment and order denying new trial, notwithstanding trial court's observations made when he denied the motion for new trial, suggesting that he experienced some personal qualms in pronouncing judgment of death.

In Bank.

Appeal from Superior Court, Merced County; El. N. Rector, Judge.

Lonnie Johnson was convicted of murder in the first degree, and he appeals. Affirmed.

C. H. McCray and H. K. Landram, both of Merced, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

SEAWELL, J. [1] Lonnie Johnson was tried and convicted of the crime of murder in the first degree, which crime was, by the information filed against him, alleged to have been committed in the county of Merced, this state, on or about March 18, 1927, by unlawfully killing with malice aforethought one May Evelyn Harris, also known as Dolly Johnson. The verdict of the jury, being one of murder in the first degree, without an assessment of the punishment at life imprisonment, carried with it the imposition of the death penalty. The court accordingly rendered judgment upon the verdict and imposed upon the defendant the extreme penalty of the law. A motion for a new trial was made in due time, based upon errors alleged to have been committed by the court at and during the trial in rulings upon the admissibility of certain evidence offered in the case and in giving and refusing to give certain requested instructions, and also upon the insufficiency of the evidence to support the verdict and judgment. The motion for a new trial being by the court denied, the defendant has appealed to this court from the order denying said motion and from the judgment of conviction.

Appellant presses with much earnestness two alleged errors made by the trial court. The first consists in the giving of an instruction as to the defense of alibi which was phrased in substantially the same language as it has been given by the trial courts of this state for many years past, but the giving of which has been advised against by the more recent decisions of this state. *People v. Arnold and Sayer*, 199 Cal. 471, 250 P. 168. The second alleged error committed by the court consisted in permitting, over the objection of the defendant's counsel, on the ground that a showing of qualification was not first made, an undertaker and embalmer of human bodies, who was also the deputy coroner of the coun-

ty of Merced, to express an opinion as to the probable number of hours life had been extinct in the body of May Evelyn Harris, or Dolly Johnson, as she was also known, at the time the body was delivered into his care.

The evidence offered to establish the criminal responsibility of the defendant is without conflict as to many of the main facts. The defendant and Dolly Johnson, as she was commonly known, were colored people and had for some time prior to the homicide been residing together as husband and wife in the colored folk district of the city of Merced. They resided in a small two-room house which had a screened porch annex. The location of the house is described as being between Fourteenth and Fifteenth streets. The screened porch abuts on an alleyway, and the front room sits back a few feet from the street. The defendant was the owner of a Ford machine and it was his habit to park it in front of his house or cabin during the night when it was not in use. On the afternoon of Friday, March 18, 1927, the defendant and his wife took Joe Wimberley and his wife, Ida May, colored acquaintances, as guests, on an automobile ride. The party arrived at the Wimberley home some time before 4 o'clock p. m. Defendant and his wife remained at the Wimberley home until 4:30 or 5 o'clock p. m., at which hour they left, ostensibly destined for their home. Their relations appeared to be friendly and cordial. This was the last time the deceased was seen alive by the Wimberleys. A short time after their departure, about 6 o'clock p. m., the defendant, Lonnie Johnson, and one Eddie Robinson, colored, visited the Wimberley home for but a few minutes and departed. They did not see Joe Wimberley, who was in a room of the house, but spoke a few unimportant words to his wife and departed. At a time fixed by the Wimberleys as about 9 o'clock p. m., the defendant went to the Wimberley home, knocked on the door, but not being admitted, inquired from without for Joe Wimberley. Joe Wimberley had retired for the evening, but his wife called to the defendant that her husband had gone out. The defendant then asked if his wife was at the Wimberley home and was informed by Mrs. Wimberley that she had not seen his wife since she left with him earlier in the evening. Upon being informed that his wife was not in the Wimberley home, the defendant replied that he thought it was a "damn lie." His voice indicated anger. The evidence shows that defendant, Johnson, and Charley Griswold, also colored, were at the home of Eddie Robinson, situate within the district in which the domiciles of all the persons heretofore mentioned are located, and that Griswold and Johnson had a slight disagreement as to some matter, whereupon Griswold left. He testified that he saw a revolver protruding from Johnson's right front trouser pocket. Johnson, until apprehended

at Tonopah some three weeks thereafter, was last seen by any of his acquaintances, so far as they have spoken, at the hour of 7:30 o'clock p. m., March 18, 1927, when he left the Robinson home.

William Dunlap, who resided within 40 feet of the cabin occupied by Johnson and his wife, was attracted by sounds which he described as a "mumbling noise" issuing from the Johnson cabin at 8 o'clock Friday night, March 18, as he was about to enter his home. Before he entered he heard a shot that sounded in the direction of the Johnson cabin. He went to the rear of his house and looked over in the direction of the Johnson home and observed a faint light in the alley in close proximity to the cabin. He made no further investigation and retired. Between the hours of 1 and 3 o'clock the following morning he was awakened by some one, as he explained it, "in the place where Johnson lived," trying to start a car. After about 20 minutes of trial the car was set in motion and it went up the alley. On the following morning Wimberley, being on his way for a newspaper, stopped at the Johnson home to greet them. He and his wife were to be the guests of Johnson and his wife at dinner on that day. The automobile was not in its accustomed place, and he was unable to arouse any one within. Neither Johnson nor his wife could be located. On that afternoon, at 1:35, the city marshal of Livingston, upon information which he received, discovered the dead body of Dolly Johnson, fully attired, bearing a fatal bullet wound, under the bridge at Livingston where said bridge spans the Merced river. The body had evidently been conveyed by automobile to the approach of said bridge and dragged therefrom to a place under said bridge, where it was left uncovered, a distance of 15 miles from the home of the Johnsons. The impression made upon the sandy soil by which the body was traced began at the edge of the highway and continued to the place where it was discovered early in the afternoon of Saturday, March 19. The officers of the law at once began a state-wide search for Johnson and for his automobile. He had not intimated to any of his acquaintances the possibility of a sudden departure. He was finally located at Tonopah. The Johnson cabin was inspected immediately after the body was identified. The sleeping room in which Dolly Johnson was doubtless killed showed evidence of a struggle between her and her assailant. It contained but a few articles of furniture. The cot was somewhat disarranged, the stove was displaced, if not overturned, and a piece or two of crockery was broken. A pool of blood of considerable extent occupied a place near the cot and others spots or patches of human blood were traceable from the main pool of blood in the bedroom through the front room, down the steps leading outdoors and upon the ground to the place where Johnson habitually

parked his car. Blood-stained shoe prints were observable upon the floor. Dirt had been thrown over the main pool of blood by the person who committed the crime.

Johnson when last seen on the afternoon and evening of March 18th wore khaki trousers with puttees or leathern leggings, tan shoes of the Nettleton brand, a shirt of a blue cast, and a cap. He also owned a vest which was found with his effects at the time of his arrest. The chemist and biologist who made an examination of the articles of wearing apparel above described testified that upon each, as well as upon his shoe laces, he discovered spots or stains made by blood that was biologically human. The vest identified as belonging to Johnson contained a number of spots which reacted positively to the biological tests. The trousers and puttees also contained a number of blood spots, as did the soles of the defendant's shoes. Blood was found to have entered the crease or crevice made by the fastening of the sole of the shoe to the upper portion and these particles of blood, which had become dry, were well preserved. The shirt worn by the defendant on the night of March 18th had been washed and while it showed some faint evidence of blood stains, the expert was not willing to testify absolutely that the discolorations upon that garment were made by human blood. All of the above-described garments were inclosed in a handbag taken from the defendant's possession. He told the officer that he left his gun at Merced, and that his wife packed the handbag, and that there were things in it he knew nothing about.

The bullet that killed Dolly Johnson entered her chest near the median line, ranged slightly downward and to the left, pierced both auricles of the heart, and made its exit at a point near the spinal column. The autopsy physician testified that death occurred practically instantaneously with the infliction of the wound. Upon an examination of the premises a bullet hole about $3\frac{1}{2}$ or 4 feet above the floor was observed in the wooden partition that separated the bedroom from the screened porch. The bullet which made said hole evidently spent its force and was found in the sink where it had apparently dropped. This unquestionably was the bullet that had also passed through the body of Dolly Johnson. In measurement it appeared to correspond in size to what is known as a 32-caliber. The defendant, Johnson, owned such a revolver before the homicide and took it with him to Reno, where he pawned it at a pawnshop. The officer recovered it, and it was received in evidence at the trial. It was 32 in caliber and resembled in general appearance the revolver which he had exhibited to Joe Wimberley, who had been his hunting companion on one or two occasions before the homicide. The bullet was evidently copper-jacketed. A fragment of the copper jacket

covering dropped from Dolly Johnson's clothing at the time they were taken from her body. Defendant was also the owner of a rifle.

[2] Defendant offered in evidence a stipulation entered into by him and the district attorney whereby it was stipulated that J. A. Dieves, conductor of passenger train No. 87 of the Southern Pacific Company, who was confined to the hospital by reason of injuries at the time of trial, if called as a witness would testify that on the morning of March 19, 1927, he was in charge of said train No. 87, which ran from Merced to Oakland; that said train was about 1 hour and 25 minutes late on said morning, it being due to leave Merced at 1:55 o'clock a. m., but it did not leave on this particular day until 3:23 o'clock a. m.; that because of delayed departure the circumstance is remembered; that a colored man got on said train at Merced and went into the smoker; that said J. A. Dieves would identify the defendant as the colored man that got on said train at 3:23 a. m., March 19th; that he wore a dark blue or black cap; that he left the train at Lathrop. The conductor's statement does not harmonize with the statements made by the defendant as to the time he left Merced, nor as to his point of destination, nor with the records as to the tickets sold at the Merced office. The brakeman, who was in the smoking car the greater portion of the way from Merced to Lathrop, testified that he had no recollection of seeing a colored man board the train at Merced, nor seeing him in the smoking car at any time on the run in question. Conceding, against the great weight of the evidence to the contrary, that the conductor was right as to the defendant having boarded his train at 3:23 a. m., the defendant would have had something like $7\frac{1}{2}$ hours in which to drive to the Livingston bridge, a distance of 15 miles from the house in which Dolly Johnson was doubtless killed, and return to Merced. This circumstance would not even tend to establish an alibi. At the preliminary hearing the defendant testified that he left Merced on train No. 87 at 2 o'clock Saturday morning. The only train he could have boarded after midnight was No. 87, which was 1 hour and 28 minutes late. The defendant seemed to have lost sight of the delayed departure of said train if he even knew the regular hour of departure. He claimed that he arrived at the Merced station but a few minutes before the time of departure. Further, he testified that he went straight through to Sacramento without changing cars. As a matter of fact, no train left Merced for Sacramento at the hour or anywhere near the hour defendant claims to have taken a train for Sacramento.

At Tonopah he replied to a statement made to him by the deputy sheriff of Merced county that he had seen him (Johnson) at Merced, that he had never been in Merced. Later he

admitted his identity. In the early portion of his conversation with the deputy sheriff he said that he left Merced at 10 o'clock or 11 o'clock Friday night, March 18, for Oakland. Upon being told that no train departed for Oakland at either of those hours, but a train was scheduled to leave regularly at 2 o'clock a. m., he adopted 2 o'clock as his hour of departure. He further stated that he went from Oakland to Reno and thence to Tonopah. The only tickets sold at the Merced station to be used on train No. 87 was one to Oakland, one to San Francisco and return, and one to Santa Barbara and return. No Sacramento ticket was sold. The jury very likely believed that the defendant did not leave Merced by train, but in the Ford that has not since been located, but if, as a matter of fact, he did leave by train he could not have left before 3:23 o'clock Saturday morning, March 19th, and that method of flight did not weaken in the slightest degree the case made against him. What the thought of the defendant was or what his mission or purpose may have been at the time he returned to the home of his friend Wimberley at the hour of 9 o'clock and made inquiries as to his whereabouts and was informed that he was not at home, and what prompted his inquiry later as to whether his wife was within, have not been explained. This was 1 hour after a near neighbor testified to hearing a strange noise at the Johnson home which was followed by the sound of a shot, as testified to by witness William Dunlap.

At Reno and Tonopah the defendant represented himself as Jackson, and in accounting for his immediate need of funds he made several statements. He told one of his newly made acquaintances that he had a car in Salt Lake City out of which he had torn the rear end and that he was short of money for the reason that he and his wife had separated and she had gone back East to purchase a rooming house. To a former acquaintance whom he chanced to meet at Reno he stated that he had had "a lot of hard luck"; that he lost his wife back East and buried her, and his car broke down on the way back, and he had put it in a shop. He said he was recently from Salt Lake.

We have substantially covered the evidence upon which the jury returned its verdict against the defendant. There is some testimony in the case tending to show an attempt made by the defendant to wrest himself from the officers' custody while being taken from the preliminary hearing to the jail. The defendant did not take the witness chair in his own behalf. Neither did he offer any evidence of a substantial character. The questions presented to us for consideration are questions of law.

[3] Applying the long approved legal test and which is crystallized into an instruction that was given in the instant case, and which

is given in practically every case in which the element of circumstantial evidence constitutes a part, if not the whole, of the case presented. can it be said, as a matter of law, that there is any reasonable hypothesis based upon the evidence upon which the defendant may be innocent of the offense charged, provided the circumstances relied upon for a conviction be true? On this subject the court instructed the jury that if there was any reasonable hypothesis upon which the defendant might be innocent, it was their duty to render a verdict of not guilty. "For," continued the instruction, "it is your duty not to look for some theory upon which you can convict the defendant, but, on the contrary, it is your duty, and the law requires you, if you can consistently do so, to reconcile any and all circumstances and the whole evidence of the case that have been shown, with the innocence of the defendant, and by doing so to acquit him." We cannot say, as a matter of law, that the jury's verdict does not respond to the requirements of the law with respect to the test that there is no rational hypothesis upon which defendant may be innocent and the facts and circumstances as proved be true.

[4] Thirty-nine instructions covering seventeen typewritten pages of the record were given at the request of the defendant, and they are certainly considerate of the defendant's rights. Said instructions constantly kept the rights of the defendant before the jury and emphasized by repetition and elaboration the rules of law that were most favorable to the defense. The instructions covered all possible phases of the homicide, and the jury was even instructed, at the request of the defendant, as to the right of a person to defend himself against persons who violently assail him, although there was no evidence adduced at the trial to show that defendant claimed or pretended to have acted in defense of his person. The instruction on the subject of alibi which was reviewed in *People v. Arnold* and *Sayer*, supra, was given in the instant case, notwithstanding the observation we made in the case last cited. We feel that it could not have been harmful for the reason that there is absolutely no evidence in the case tending to show that the defendant was not at the place of the homicide at the time the crime was committed. The undisputed evidence is that the defendant was at the Wimberley home, which is in close proximity to the Johnson home, 1 hour after the shot was heard by Dunlap. According to his own statement, he did not leave Merced earlier than 2 o'clock or 3:23 o'clock a. m., March 19th. He offered no evidence tending to establish an alibi, and there was none brought into the case to show that he was at a place other than the place where the crime was committed. The defense relied upon the theory that a case had not been proved against the defendant and not upon the defense of an alibi as it is distinctly

known to the law. An instruction, however, was given upon the request of the defendant which informed the jury that in cases where a defendant relies upon the defense of alibi he is not required to prove it beyond a reasonable doubt nor by a preponderance of evidence, "but to such a degree of certainty as will, when the whole evidence is considered, create and leave in the minds of the jury a reasonable doubt of the guilt of the accused." We feel satisfied that the defendant's case was in no way prejudiced by the instruction of which he now complains. It is substantially the same instruction that was given in the Arnold Case and a long list of cases preceding it.

[5] Error is predicated upon testimony given by Dr. F. E. Twining as to caliber of the bullet found in the sink. The objections of the defendant to this line of testimony on the ground that the witness was not qualified to testify on the subject came after a number of questions as to the caliber of said bullet had been asked and answered without objection. The witness, at best, merely gave it as his opinion that the bullet was fired from a .32-20 cartridge. The bullet, however, was submitted to the inspection of the jury and whether it fitted the pistol of the defendant, which was also in evidence, was a matter which the jurors most likely determined for themselves. Besides, the witness showed some expert knowledge as to the weight and measurement of pistol bullets.

[6] Appellant makes further complaint that the court committed prejudicial error in permitting the deputy coroner of Merced county, who was an embalmer of human bodies of some eight years' experience, to give an opinion as to the length of time the body of Dolly Johnson had been lifeless at the time he examined it on the afternoon of the day following her disappearance. The witness testified that he had had war experience with dead bodies, and that he had embalmed at least 1,000 bodies. He testified that when he examined the body it was in a state of rigidity. His description of its condition indicates that it was in a marked stage of dissolution. In his opinion life became extinct 12 or 15 hours before he examined it. No error was committed by the ruling.

[7, 8] As to the argument that no malice on the part of the defendant, which is a necessary element or ingredient of murder of the first degree, was shown by the case presented and, therefore, the penalty fixed by the jury cannot stand, it is sufficient to say that the duty of affixing the penalty in murder cases of the first degree is, by section 190, Penal Code, committed to the sound discretion of

the jury trying the case. Malice, as defined by section 188, Penal Code, may be express or implied. It is implied when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart. Again these are questions which it is the province of the jury to determine. The ruthless disposition of the body of the deceased, following the killing, certainly is some evidence as to an abandoned or malignant heart upon the part of the slayer. However this may be, section 1105, Penal Code, provides that:

"The commission of the homicide by the defendant being proved, the burden of proving circumstances of mitigation, or that justify or excuse it, devolves upon him, unless the proof on the part of the prosecution tends to show that the crime committed only amounts to manslaughter, or that the defendant was justifiable or excusable."

The defendant offered no proof to meet the burden which the law casts upon him, and, as there was no claim of justification or excuse offered for the killing of decedent or pretense that the proof tended to show that the crime committed only amounted to manslaughter, the crime was murder of the first degree.

[9] Appellant has raised the point that certain statements purporting to have been made by the defendant as to his conduct and movements since the homicide were not freely and voluntarily obtained. The evidence is to the contrary. It is only where a confession is offered in evidence that it devolves upon the prosecution to first show that the confession was freely and voluntarily made. This rule does not apply to statements, however harmful they may prove to be. *People v. Ammerman*, 118 Cal. 23, 50 P. 15; *People v. Shannon*, Crim. 3026 (Cal. Sup.) 263 P. 522.

[10, 11] The observations of the trial court made at the time he denied defendant's motion for a new trial and pronounced judgment are set out in the clerk's transcript in full. Appellant commends them to our attention. They are not properly a part of the record. While the trial court may have experienced some personal qualms in performing the unpleasant duty of denying the motion and pronouncing a judgment of death, we cannot here do what the trial court judicially refused to do. He judicially approved the verdict of the jury by denying defendant's motion for a new trial and pronounced the judgment which is before us for review. We find no reversible error in the record.

The order and judgment are affirmed.

We concur: WASTE, C. J.; RICHARDS, J.; SHENK, J.; CURTIS, J.; PRESTON, J.

203 Cal. 231

BUTLER v. SOLANO LAND CO.
(S. F. 11932.)

Supreme Court of California. Jan. 26, 1928.

Brokers ⇨65(4)—Vendor's broker might not recover commission, where brokerage contract specified minimum, not absolute price, and broker received secret commission from purchaser.

Vendor's broker *held* not entitled to recover commission, where brokerage contract specified price as "not less than \$30 per acre," and broker actively negotiated sale at \$30 per acre and received secret commission from purchaser.

Department 2.

Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action to recover broker's commission on sale of real property by Harold W. Butler against the Solano Land Company. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

Glensor, Clewe & Van Dine, of San Francisco, for appellant.

C. W. Durbrow, Frank B. Austin, and Albert Michelson, all of San Francisco, for respondent.

RICHARDS, J. This appeal is from a judgment in the defendant's favor in an action brought by the plaintiff for the recovery of a commission claimed by plaintiff to be due him upon a contract of employment between himself and the defendant, by which he was employed in the capacity of a broker to procure a purchaser for certain real estate owned by the defendant, and for which he was to be paid a commission of 5 per cent. upon the purchase price. Plaintiff alleged that he procured such purchaser and had thereby earned the stipulated commission. The main defense which the defendant urged in its answer and upon the trial of the action was that the plaintiff, while assuming to act as the defendant's agent in the premises, had also, and without defendant's knowledge, agreed with the purchaser to receive, and that he did receive from him, a commission upon the sale of the premises in question. The trial court found in favor of the defendant upon its said plea and contention, and upon such finding rendered its judgment in the defendant's favor. The assault which the plaintiff and appellant makes upon said finding and upon the judgment based thereon is predicated upon the proposition that under the terms of the agreement between himself and the defendant he was invested with no discretion as to the amount of the purchase price which the purchaser found by him was to pay for said property, and that, this being so, he was exempted from the rule which he

otherwise concedes to be correct and which would have forbidden him, without the knowledge of his employer, from receiving a commission from the other party to the transaction. The difficulty with the appellant's contention in this regard is that it sufficiently appears from the evidence in the case and from the findings of the trial court that the plaintiff's agreement contained the provision that he was to procure a purchaser for the defendant's property at a price "not less than \$30.00 per acre," and that in procuring such purchaser the plaintiff actively engaged in the negotiation between the owner and such purchaser with a view to the transfer of the property to the latter at said minimum price, without revealing to his said employer the fact of his secret agreement with the purchaser for a double commission, and that as a result thereof the land was sold for such price. Such being the state of the evidence and the findings, it follows that the judgment of the trial court was, as a matter of law, correct in denying the plaintiff a right to recovery herein.

The judgment is affirmed.

We concur: SHENK, J.; LANGDON, J.

203 Cal. 190

CUNEO v. LAWSON et al. ★

SCATENA v. BANK OF ITALY et al.

(S. F. 11694.)

Supreme Court of California. Jan. 24, 1928.

Rehearing Denied Feb. 23, 1928.

1. Bills and notes ⇨496(1)—Assignee of note cannot maintain action thereon without proof of assignment.

In action on promissory note brought by assignee, plaintiff must prove assignment to him of right to sue thereon.

2. Pleading ⇨350(3)—Allegations of answer are deemed true on plaintiff's motion for judgment on pleadings.

On motion by plaintiff for judgment on pleadings, every allegation affirmatively set up in answer must be deemed true.

3. Pleading ⇨345(2)—In assignee's action on note, answer denying that plaintiff had any interest in note held sufficient as against general demurrer and to preclude judgment on pleadings.

In action on note brought by assignee, answer denying that plaintiff had any interest in note and denying that plaintiff had capacity to sue on such note *held* to set up good defense so as to be sufficient as against general demurrer and preclude judgment on pleadings.

4. Pleading ⇨122—In assignee's action on note, denial of plaintiff's interest in note may be made on information and belief.

In action on note brought by assignee, denial in answer of plaintiff's interest in note sued on may be made on information and belief.

5. Set-off and counterclaim $\S$ 44(1)—In assignee's action on several obligation of note, defendant cannot set up counterclaim in which others were interested, based on assignor's handling of money deposited to discharge note.

In action on several obligation of note, defendant may not set up as counterclaim demand or debt in which others than defendant are beneficially interested, such as claim that plaintiff's assignor to whom note was made had, contrary to instructions, permitted withdrawal of sum deposited with it which was to have been used only in discharge of note sued on.

6. Set-off and counterclaim $\S$ 24—Test whether set-off is proper is whether defendant could maintain independent action on demand (Code Civ. Proc. $\S$ 438).

Test as to whether set-off is proper is whether defendant could have maintained independent action on demand attempted to be set off, since if he could not maintain such action it cannot be said to constitute counterclaim existing in favor of defendant and against plaintiff between whom several judgment might be had in action, as required by Code Civ. Proc. $\S$ 438.

7. Pleading $\S$ 147—In assignee's action on note, defendant's allegations as to assignor's handling of money deposited to discharge note held not proper "cross-complaint," within statute (Code Civ. Proc. $\S$ 442).

In action by assignee on several obligation of note, defendant's allegations as to assignor's handling of money deposited to discharge such note held not to constitute proper cross-complaint, within Code Civ. Proc. $\S$ 442, since action does not grow out of nor is it connected with action declared on in complaint.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Cross-Complaint.]

8. Set-off and counterclaim $\S$ 34(1)—In assignee's action on note, defendant's allegations as to assignor's handling of money deposited to discharge note held insufficient as counterclaim, not growing out of transaction alleged in complaint (Code Civ. Proc. $\S$ 438, subds. 1, 2).

In action by assignee on several obligation of note, defendant's allegations as to assignor's handling of money deposited to discharge such note held insufficient as counterclaim, under Code Civ. Proc. $\S$ 438, subds. 1, 2, prior to amendment of 1927 (St. 1927, p. 1620), since it does not grow out of transaction set forth in complaint, nor is it action on contract or for breach of contract.

9. Set-off and counterclaim $\S$ 59—Assignee of note cannot be subjected to personal judgment under counterclaim against assignor.

Assignee of promissory note cannot be subjected to personal judgment by way of counterclaim against assignor of note.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Edmund P. Morgan, Judge.

Action by Clarence P. Cuneo against W. H. Lawson and others, in which defendant S. Scatena filed a cross-complaint against the Bank of Italy and others. From a judgment for plaintiff and for cross-defendant Bank of Italy, defendant and cross-complainant appeal. Reversed.

John L. McNab, of San Francisco, for appellant.

Louis Ferrari, and J. J. Posner, both of San Francisco, for cross-defendant and respondent Bank of Italy.

Haven, Athearn, Chandler & Farmer and Edwin V. McKenzie, all of San Francisco, for other cross-defendants and respondents.

PER CURIAM. In this cause judgment was had on the pleadings in favor of plaintiff and against defendant S. Scatena, which defendant has appealed. The complaint declares for the balance due from defendants upon a promissory note dated May 26, 1921, and due August 6, 1921, for the principal sum of \$30,000, with interest at 7 per cent., payable to the Bank of Italy, together with appropriate allegations of assignment for a valuable consideration by the Bank of Italy of said note to the plaintiff.

The defendants Lawson and Perelli-Minetti demurred to said complaint, but the record shows no action upon the demurrer and no mention is made of these defendants in the further proceedings in the cause. The defendant S. Scatena answered said complaint, denying or attempting, at least, to deny only the assignment by the Bank of Italy to the plaintiff of said promissory note; also set up an alleged counterclaim and alleged cross-complaint, which said cross-complaint undertook to make the Bank of Italy a party cross-defendant in the action. Thereupon plaintiff filed a general demurrer to the cross-complaint and a general demurrer to the counterclaim set up in the answer, and the Bank of Italy filed a general demurrer to the cross-complaint, but plaintiff filed no demurrer of any kind to the answer proper. Later and on June 5, 1925, the court made a minute order sustaining the demurrers without leave to amend, and as a part of the same minute order directed that plaintiff's motion theretofore filed for judgment on the pleadings be granted. This action by the court was followed on the same day by a judgment which decreed that the "demurrers and each of them to said amended answer, counterclaim and cross-complaint be and the same are hereby sustained without leave to amend," and then provided for judgment in favor of the plaintiff and against said defendant Scatena on said promissory note for the sum of \$6,223.59, plus \$496.15 interest, and judgment in favor of the Bank of Italy as cross-defendant and

against said defendant for costs in the sum of \$2.

[1-3] On this appeal defendant and appellant Scatena asserts that the judgment on the pleadings against him was improper and for that reason it must be reversed. We agree with said appellant in this contention. In fact, the sole answer to it made by respondents is that the denials in the answer of the assignment of the cause of action to the plaintiff are in themselves insufficient. The answer in this connection contains three paragraphs, as follows:

"Avers that he has no information or belief sufficient to enable him to answer the allegations contained in paragraph V of plaintiff's complaint, and basing his denial on said ground he denies that prior to the commencement of this action, or at any time, the said Bank of Italy, for a valuable or any consideration whatever, duly or otherwise, either assigned, transferred or delivered the said note to the plaintiff.

"Denies that the plaintiff is now the owner or holder of said promissory note, and on said ground denies that said note has ever been endorsed or assigned to the plaintiff.

"Denies that said plaintiff has any interest whatsoever in said promissory note or in the cause of action set forth in plaintiff's complaint, and defendant alleges that plaintiff has not the capacity to sue in said action and is not the proper party plaintiff therein."

It requires no citation of authority to declare that the above-mentioned denials put in issue the assignment to the plaintiff of the promissory note and cause of action sued upon. The pleader denies the right of plaintiff from any standpoint to bring this suit. Any mere ambiguity in the pleadings is without significance in the situation before us. Plaintiff cannot maintain the suit without proof of the assignment to him of the right to sue upon the note. It is elementary that on a motion for judgment on the pleadings every allegation affirmatively set up in the answer must be deemed true. *Hill v. Moore*, 47 Cal. App. 353, 190 P. 651; *McGowan v. Ford*, 107 Cal. 177, 40 P. 231; *Bradford Investment Co. v. Joost*, 117 Cal. 211, 48 P. 1083.

As the answer sets up a good defense and denies material allegations of the complaint, it was sufficient as against a general demurrer, and the plaintiff was not entitled to judgment on the pleadings. *Neale v. Morrow*, 174 Cal. 49, 54, 161 P. 1165.

In the case of *Casci v. Ozalli*, 158 Cal. 282, 283, 284, 110 P. 932, 933, it is said:

"The allegation that the plaintiff was the owner and in possession of the interest in the mining claim described was an allegation of facts material to the cause of action of the plaintiff. *Payne v. Treadwell*, 16 Cal. 243; *McCarthy v. Yale*, 39 Cal. 586; *Johnson v. Vance*, 86 Cal. 130, 24 P. 863. It was necessary for the plaintiff to establish ownership or possession, either by proof or admission, in order to entitle him to recover. The denial in the answer that he was either the owner or

in possession of this, or of any, interest in the mining claim, put these facts directly in issue and made it necessary for the plaintiff to introduce evidence thereof before he could become entitled to judgment. In this condition of the pleadings it was error to grant a motion for judgment on the pleadings. *Nudd v. Thompson*, 34 Cal. 47; *Prost v. More*, 40 Cal. 347; *Amador Co. v. Butterfield*, 51 Cal. 526; *Hicks v. Lovell*, 64 Cal. 17, 27 P. 942, 49 Am. Rep. 679; *Botto v. Vandament*, 67 Cal. 333, 7 P. 753; *Martin v. Porter*, 84 Cal. 479, 24 P. 109; *Derby v. Jackman*, 89 Cal. 3, 26 P. 610; *Norris v. Lilly*, 147 Cal. 757, 82 P. 425, 109 Am. St. Rep. 188. Because of this error it is necessary that the part of the judgment involved in the appeal be reversed."

[4] In the case of *Cass v. Rochester*, 174 Cal. 358, 362, 163 P. 212, 213, a situation similar to the one before us was under consideration, and there this court said:

"There is still a further ground of objection to the granting of judgment on the pleadings. Defendant denied the transfer and assignment of the automobile by the Motor Company to the plaintiff. An assignment by the Motor Company of its interest in the automobile was not a matter that was presumably within the knowledge of the defendant. A denial for want of information or belief was, therefore, sufficient to raise an issue. *Jensen v. Dorr*, 159 Cal. 742, 747, 116 P. 553. The fact that in the counterclaim the defendant may have made admissions inconsistent with this denial does not impair its effect. A defendant has the right to plead inconsistent defenses, and if one of them denies material allegations of the complaint, judgment cannot be rendered on the pleadings, even though the matter thus denied may be admitted in another defense. *Nudd v. Thompson*, 34 Cal. 39; *Botto v. Vandament*, 67 Cal. 332, 7 P. 753."

It will be noted that in the case quoted next above is found express authority for the proposition that denials of this character may be made upon information and belief. See, also, *Norris v. Lilly*, 147 Cal. 754, 757, 82 P. 425, 109 Am. St. Rep. 188.

For the benefit of the court below, to whom this action must go for further proceedings, it is necessary to allude to the contention of respondents that neither the counterclaim urged nor the cross-complaint filed states a cause of action either as a counterclaim or as a cross-complaint. Giving the combined counterclaim and cross-complaint the construction most favorable to defendant, it is in substance that the Bank of Italy, to whom the promissory note declared upon was owing, was served with a notice by said defendant that certain money, the owner of which is not stated, would be placed on deposit to the joint account of the three defendants herein named, and when so deposited it should be used only in the payment of the balance due upon and in the discharge of said promissory note, and that said Bank of Italy, in disregard of this notice, permitted the other two defendants jointly interested in

said deposit to abstract a portion thereof, to wit, \$10,000, and that had it been applied as directed the promissory note in suit would have been paid and discharged; that the plaintiff in this action is the agent of the Bank of Italy, which bank has in reality never parted with title, legal or equitable, to said note; that by reason of the permitting of the withdrawal of said sum of \$10,000 appellant has had to carry on with the other two defendants expensive litigation (without mentioning the amount of such expense) in an attempt to obtain an accounting between himself and his said codefendants respecting said \$10,000. This litigation is apparently still pending and undetermined, and we are not even given a prognosis of the result thereof. The counterclaim concludes with a prayer for \$10,000 as against the plaintiff, and the cross-complainant prays that the Bank of Italy be brought in as a party cross-defendant to the litigation, and that it be decreed that the bank was the real plaintiff in the action, and that the regular plaintiff had no interest therein, and that defendant and cross-complainant have judgment against the Bank of Italy for the sum of \$10,000 and for general relief.

[5-9] In our opinion, the demurrers to the counterclaim and cross-complaint were properly sustained without leave to amend. The attempted set-off was not available in this action to the defendant for the following reasons: (1) In an action upon a several obligation, the defendant may not set up as a counterclaim a demand or debt in which others than the defendant are beneficially interested. *Wood v. Brush*, 72 Cal. 224, 226, 13 P. 627; *Corwin v. Ward*, 35 Cal. 195, 198, 95 Am. Dec. 93; *Howard v. Shores*, 20 Cal. 278, 282; *Flynn v. Seale*, 2 Cal. App. 665, 670, 84 P. 263; 23 Cal. Jur. 260, § 34. The test is whether the defendant could have maintained an independent action on the demand attempted to be set off. *Roberts v. Donovan*, 70 Cal. 108, 112, 9 P. 180, 11 P. 599. If not, then it cannot be said to constitute a counterclaim "existing in favor of a defendant and against a plaintiff between whom a several judgment might be had in the action," as required by the provisions of section 438 of the Code of Civil Procedure. (2) As a cross-complaint the action does not grow out of nor is it in any wise connected with the action declared upon in the complaint and fails to meet the requirements of section 442 of the Code of Civil Procedure. As a counterclaim it does not grow out of the transaction set forth in the complaint as the foundation of plaintiff's claim, nor is it an action upon a contract or for the breach of a contract, and hence it is insufficient under either subdivision 1 or 2 of section 438 of the Code of Civil Procedure as that section stood prior to the amendment of 1927 (St. 1927, p. 1620).

Also it is self-evident that the assignee of a promissory note cannot be subjected to a personal judgment by way of a counterclaim against the assignor of the note.

The judgment is reversed.

PRESTON and LANGDON, JJ., being disqualified, do not participate in the foregoing opinion.

203 Cal. 252

FOURATT v. GOODMAN. (S. F. 12041.)

Supreme Court of California. Jan. 27, 1928.

Compromise and settlement § 17(1)—**Compromise as to compensation due under contract held bar to reopening controversy, where entered with full knowledge and not rescinded or impeached.**

Compromise of dispute between owner of sales business and manager as to compensation due manager under contract entitling him to certain commissions held bar to reopening controversy in action upon note given under compromise, where compromise was entered with full knowledge of points in dispute and was not rescinded or impeached by evidence.

Department 2.

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action on a promissory note by Alvin R. Fouratt against A. I. Goodman, individually, etc., with cross-action by defendant. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Philip S. Ehrlich, of San Francisco (Albert A. Axelrod, of San Francisco, of counsel), for appellant.

Wallace & Ames, of San Francisco, for respondent.

SHENK, J. This is an appeal from a judgment in favor of the plaintiff in an action on a promissory note for \$300. In his answer the defendant alleged certain false and fraudulent representations on the part of the plaintiff in procuring the contract which was the basis of and consideration for the note. By way of cross-complaint the defendant set forth more particularly the fraud alleged in the answer and prayed that said promissory note be canceled and that the defendant receive from the plaintiff the sum of \$7,200 on said cross-complaint.

The defendant was transacting business under the fictitious name of Goodman's International Importing & Exporting Company. On April 15, 1921, the plaintiff and the defendant entered into a contract whereby the plaintiff engaged to assume a qualified management of the defendant's business and was to receive as compensation therefor a graduated percentage of the gross sales of the

company. He served in that capacity until May, 1925. Shortly prior to February 16, 1925, a dispute arose between the parties with reference to the amount of money due the plaintiff under the contract of April 15, 1921, and the sales that had been made by the company. In an endeavor to compromise the controversy a conference was had between the plaintiff and the defendant in the office and under the direction of the defendant's attorney. A settlement was then and there agreed upon, under which the defendant acknowledged his indebtedness to the plaintiff in the sum of \$748.56, and the plaintiff agreed to accept as full settlement the sum of \$148.56 in cash and two promissory notes for \$300 each, one of which is the note sued on herein. Under date of February 16, 1925, a written contract was signed by the parties confirming the settlement shortly theretofore agreed upon, the same to constitute a full acquittance, the one against the other. In May, 1925, the plaintiff was injured in an automobile accident and the defendant had occasion to assume management of the affairs of the company. Upon an examination of the books of the concern he concluded that the plaintiff had been computing his commissions on an erroneous basis and had been retaining excessive amounts therefor. The plaintiff apparently did not return to the service of the defendant after his injury, and this action was commenced in August, 1925.

The trial court found the allegations of the complaint to be true, and further found on the issues raised by the answer and cross-complaint that the plaintiff had not practiced any fraud upon or misled the defendant in the procurement of the settlement agreement of February 16, 1925. It is the contention of the defendant that the findings are not supported by the evidence. It is insisted that the note here in suit was given by the defendant under the mistaken belief that he was still indebted to the plaintiff for compensation, and that he would not have executed the same if he had known the facts. This phase of the controversy hinges largely on the correct method of the computation of commissions on sales under the original contract. If the computation were made according to plaintiff's contention, he would have been entitled to \$3,700 more than he received. If computations were made as contended for by the defendant, the plaintiff was overpaid. It was in evidence that, at the time the compromise negotiations were pending, the attorney for the defendant conceded that the original contract was ambiguous and could be construed in accordance with the contentions of either party. Whatever may have been the correct construction of the original contract, the parties entered into negotiations for a settlement with full knowledge of the points in dispute. The compro-

mise agreement was not rescinded or impeached by the evidence and as such operated as a bar to the reopening of the controversy under the original contract. 5 Cal. Jur. 401. The judgment is affirmed.

We concur: RICHARDS, J.; LANGDON, J.

203 Cal. 246

FIGLIETTI v. FRICK et al. (S. F. 11945.)

Supreme Court of California. Jan. 27, 1928.

1. Action $\Leftrightarrow$ 48(1)—Action for negligent operation on minor, resulting in death, held properly united with one for operation without parents' consent (Code Civ. Proc. § 427).

Cause of action for alleged wrongful and negligent operation upon plaintiff's minor son, resulting in his death, and one based on same operation, alleged to have been without knowledge or consent of parents or guardian of such minor, were susceptible of being properly united in one complaint, under Code Civ. Proc. § 427.

2. Action $\Leftrightarrow$ 48(1)—Two inconsistent causes of action arising out of same transaction may be tried together, where proof and remedies are substantially the same.

A plaintiff may plead and proceed to trial on two inconsistent causes of action when each arises out of same transaction, and proof and remedies available in each are substantially the same.

3. Election of remedies $\Leftrightarrow$ 3(1)—Cause of action for unskillful operation on minor held not so inconsistent with one based on operation without consent so as to require election.

Cause of action for alleged negligent operation on plaintiff's minor son resulting in his death held not so far inconsistent with one based on same operation alleging that it was without knowledge or consent of minor's parents or guardian so as to justify compelling plaintiff to elect, since plaintiff in both cases must show that death was proximately caused by unskillfulness in performing operation, and defense in each cause of action would be substantially the same.

Department 2.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by Maria Figlietti against E. B. Frick and others. Judgment for defendants, and plaintiff appeals. Reversed.

Ernest M. Torchia, of Los Angeles, for appellant.

Arthur H. Barendt, of San Francisco, for respondents Frick, Yocom, and Larson.

Hartley F. Peart and Charles V. Barfield, both of San Francisco, for respondent Fowler.

Louis Ferrari and Joseph J. Posner, both of San Francisco, for respondent Jeffry.

RICHARDS, J. This appeal is prosecuted by the plaintiff from a judgment of the superior court in and for the city and county of San Francisco in the defendants' favor after the court had granted a motion for nonsuit at the conclusion of the plaintiff's case. The action was one instituted by the plaintiff for the recovery of damages for the death of her minor son, which occurred on or about May 4, 1922, while the latter was an inmate of the city and county hospital of San Francisco, and which death was alleged to have occurred after the performance of an operation upon said inmate by or under the direction of the defendants herein, who were the physicians, surgeons, assistants, and employees in charge of said hospital at said time. The plaintiff's fourth amended complaint was in two counts, in the first of which she alleged that the operation upon her deceased son, a minor, was performed by and under the direction of said defendants, and that the same was performed wrongfully, unlawfully, carelessly, unskillfully, and negligently, and that the same resulted in the death of her said minor son as the direct result of said operation. In the second count of her said complaint the plaintiff, after repeating by adoption the first eight paragraphs of the first count of her said complaint, but omitting those later paragraphs wherein the negligent performance of said operation was averred, proceeded to aver that the operation thus alleged to have been performed upon the person of her said minor son was performed "wrongfully and unlawfully and without the knowledge or consent of the parents or guardian of said minor," and that by reason of said operation the said minor, on or about May 4, 1922, died. The defendants answered severally with denials of the gravamen of both counts of said complaint, and the cause proceeded to trial before a jury.

At the beginning of the trial counsel for the defendants joined in a motion to compel the plaintiff to an election upon which count of her said complaint she would proceed to trial. The trial court, over the objection of the plaintiff, granted said motion, and thereupon the plaintiff, still insisting upon her objection, elected to proceed to trial upon the second count of her said complaint, viz., that averring that the death of her said minor son occurred through the performance upon him by said defendants of said operation without the parents' or guardian's consent. During the progress of the trial the court from time to time sustained objections urged by defendants' counsel to the introduction of any evidence tending to show negligence on the part of the defendants, or any of them, in the performance of said operation, thereby confining the plaintiff's evidence strictly to the issue of consent. At the conclusion of the plaintiff's case several motions for nonsuit were made on behalf of one or more of said defendants severally, all of which were granted by the

trial court, the result being that each and all of said defendants were absolved from liability and the general judgment in their favor followed as of course.

[1, 2] The plaintiff makes two points upon this appeal: First, that the trial court was in error in making its order at the beginning of the trial compelling the plaintiff to an election as to which of the two counts in her said complaint she would proceed to trial; second, that the trial court was in error in granting the defendants' motion for nonsuit. As to the first of these alleged grounds of error an examination of the plaintiff's said complaints discloses that the two counts or causes of action set forth therein arose out of the same transaction, viz., out of an operation performed upon the minor son of the plaintiff while he was an inmate of the hospital of which the defendants in various capacities were in charge. Both causes of action were grounded in alleged injuries to the person of the plaintiff's minor son, followed by his death. Both of these causes of action were actions *ex delicto*, the one being an injury alleged to have been committed upon the person of the decedent and which was in the nature of an assault or trespass upon his person because committed without the consent of his parents or guardian; the other being for the negligent performance upon the decedent's person of an operation which resulted in his death. *Harding v. Liberty Hospital Co.*, 177 Cal. 520, 171 P. 98, and cases cited. These two causes of action were thus susceptible of being properly united in the said complaint, under the provisions of section 427 of the Code of Civil Procedure. Whether, being thus properly united in the plaintiff's said complaint up to the time of the commencement of the trial of said action, they were so inconsistent as to the proofs to be offered in support of each, or as to the remedy to be accorded for the breach of one or both of them, is the real issue before us upon this, the plaintiff's first alleged ground of error. We are unable to discover any such inconsistency in these two causes of action as would serve to justify the action of the trial court in compelling the plaintiff's election as to which of them she would rest her right of recovery upon. It may be concluded that, as pointed out by Mr. Justice Lennon in the case of *Tognazzini v. Freeman*, 18 Cal. App. 468, 123 P. 540, there exists an inconsistency between a cause of action for willful injuries and a cause of action for injuries arising from negligence. But it is not such an inconsistency as would either have prevented the uniting of the two causes of action in the same complaint originally or the reliance upon both by the plaintiff at the trial. The error of the trial court in the above-cited case did not consist in permitting the plaintiff to go to trial upon two inconsistent causes

of action, but in so instructing the jury as to permit the plaintiff to recover upon a cause of action not averred in the complaint.

[3] The law is well settled in this state that a plaintiff may plead and proceed to trial upon inconsistent causes of action (Stockton, etc., v. Glens, etc., I. Co., 121 Cal. 167, 171, 53 P. 565; Froeming v. Stockton, etc., Co., 171 Cal. 401, 404, 153 P. 712, Ann. Cas. 1918B, 408), when each arises out of the same transaction and when the proofs as to which and the remedies available in each are substantially the same. The other cases upon which the respondents herein rely afford little comfort to their contention. In the case of Wood v. Wyeth, 106 App. Div. 21, 94 N. Y. S. 360, it was held that "the cause of action set out therein [the complaint] was clearly a cause of action for negligence, and nothing else," and hence that the order of the trial court in confining the plaintiff's proofs to that single cause of action was without substantial error. In the case of Staloch v. Holm, 100 Minn. 276, 111 N. W. 264, 9 L. R. A. (N. S.) 712, the court held that the action was one for negligence, in which the question as to whether the operation was with or without consent did not arise. The case of Van Meter v. Crews, 149 Ky. 335, 148 S. W. 40, to which we are cited by appellant, presents to our minds the better reasoning as to why the two causes of action, which were the same in that case as in this, were not so far inconsistent as to prevent their trial together. The similarity between that case and the instant case is striking. The patient in each case was under the care of the physicians who performed the operation out of which the plaintiff's cause or causes of action arose. If the operation was performed upon either patient while that relation existed, it was equally a breach of duty if performed without the consent on the part of the patient, or, in the case of a minor, of those capable of giving consent, or if, with consent, it was done unskillfully. In such circumstances, as the Supreme Court of Kentucky well said:

"If the plaintiff is to recover at all she must recover all her damages in one action, for manifestly, she cannot bring one action alleging that the operation was performed without her consent and another alleging that it was performed unskillfully. If she cannot present her whole case in one action therefore she will be denied remedy. Her whole case arises from the defendant's breach of duty as a physician and she may in one action set up as many breaches of duty as exist. The court, therefore, properly refused to require the plaintiff to elect between the two grounds of recovery sued on."

The error of the trial court in compelling the plaintiff to an election as to which cause

of action she would rely upon would seem to be manifest when considered from another point of view. The gravamen of the plaintiff's complaint under either cause of action is the injury she has sustained. The injury upon which the amount of her recovery must be predicated under either of these counts consists in the death of her minor son, and in order to recover damages for that injury she must have been able to show that the operation upon the patient, whether performed with or without consent, was the proximate cause of his death. In the absence of such showing, only nominal damages would have been recoverable, even though her consent to the operation had not previously been obtained. In either event, therefore, it was incumbent upon the plaintiff, in order to the recovery of substantial damages, to show unskillfulness in the performance of the operation upon her son; and if such unskillfulness were proved, and if the death of her son had been shown to be the proximate consequence thereof, the amount of her recoverable damages would be the same under either cause of action. It may be further said that under either cause of action the defense of the defendants, and each of them, would be substantially the same, since whether the plaintiff did or did not consent to the operation they would be compelled to meet the issue as to whether or not the patient's death had been proximately caused by unskillfulness in its performance. It follows that both in respect to the proofs and also of the remedies there was no such inconsistency between these two pleaded causes of action as would suffice to justify the order of the trial court compelling the plaintiff to elect as to which she would go to trial upon. This initial error on the part of the trial court was persisted in throughout the trial to the extent of exclusion upon the defendants' insistence of all evidence tending to prove negligence in the performance of the operation. This initial error of the trial court thus persisted in compels a reversal of this case; and this being necessitated, it becomes needless to consider whether the trial court was also in error in granting the defendants' several motions for nonsuit. On another hearing upon the whole issue presented by the plaintiff's complaint and the defendants' answers thereto, it may be found that as to some of the defendants herein a cause of action upon either count cannot be stated, but until that is shown we think the status quo of the parties to the action should be maintained.

The judgment is reversed.

We concur: SHENK, J.; LANGDON, J.

203 Cal. 254

(263 P.)

KAHRIMAN v. JONES, Sheriff, et al.
(S. F. 12197.)

Supreme Court of California. Jan. 27, 1928.

1. Chattel mortgages ⇨3—Provisions of Civil Code relating to chattel mortgages should be strictly construed (Civ. Code, § 2956 et seq.).

Provisions of Civil Code relating to chattel mortgages (section 2956 et seq.) should be strictly construed, for they give a special right to a lien independent of possession, a situation unknown to common law with relation to personal property.

2. Chattel mortgages ⇨52—Chattel mortgage on automobile given to secure payment of notes, failing to show due date of notes, held insufficient (Civ. Code, § 2956).

Chattel mortgage on automobile which merely recited that it was given as security for payment of certain promissory notes, there being nothing on its face which would give notice to third persons as to due date of debt secured by it, did not meet requirements of Civ. Code, § 2956, and hence was insufficient to give notice to third persons.

Department 2.

Appeal from Superior Court, Fresno County; S. L. Strother, Judge.

Action by A. K. Kahrman against W. F. Jones, Sheriff of the County of Fresno, and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Frank J. Solinsky, Edw. R. Solinsky, and Edward Schary, all of San Francisco, for appellant.

Roy Fitzpatrick, of Fresno, for respondents.

LANGDON, J. This is an appeal by the plaintiff from a judgment against him, after defendants' motion for a nonsuit had been granted, in an action in which plaintiff sought to recover from the defendants damages for alleged conversion of an automobile upon the theory that at the time of its seizure the plaintiff was the holder of a valid and subsisting chattel mortgage upon said property. The purported chattel mortgage was offered in evidence, and the only question presented upon the appeal is its sufficiency to meet the requirements of section 2956, Civil Code. It is admitted that the instrument was accompanied by the proper affidavit and acknowledged and recorded in like manner as a grant of real property, as required by section 2957, Civil Code.

[1, 2] Section 2956, Civil Code, prescribes the form of a mortgage of personal property in this state, and this form includes a description of the property mortgaged and a description of the debt for which the mortgage is given, specifying the amount of said debt, the date due, the amount of interest payable thereon; and, in the event the mort-

gage is given to secure the payment of a note, the form is to contain a description of said note. In the instant case the mortgage merely recited that it was given "as security for the payment of four promissory notes totaling \$5,329.14, and also the repayment of all advances by the mortgagee or assigns to the mortgagor not exceeding the sum of \$100," etc. This mortgage was dated March, 1920, and the notes which were introduced in evidence and asserted to be those secured by the mortgage were dated December, 1923, and recited that they were renewals of notes given during the years 1918 and 1919.

It thus appears that the mortgage on its face would give no notice to third persons as to the due date of the debt secured thereby.

The provisions of the Civil Code relating to chattel mortgages have been strictly construed by the courts, as, indeed, they should be, for those sections give a special right to a lien independent of possession, a situation unknown to the common law with relation to personal property. It was said in *Cardenas v. Miller*, 108 Cal. 250, 41 P. 472, 49 Am. St. Rep. 84:

"The latter [subsequent purchasers] are protected against the prior unrecorded mortgage only when they take their conveyances 'in good faith and for value'; and, of course, they do not take them in good faith if they have actual notice of the prior mortgage. But not so as to creditors. As to them good faith is not made a condition, but such a mortgage is declared void without qualification. * * * The plain import of the statute is that nothing but a compliance with its terms will protect a mortgage of chattels against creditors."

To the same effect are the cases of *Ruggles v. Cannedy*, 127 Cal. 290, 53 P. 911, 59 P. 827, 46 L. R. A. 371. In *Simpson v. Ferguson*, 112 Cal. 180, 40 P. 104, 53 Am. St. Rep. 201, it is said:

"It is sufficient, for the purposes of this case, to say, that, as against a subsequent mortgagee in good faith, a mortgage upon a growing crop must be executed with the formalities prescribed in the Civil Code, otherwise it is void as against him."

To the same effect are the cases of *Bell v. Sage*, 60 Cal. App. 149, 212 P. 404, and *Hopper v. Keys*, 152 Cal. 493, 92 P. 1017. In the latter case it was said:

"It must be conceded that the authority for the creation of chattel mortgages in this state derives its force from the statutory provisions relating to the subject, and that all rights accruing by virtue of such mortgages can be protected and preserved only by fully meeting the requirements of the statute and strictly observing its provisions."

The appellant relies solely upon the case of *Harms v. Silva*, 91 Cal. 636, 27 P. 1088. That case presents a contest between two mortgagees, and the question decided was as

to whether a subsequent mortgagee, with notice of the rights of a prior incumbrancer, is an "incumbrancer in good faith." The court states:

"Section 2956 provides a form with which such mortgage must substantially comply. Keating's mortgage does substantially comply with the prescribed form."

The Keating mortgage was not set forth in the opinion, either in whole or in part, but appellant has printed a copy of it, obtained from the transcript in that case. From this it appears that in describing the debt secured by the mortgage the due date was omitted, as in the instant case. The date of the promissory note was given, however, and the rate of interest it bore, which details were not given in the instant case. It is clear that there was a closer compliance with the statute in the case of *Harms v. Silva*, supra, than there was in the instant case and we do not feel that the rule of strict compliance, announced by the authorities herein cited, should be further relaxed. That rule has the advantage of certainty in its application, and we think it is necessary to effect the purpose of the statute.

The judgment appealed from is affirmed.

We concur: SHENK, J.; RICHARDS, J.

88 Cal. App. 20

WEBB v. JONES et al. (Civ. 5180.)★

District Court of Appeal, Second District, Division 2, California. Dec. 27, 1927.

Rehearing Denied Jan. 20, 1928. Hearing Denied by Supreme Court Feb. 23, 1928.

1. Landlord and tenant ⇨76(3)—Lessor's consent to assignment discharges covenant against assignment, and subsequent assignments may be made without consent unless lease provides otherwise.

Where lease contains covenant against assignment without consent, such consent once given by lessor discharges covenant, and subsequent assignments may be made without such consent, unless there is appropriate language in lease making covenant binding upon subsequent assignees.

2. Landlord and tenant ⇨208(2)—Assignees of lessees are liable to lessors for rents accruing during time assignees are in possession.

Assignees of lessees are liable to lessors for rents accruing during time assignees are in possession of demised premises.

3. Landlord and tenant ⇨79(1)—Where assignees of lease did not assign whole estate and created new causes of forfeiture, parties taking possession were sublessees, not assignees.

Where assignees of lease executed conditional sales contract to W., reserving title to lease and furniture and appointments, and W.

assumed assignees' obligations, and it was provided that assignees should have right to retake possession on W.'s default, and W. later assigned conditional sales contract to J., W. and J. were not assignees of lease, but each held only as sublessee, since whole estate of assignees of lease was not assigned and new causes of forfeiture were created.

4. Appeal and error ⇨882(3)—Plaintiff was bound on appeal by theory of case she followed in lower court.

Plaintiff lessor was bound in appellate court by theory of rights of parties resulting from subleasing which she followed in lower court.

5. Landlord and tenant ⇨80(3)—Subtenant is not liable to lessor on covenants of lease nor on covenants of sublease.

There is no privity of contract or estate between an original lessor and a subtenant, and subtenant is not liable to lessor on covenants of lease nor on covenants of sublease.

6. Landlord and tenant ⇨291(5)—Sublessees were proper parties defendant in unlawful detainer action by lessor (Code Civ. Proc. § 1164).

In unlawful detainer action by lessor, sublessees were proper parties defendant under Code Civ. Proc. § 1164, in order that whatever claims they had to demised premises might be determined, although action could have proceeded without them.

7. Landlord and tenant ⇨112(1)—Lessor, by trying unlawful detainer action on theory that sublessees were liable for rents, waived forfeiture of lease because of subleasing.

Lessor, trying unlawful detainer action against lessee and sublessees and taking judgment on theory that by reason of contractual relations existing between lessee and sublessees both sublessees were liable for rents and damages, waived forfeiture of lease because of subleasing, where lease prohibited subleasing.

8. Tender ⇨18—Where lessor refused sublessee's checks for rent and sublessee did not deposit amount to lessor's credit and give notice as required by statute, debt was not extinguished by tenders (Civ. Code, § 1500).

Where sublessee tendered rents to lessor which were refused by her, but sublessee did not attempt to extinguish obligation by depositing amount thereof to lessor's credit and by giving of notice of deposits as provided in Civ. Code, § 1500, debt was not extinguished by tenders.

9. Landlord and tenant ⇨290(2)—Where lessor refused rents tendered by sublessee and sublessee used money for other purposes and was unable to pay back rents after June 14, 1924, lessor had cause of action in unlawful detainer on June 25, 1924, because of nonpayment of rent.

Where lessor refused payments of rent tendered by sublessee and sublessee thereafter used money for other purposes and was unable to pay back rents on or after June 14, 1924, and lessor commenced action June 25, 1924, she had

just cause of action in unlawful detainer because of nonpayment of rent.

10. Landlord and tenant $\hookrightarrow$ 291(14)—Lessor could not recover interest on unpaid rents in unlawful detainer action where rents were tendered and refused, though tenders were not kept good (Civ. Code, § 1504).

Lessor was not entitled to interest on amount of rents found unpaid in unlawful detainer action, where sublessee, one of defendants, had tendered rent to lessor and she had refused same, since tenders and their refusals, although tenders were not kept good, stop running of interest on the obligation under Civ. Code, § 1504.

11. Pleading $\hookrightarrow$ 129(2)—Defendants' admitted lessor's allegation in complaint in unlawful detainer that termination notices stated amount of rent unpaid by failure to deny allegations (Code Civ. Proc. §§ 462, 1161).

Under Code Civ. Proc. § 462, defendant assignee of lease and sublessees admitted lessor's allegations in unlawful detainer action that termination notice and notice to quit stated amount of rents unpaid as provided in section 1161 by their failure to deny allegations in answer.

12. Landlord and tenant $\hookrightarrow$ 291(3)—Defendants waived objections to lessor's termination notices by failure to specially demur by admitting allegations in answer, and by presenting objections on appeal for first time (Code Civ. Proc. § 1161).

Defendants waived objections in unlawful detainer action to lessor's termination notices as not complying with Code Civ. Proc. § 1161, by failure to reach point by special demurrer to amended complaint, by admitting in their answer truth of allegations of amended complaint in relation to contents of notices, and by presenting their objections on appeal for first time.

On Petition for Rehearing.

13. Landlord and tenant $\hookrightarrow$ 290(2)—Where breaches of lease were shown, and proper notices of forfeiture given, court could cancel lease and grant other relief prayed (Code Civ. Proc. § 1161, subd. 3).

Where breaches of covenants of lease regarding keeping demised premises in good order and condition, and making alterations and keeping premises furnished, were shown in unlawful detainer action, and proper notices of forfeiture were given, court was authorized to terminate lease, restore premises to plaintiff, and award damages, under Code Civ. Proc. § 1161, subd. 3.

14. Appeal and error $\hookrightarrow$ 1071(5)—Finding that defendants failed to keep premises in repair, if erroneous, because notices of forfeiture did not mention such default, held harmless where judgment was otherwise sustained.

In unlawful detainer action, finding to effect that defendants failed to keep premises in repair, if erroneous, for reason that notices of forfeiture made no mention of such default, held not prejudicial, where failure to fulfill other covenants sustained judgment terminating lease.

15. Landlord and tenant $\hookrightarrow$ 291(17)—Defendant's failure to fulfill covenants of lease regarding altering premises and keeping premises furnished sustained judgment terminating lease, without right of reinstatement (Code Civ. Proc. § 1161, subd. 3; § 1174).

Failure of defendants in unlawful detainer action to fulfill covenants of lease not to alter premises without consent and to keep premises furnished were sufficient to sustain judgment terminating lease, under Code Civ. Proc. § 1161, subd. 3, with no right of reinstatement under section 1174, on payment of unpaid rents.

Appeal from Superior Court, Los Angeles County; John L. Fleming, Judge.

Action in unlawful detainer by Lillie T. Webb against A. M. Jones, Walter J. Lewis, and Annie Lewis and others. From the judgment, Walter J. Lewis and Annie Lewis appeal. Affirmed as modified.

William C. Jensen, of Los Angeles, for appellants.

Joseph Musgrove, J. Karl Lobdell, and Fred O. McGirr, all of Los Angeles, for respondent.

HAZLETT, Justice pro tem. Plaintiff, the respondent herein, brought this action in unlawful detainer to recover possession of demised premises, consisting of an apartment house property, for damages on account of unpaid rents and unlawful detention, and for attorney's fees. Plaintiff's predecessors in interest, by written lease, demised to defendant Maude Bryant Johnson for eight years, beginning August 1, 1920, at the rental of \$450 per month during the first three years and \$500 per month during the remainder of the term, payable monthly in advance, and the lessee agreed therein as follows: That she should keep the premises and appurtenances in the same good order and condition as when delivered to her, reasonable use excepted; that no alterations or changes in the premises should be made without the written consent of the lessors; that she should keep the premises as fully and well furnished as at the execution of the lease, and should make all necessary restorations and replacements to keep them so furnished. The lease contains the following provisions regarding assignment and for subletting:

"Permission is granted to the original lessee to assign and transfer this lease to an individual person or persons, providing such assignee or assignees shall assume and agree to perform each and all of the covenants herein contained to be performed by the lessee. Save as aforesaid, it is agreed that this lease shall not be assigned or transferred except by and with the written consent of the lessors. The said premises shall not be sublet or underlet except the customary underletting of apartments in conducting an apartment house. * * *

The lease also provides that, should any of the rent be unpaid or should the lessee

be in default in any other covenant or condition of the lease, the lessors might, at their option, and upon ten days' written notice to the lessee, re-enter, take possession, and remove all persons from the premises, and upon so electing they might at their option terminate the lease and recover from the lessee all damages caused by any such breach, including costs and reasonable attorney's fees incurred by the lessors; also that the lessors should have a first lien upon all the furniture and furnishings to secure payment of the rents and performance of the lessee's other agreements. The lessee executed her chattel mortgage in conformity with the foregoing.

Defendant Johnson sold the furniture and furnishings and assigned the lease to appellants and put appellants into possession, and about August 1, 1922, appellants procured the written consent of the lessors for an assignment of the lease by appellants to defendant Tillie J. Wentling. About August 10, 1922, appellants entered into a conditional sales contract denominated "Lease Contract," whereby they agreed to sell the lease and the "furniture and appointments" of the apartment house for \$40,000 to defendant Wentling, \$16,000 of which sum was then paid and the balance Wentling agreed to pay in installments of \$300 per month, appellants reserving the title to the lease and furniture and appointments until full payment, and Wentling assuming all the lessee's obligations under the lease. It was further stipulated therein that the contract should be subject to all the terms of the lease, and that, in the event of any default on the part of Wentling, under the contract, all payments thereunder which remained unpaid should become immediately payable, and upon her failure to pay appellants should have the right to retake possession. Thereafter appellants put Wentling into possession of the premises and contents under the contract.

On January 1, 1923, lessors conveyed the premises and assigned the lease to plaintiff. About January 15, 1924, Wentling assigned the conditional sales contract to defendant A. M. Jones, who assumed all of the obligations thereof, and Jones went into possession of the premises and contents under the contract. No consent was obtained from plaintiff to any assignment of the lease to Jones or to any subletting to Wentling or Jones or to the possession by Jones. Jones paid the rent for February, 1924, and tendered to plaintiff the rents for March to December, inclusive, in 1924, at \$500 per month, which tenders were refused by plaintiff, but Jones failed to keep his tenders good by depositing the amount and serving the notice as provided in section 1500 of the Civil Code, and those rents and all rents subsequently falling due remained unpaid. Plaintiff or her predecessors in interest had no knowl-

edge of the execution or existence of the conditional sales contract or that Wentling was in possession under it, or that it had been assigned to Jones, or of the possession by Jones under that contract, until after this action was commenced, but plaintiff was informed by Jones that he was in charge of the premises as manager for Wentling. The foregoing facts are not in dispute, and the following are established by the weight of evidence: During the term of the lease defendants made or permitted to exist material alterations in the demised premises and omissions from the contents thereof without replacements, without the consent of plaintiff or her predecessors in interest.

On or about May 1, 1924, plaintiff served a written demand upon each of the defendants, including appellants Wentling and Jones, reciting that appellants and Wentling, without the consent of lessors or plaintiff, "assigned, transferred and/or sublet said lease or premises to said A. M. Jones," failed to keep the premises furnished as required in the lease and made said alterations, and that the rent for the months of March and April, 1924, has not been paid, and that, by reason thereof, plaintiff elected to terminate the lease and to re-enter the premises at the expiration of ten days and to recover all damages caused by said breaches, including reasonable attorney's fees and costs; and that defendants are required to surrender possession upon the expiration of said ten days unless said breaches are remedied. The rents were not paid and none of the other matters complained of were remedied, and on or about June 19, 1924, plaintiff served upon each of the defendants a three-day notice and demand referring to the ten days' demand, reciting the asserted defaults and that plaintiff had elected to and did terminate the lease and to re-enter the premises, that further defaults had been made in that the rentals for the months of May and June, 1924, were not paid, and that defendants were required, within three days after the service of this notice, to remedy the defaults or to deliver up possession of the premises or plaintiff will institute proceedings to recover the same, together with damages for detention thereof.

This action was commenced on June 25, 1924, and the trial court found the foregoing facts, and the following: That appellants sublet the premises to Wentling and her husband and that Wentling and her husband sublet to Jones, each of whom assumed the obligations of the lease binding on the lessee; that neither of the sublettings was known or consented to by plaintiff or the lessors and that each subletting was a violation of the terms of the lease; that the unpaid rents of \$500 per month from March 1, 1924, to March 2, 1925, aggregated \$6,000, and the interest accrued thereon \$192.-

70 and that \$1,000 is a reasonable attorney's fee to be allowed plaintiff. The court concluded upon the facts that plaintiff was entitled to have the lease terminated, to restitution of the premises and to recover from the defendants "for rental for said premises" \$6,000, and \$192.70 interest thereon. Judgment was entered for such termination and restitution and for \$6,192.70 against all of the defendants, but the judgment does not recite whether the sum or any part of it was for rent or damages.

The amended complaint alleged that the rents subsequent to March 1, 1924, were unpaid, the service of the demands for the rents at \$500 per month, and that plaintiff was damaged \$3,000 by unlawful possession by defendants, and prayed for cancellation of the lease, possession, and damages for unlawful possession, for rents and attorney's fees.

1. The complaint, findings, conclusions, and judgment indicate that money recovery in the judgment covers only the unpaid rents that accrued prior to the notice of forfeiture, and the damages suffered by the unlawful detention after the forfeiture, as found and determined by the court, and attorney's fees. *Pfizer v. Candeias*, 53 Cal. App. 737, 200 P. 839.

Appellants made a number of assignments of error. In order to determine the rights of the parties, consideration is given to the following points presented by them: The lease was assigned, not sublet to Wentling and Jones. The covenant not to assign or sublet was not violated. The agreement to pay rent was not broken. The covenant not to alter the premises was not broken. The covenants to keep the premises in good condition and repair and fully furnished were performed. The ten-day termination notice and the three-day notice were insufficient as a matter of law. Forfeiture was waived.

2. Although the lessors gave their written consent to an assignment of the lease by appellants to Wentling, appellants executed to Wentling only the conditional sales contract of the lease and contents of the apartment house, and appellants reserved the right of re-entry upon any breach of the terms of the contract. Jones held as assignee of the rights of Wentling under the conditional sales contract.

[1] The first question to be determined in this connection is whether Wentling and Jones were assignees of the lease or sublessees. In relation to assignments by lessees under a lease containing a covenant against assignment without consent such as found in the lease under consideration, our courts have held that the covenant is personal, binding only upon the lessee, and does not run with the land. Such consent once given by a lessor discharges the covenant, and subsequent assignments may be made

without such consent unless there is appropriate language in the lease making the covenant binding upon the subsequent assignees. *Miller v. Reidy* (Cal. App.) 260 P. 358, and cases cited therein. See, also, *Ericksen v. Rhee*, 181 Cal. 562, 185 P. 847; *Rothrock v. Sanborn*, 178 Cal. 693, 174 P. 314.

[2] Assuming that Wentling and Jones were assignees as contended by appellants, the assignment to Wentling by consent of appellants discharged the covenant contained in the lease against assignment without consent of the lessors, and no consent to the subsequent assignment to Jones was necessary. Therefore, as the courts have uniformly held that assignees of lessees are liable to the lessors for rents accruing during the time the assignees are in possession of demised premises (*Baker v. J. Maier & Zobelein Brewery*, 140 Cal. 530, 74 P. 22; *Realty & Rebuilding Co. v. Rea*, 184 Cal. 565 at page 569, 194 P. 1024; *Jordan v. Scott*, 38 Cal. App. 739, 177 P. 504), plaintiff was within her rights in pursuing Wentling and Jones for the unpaid rents and for damages for unlawful detention.

[3] On the other hand, plaintiff contends that Wentling and Jones were sublessees. If they were, we are faced by a different situation, unless by her acts in this action plaintiff has waived her right to deny that they were assignees or that they acquired some rights in the demised premises which she recognized.

The rules of law, governing such a situation are clearly defined in *Barkhaus v. Producers' Fruit Co.*, 192 Cal. 200, at pages 205, 206, 219 P. 435, 437, as follows:

"It is elementary that a sublease, in order to operate as an assignment, must transfer to the sublessee the entire term of the original lessee, in the whole or some part of the demised premises. * * * The term thus referred to is not measured alone by the length of time for which it runs, but is measured as well by the extent of the premises which it covers and the nature and extent of the estate or interest therein which it embodies. The term * * * may be regarded as having three dimensions analogous to the special dimensions of length, breadth, and thickness. *The term to be transferred to his assignee by such a tenant * * * must include all of the estate and interest in said premises possessed by the lessee under the original lease.* 'To constitute an assignment of a leasehold interest, the assignee must take precisely the same estate in the whole or in a part' of the leased premises which his assignor had therein. * * * For in the language of Blackstone, * * * 'if by the terms of the conveyance, be it in the form of a lease or an assignment, new conditions with the right of entry, or new causes of forfeiture are created, then the tenant holds by different tenure, and a new leasehold interest arises, which cannot be treated as an assignment or a continuation to him of the original term.' *Dunlap v. Bullard*, 131 Mass. 161, 162. See, also, *United States v. Hickey*, 17

Wall, (84 U. S.) 9, 21 L. Ed. 559. See, also, Rose's U. S. Notes; Davis v. Vidal, 105 Tex. 444, 151 S. W. 290, 42 L. R. A. (N. S.) 1084; 1 Taylor on Landlord and Tenant (9th Ed.) § 16." (Italics ours.)

As the whole estate held by appellants under the lease was not assigned to Wentling or Jones, and as in the conditional sales contract new causes of forfeiture were created and appellants expressly reserved the right to re-enter the demised premises and terminate the contract upon any breach thereof by Wentling, it appears that neither Wentling nor Jones held as assignee of the lease, but that each held only as sublessee. The lease prohibited any such subleasing and provided that the lessors might at their election re-enter the demised premises and terminate the lease upon any such subleasing.

[4] 3. In determining the rights of the parties resulting from the subleasing, full consideration must be given to the theory on which the case was tried in the lower court. Plaintiff is bound here by the theory she followed there. *Lugiani v. Landau Economic Syphon Co.*, 38 Cal. App. 146, 175 P. 648; *Lamberson v. Bashore*, 178 Cal. 321, 173 P. 401; 2 Cal. Jur. 237 and 801. Plaintiff pursued Wentling and Jones in this action, and, after she was advised that they were sublessees only, she took judgment against them as well as against appellants for the unpaid rents which accrued prior to the forfeiture and for the damages she suffered thereafter by the unlawful detention as found by the court.

[5] There is no privity of contract or estate between an original lessor and a subtenant, and the subtenant is not liable to the lessor on the covenants of the lease nor on the covenants of the sublease. *Tiffany on Landlord and Tenant*, § 162; *Bekins v. Smith*, 37 Cal. App. 222, 174 P. 96; *Richmond v. Superior Court of Los Angeles County*, 9 Cal. App. 62, 98 P. 57; *Francis v. West Virginia Oil Co.*, 174 Cal. 168, 162 P. 394; *Steinback v. Krone*, 36 Cal. 303. However, it was held by the Supreme Court of Arkansas that, where a defendant agreed to take the place of the tenant under a lease, whether as assignee, or sublessee, and pay the rent to the lessor, the agreement inured to the benefit of the lessor and the lessor could sue the defendant for the rent. *Foucar v. Holberg*, 58 Ark. 59, 107 S. W. 172; but see *Ericksen v. Rhee*, 181 Cal. 562, at page 566, 185 P. 847; 18 Cal. Jur. p. 41, § 364, and cases cited.

[6] In the conditional sales contract Wentling assumed "all and every obligation of sellers" (appellants) under the lease, and in the assignment of that contract Jones assumed and agreed to "fulfill all the terms and conditions as set out in said contract." As sublessees, Wentling and Jones were proper

parties defendant in this action in order that whatever claims they had to the demised premises might be determined (section 1164, Code Civ. Proc.; *Pardee v. Gray*, 66 Cal. 524, 6 P. 389), but this action could have proceeded without them (*Tujague v. Superior Court of City & County of San Francisco*, 69 Cal. App. 35, 230 P. 198).

The theory upon which this case was tried and judgment taken was that, by reason of the contractual relations existing between appellants and Wentling and Jones, both Wentling and Jones were liable for said rents and damages. Wentling and Jones did not appeal.

It was held in *Randol v. Tatum*, 98 Cal. 390, 33 P. 433, which was an action for rent and against sureties on a bond to secure the rent, that forfeiture of a lease for breach of a condition against assignment without consent of the lessor was waived by acceptance of rent, *eo nomine*, from any one after knowledge by the lessor of the assignment. See, also, *Goodwin v. Grosse*, 56 Cal. App. 615, 206 P. 138.

[7] The conclusion necessarily follows that plaintiff, by her acts, waived forfeiture of the lease because of the subleasing. This conclusion, however, is not decisive of this appeal. The matters hereinafter discussed determine the rights of the parties herein involved.

[8, 9] 4. Jones tendered the rents for the months of March to December, 1922, at \$500 per month by means of checks mailed to plaintiff, which were refused by her, but he did not attempt to extinguish the obligation by depositing the amount thereof to the credit of plaintiff and by giving the notice of the deposits as provided in section 1500 of the Civil Code. Therefore the debt was not extinguished by the tenders. *Segno v. Segno*, 175 Cal. 743, 167 P. 285; 24 Cal. Jur. 526. Continuous readiness to pay after the tender was not shown. In fact, Jones testified that after he made the tenders he used the money for other purposes and was not able to pay the back rents on or after June 14, 1924. This action was commenced on June 25, 1924. Therefore plaintiff had a just cause of action in unlawful detainer because of the nonpayment of the rent. *Occidental Real Estate Co. v. Gantner & Matern*, 7 Cal. App. 727, 95 P. 1042.

[10] In the ordinary action of unlawful detainer for nonpayment of rent, it is proper for the court to allow 7 per cent. interest on the installments of rent. *Chambers v. Security Commercial & Savings Bank*, 46 Cal. App. 32, 188 P. 818. The lower court erred in this case, however, in allowing interest upon the amount of rents found unpaid. The tenders and their refusals, although the tenders were not kept good, "stop the running of interest on the obligation." Section 1504, Civ. Code; *Lockhart v. J. H. McDou-*

gall Co., 190 Cal. 308, at page 312, 212 P. 1, and cases therein cited.

5. The court found, and the findings are supported by substantial evidence, that the defendants were guilty of other violations of the covenants or conditions of the lease consisting of material alterations in the demised premises and material omissions from the contents thereof without replacements, and that the consent or approval of plaintiff or her predecessors in interest therefor was not obtained. As the judgment appealed from was based substantially upon the defaults in payment of rents, and such defaults are sufficient to sustain the judgment, no further consideration will be given to the question whether the violations were in themselves sufficient to base this action upon.

[11] 6. Appellants contend that the termination notice and the notice to quit were fatally defective, in that neither notice stated the amount of rents unpaid, as provided in section 1161 of the Code of Civil Procedure, and they also cite *Hill Co. v. Pinque*, 179 Cal. 759, 178 P. 952, 3 A. L. R. 669; *Id.*, 56 Cal. App. 245, 204 P. 1097. This point was not raised by appellants in the lower court, and no objection as to the sufficiency of the evidence in relation to the notices was made there by them. Each of the notices named the months for which the rents were unpaid, but failed to state the amount of the rents. The lease required the payment of \$500 per month rent in each of those months. The amended complaint alleged that the termination notice served on the defendants named the months and *stated the amount of rent unpaid*, and that the notice to quit also named the months and likewise *stated the amount of rent unpaid*. A copy of each of the notices was attached to the amended complaint and was referred to and made a part of it. Appellants did not demur to this pleading. The answer of appellants *admits* those allegations by failure to deny them. "Every material allegation of the complaint, not controverted by the answer, must, for the purposes of the action, be taken as true. * * *" Section 462, Code Civ. Proc.; *Welch v. Alcott*, 185 Cal. 731, at page 754, 198 P. 626, and cases cited.

In the case of *Mendocino County v. Morris*, 32 Cal. 145, the complaint alleged that the official bond sued on was signed by all the defendants. The name of the principal did not appear on the copy of the bond attached to the complaint. Demurrer was interposed to the complaint, but the demurrer did not raise the question of uncertainty or ambiguity. "The direct averment of the execution of the bond in the body of the complaint must prevail, as against the omission of the signature in the copy. * * * The most that can be said is that the complaint is ambiguous in this respect. * * * The

objection is raised for the first time in this court."

In the case of *Blasingame v. Home Ins. Co.*, 75 Cal. 633, at page 637, 17 P. 925, brought on a policy of fire insurance, it appeared that the complaint alleged that by the policy, a copy of which was attached to and made a part of the complaint, the loss, if any, was made payable to plaintiff, but the attached copy contained nothing to show that the loss was made payable to plaintiff. It was held that the complaint was good as against a general demurrer.

It was held in *Silvers v. Grossman*, 183 Cal. 696, at page 702, 192 P. 534, that such a defect is merely one of uncertainty or ambiguity, and can be reached only by special demurrer.

It was held in *Panter v. National Surety Co.*, 36 Cal. App. 44, at pages 46 and 47, 171 P. 803, 804, that:

"Whatever is an essential element of a cause of action must be presented by a distinct averment and cannot be left to an inference to be drawn from the construction of a document attached to the complaint [citing cases]. The converse of this rule must be that, in the absence of a special demurrer for uncertainty, direct and essential allegations in a complaint will not be modified, controlled, or defeated by the recitals of an instrument attached to the complaint" (citing cases).

To the same effect, see *Kennard v. Binney*, 62 Cal. App. 732, 217 P. 808; and *Linz v. McIver & Becker*, 29 Cal. App. 470, 156 P. 1000; *Estate of Cook*, 137 Cal. 184, 69 P. 968.

It was held in *Treanor v. Houghton*, 103 Cal. 53, 36 P. 1081, that, where there is no objection to the pleadings or the sufficiency of the evidence to support the findings, which are full and explicit upon all the material issues, all errors and omissions are cured by verdict, and waived, and cannot be urged upon appeal for the first time.

It was held in *Doble Co. v. Keystone Consol. Min. Co.*, 145 Cal. 490, at page 495, 78 P. 1050, 1052, that:

"It is unfair for a party to withhold an objection founded upon a defect which, if pointed out in time, might be remedied, until it is too late to correct the defect, thereby inducing an opponent to rely upon his pleading as sufficient in order that he may have a fatal objection. Such a course is a fraud upon justice and prevents a fair trial. It is therefore not tolerated" (citing cases).

[12] The objections to the notices were waived by failure of appellants to reach the point by special demurrer to the amended complaint, by admitting in their answer the truth of the allegations of the amended complaint in relation to the contents of the notices, and by presenting their objections on appeal for the first time.

The judgment is modified by disallowing

and striking out the amount of \$192.70 interest, reducing the amount of plaintiff's judgment to \$6,000, and the attorney's fees, and, as so modified, the judgment is affirmed.

We concur: WORKS, P. J.; CRAIG, J.

On Petition for Rehearing.

PER CURIAM. In their petition for a rehearing herein, defendants (appellants) Walter J. Lewis and Annie Lewis complain that the opinion of this court is based substantially upon defaults of defendants in the payments of rents, thus leaving room for the operation of section 1174, Code of Civil Procedure, giving them five days after judgment within which to pay the unpaid rents and reinstate the lease. Defendants also contend that the findings and judgment of the trial court in terminating the lease for violation of its covenants binding defendants to keep the demised premises in good order and condition, reasonable use excepted, to make no alterations or changes therein without the written consent of the lessors, to keep the premises as fully and well furnished as when leased, to make the necessary restorations and replacements, and to keep it so furnished, constituted prejudicial error.

In regard to those findings, and the facts upon which they were based, this court said: "The findings are supported by substantial evidence." The lease provides that the lessors shall have a first lien on the furnishings to secure the rents and certain other covenants of the lease, and that, "should any of the rents herein provided for be due and unpaid, * * * or should the lessee be in default in any other condition or covenant of this lease, the lessors may at their option and upon ten (10) days' written notice * * * re-enter and take possession of the premises and remove all persons therefrom, * * * and * * * terminate this lease."

The testimony quoted in the briefs of the parties, and reported in the transcript of the evidence, satisfactorily shows that each of the covenants herein mentioned was violated by the defendants, and that each of the findings relating to those matters had substantial support. The notice to terminate the tenancy recited that certain alterations had been made by defendants in the leased premises without the consent of the lessors, that the premises had not been kept as fully and well furnished as at the date of the lease, and other defaults which need not be mentioned here, and demanded that each of the defaults be remedied within 10 days, or the lease would be forfeited and possession of the premises retaken by plaintiff. The three days' notice to quit referred to the ten days' notice, recited the defaults mentioned in that notice, and that none of them had been cured, and demanded that

they be cured within three days, or possession be given, or legal proceedings would be instituted for possession.

[13] One who seeks the summary remedy allowed by the statute must bring himself clearly within its terms (*Harris v. Bissell*, 54 Cal. App. 307, 313, 204 P. 453; *Opera House Ass'n v. Bert*, 52 Cal. 471; *Iburg v. Fitch*, 57 Cal. 192); but where, as in this case, the breaches are shown and proper notices of forfeiture given, the court is authorized to grant the relief prayed for (section 1161, subd. 3, Code Civ. Proc.; *Pfizer v. Candelas*, 53 Cal. App. 737, 200 Pac. 839).

[14, 15] The finding of the lower court to the effect that defendants failed to keep the premises in repair, if erroneous, for the reason that the notices made no mention of such default, was not prejudicial to the rights of defendants. The failure of defendants to fulfill the other covenants, not to alter the premises without consent and to keep the premises furnished, are sufficient to sustain the judgment terminating the lease with no right of reinstatement.

Petition for rehearing is denied.

87 Cal. App. 601

PEOPLE v. BROCK. (Cr. 1004.)

District Court of Appeal, Third District, California. Jan. 14, 1928.

Criminal law ⇨ 1133—That testimony showed stolen property taken from another, instead of from defendant as record showed, held not to warrant reversal on rehearing.

Where evidence showed beyond any reasonable doubt that defendant was participant in robbery and properly convicted, fact that certain witness testified that stolen beads were taken from another participating in robbery, instead of from defendant as record originally showed, is not ground for reversal on rehearing.

Appeal from Superior Court, Yolo County; W. A. Anderson, Judge.

On petition for rehearing. Petition denied, and former opinion modified.

For former opinion, see 262 P. 369.

Arthur C. Huston, Jr., and Percy Napton, both of Woodland, for appellant.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

PER CURIAM. Appellant, upon petition for rehearing, calls attention to a stipulation by counsel purporting to correct the official record in this case, certified to by the trial court as being correct. The stipulation of counsel is to the effect, that the witness Grove, called for the prosecution, actually testified that a certain string of pearl beads was taken from the clothing of one of the defend-

ants accused of participation in the Lillard robbery, named Franks, whereas the record certified to by the trial court makes this witness testify that beads were taken off of the person of the defendant Brock, and bases his petition for a rehearing thereon. While this manner of correcting a record does not appear to be provided for in any of the Codes, we will, nevertheless, accept the stipulation as showing the true facts, and for that purpose it is hereby ordered that that portion of the testimony in the opinion which, as filed, reads as follows:

"The pearl beads were taken off the person of the defendant Brock. The testimony in this particular shows that the defendant Brock, who was seriously wounded, was taken to the Woodland Sanitarium, and the testimony as to the pearl beads is as follows: 'Q. Here are some pearl beads; do you know anything about these? A. Yes; those beads were taken off Mr. Brock in the Sanitarium, at the Woodland Sanitarium—out of his pocket,'"

—be corrected to read as follows:

"The pearl beads were taken off of the person of the defendant Franks. The testimony in this particular shows that the defendant Franks, as well as the defendant Brock, were taken to the Woodland Sanitarium, and there the pearl beads were found, the testimony being as follows: 'Q. Here are some pearl beads; do you know anything about these? A. Yes; those were taken off Mr. Franks in the Sanitarium, at the Woodland Sanitarium—out of his pocket.'"

It is also further ordered that that portion of the opinion reading as follows:

"This objection is based upon the erroneous allegation that none of the stolen property was found upon the person of the defendant Brock. The incident of the pearl beads appears to have been entirely forgotten,"

—be corrected as follows:

"This objection is based upon the allegation that none of the stolen property was found upon the person of the defendant Brock; that the evidence which we have referred to shows concerted action and proper to be submitted to the jury, establishing conspiracy, and hence, that the possession of one would be the possession of all, is overlooked."

The ruling of this court in the case of *People v. Haack* (Cal. App.) 260 P. 913, on an instruction relative to the recent possession of stolen property, is also relied upon by the petitioner herein. A comparison of the instruction condemned in the *Haack* Case with the instruction given by the court in this case shows that the instructions are readily distinguishable. The syllabus in the *Haack* Case does not fully show the vice of the instruction referred to, and has probably misled counsel in citing the *Haack* Case in support of appellant's contentions.

After a careful review of this case, we do not find that the error in the transcript nor

the corrections made by stipulation, and here accepted for the purposes of this opinion, affect in any way the substantial rights of the parties to this cause. We think the evidence shows beyond any reasonable doubt whatever that the defendant was one of the participants in the robbery, and that he was properly convicted.

The petition for rehearing is denied.

88 Cal. App. 608

WINNE v. FORD. (Civ. 5905.)

District Court of Appeal, First District, Division 1, California. Jan. 12, 1928.

1. Chattel mortgages $\S$ 173(4)—Evidence, in action for conversion, held sufficient to support finding that defendant constable sold mortgaged automobile on execution before execution creditor furnished statutory bond (Civ. Code, $\S$ 2969).

In action for the conversion of an automobile, evidence held sufficient to support a finding that defendant constable sold mortgaged automobile on execution before execution creditor furnished verified statement and bond, as required by Civ. Code, $\S$ 2969.

2. Records $\S$ 9½—Former Vehicle Act did not require filing notice of mortgage (St. 1919, pp. 194, 199, $\S$ 8, and $\S$ 1, subds. 11, 11a; St. 1923, p. 517).

Under Vehicle Act (St. 1919, p. 191), and prior to the adoption of the act of 1923 (St. 1923, p. 517), filing notice of automobile mortgage held not necessary, section 8 (St. 1919, p. 199) requiring notice of transfer of ownership, as interpreted in the light of section 1, subds. 11, 11a (page 194), not being applicable.

3. Records $\S$ 2—Vehicle Act, making mortgagee owner, is inapplicable to mortgage executed before enactment (St. 1919, p. 194, $\S$ 1, subd. 11a; St. 1923, p. 519, $\S$ 17).

St. 1923, p. 519, $\S$ 17, changing the definition of a legal owner, as defined in Vehicle Act, $\S$ 1, subd. 11a (St. 1919, p. 194), so as to include mortgagee, and hence to indirectly require notice of automobile mortgage to be filed, held inapplicable to mortgage executed before statute became effective.

4. Trover and conversion $\S$ 16—Plaintiff, in action for conversion, must prove possession or ownership with right to possession.

In actions for conversion, plaintiff must prove actual possession or ownership, with the right to possession at the time of the alleged conversion.

5. Records $\S$ 9½—Transferee of automobile, failing to show actual possession or compliance with Vehicle Act, cannot recover in conversion (St. 1919, p. 191).

The transferee of an automobile who fails to show actual possession or a compliance with the Vehicle Act (St. 1919, p. 191) requirement that the automobile be re-registered in the name

of the transferee, cannot recover in conversion.

6. Chattel mortgages ☞17—Automobile mortgage, executed by debtor with consent of son, the registered owner, held good as against defendant constable, who sold automobile under execution against debtor (St. 1919, p. 191).

Automobile mortgage, executed by a debtor with his son's consent, held good as against defendant constable, who sold the automobile under an execution against the debtor before the execution creditor furnished the statutory bond, as required by Civ. Code, § 2969, notwithstanding evidence son was the legal owner in possession, and that the automobile was registered in his name, in compliance with Vehicle Act (St. 1919, p. 191).

7. Chattel mortgages ☞170(2) — Constable who sold automobile under execution before execution creditor furnished statutory bond held liable to mortgagee for conversion (Civ. Code, § 2969).

Constable who sold automobile under execution before execution creditor furnished bond, as required by Civ. Code, § 2969, held liable to mortgagee for conversion.

Appeal from Superior Court, Fresno County; Denver S. Church, Judge.

Action by D. T. Winne against J. W. Ford. Judgment for plaintiff, and defendant appeals. Affirmed.

Iener W. Nielsen, of Fresno, for appellant.
Ernest Klette, of Fresno, for respondent.

CASHIN, J. An action in conversion brought by the mortgagee of an automobile against a constable by whom the automobile was levied upon and sold under an execution.

The complaint, among other averments, alleged the execution of the mortgage by the owner of the car, one S. M. Eksoozian, and that the mortgage was unpaid; that the defendant failed to tender or deposit the amount of the mortgage debt; and that no verified statement or bond, as required by section 2969 of the Civil Code, was presented or furnished before the levy and sale. With the exception of the allegations of a failure to tender or deposit the amount of the debt, the above allegations were denied, as were certain allegations of facts which the plaintiff contends should estop the defendant from asserting a want of title in the mortgagor.

The court found for the plaintiff, and from the judgment entered the defendant appeals.

As stated by the latter in his brief, the only grounds urged for a reversal of the judgment are that certain conclusions of the trial court are unsupported, namely, that there was a failure to comply with the provisions of the Code section; that the mortgagor was the owner of the automobile; that the plaintiff acquired a lien thereon; and

that the facts alleged and found were sufficient to estop the defendant from asserting want of title in the mortgagor.

The Code section provides for a tender of the mortgage debt and interest or a deposit of the amount with the county clerk or treasurer, payable to the order of the mortgagee before the property is taken by the officer, and it is not claimed that this requirement was met. It further provides that, when an attachment or execution creditor presents to the officer a verified statement that the mortgage is void or invalid for reasons therein specified, and delivers to the officer a good and sufficient indemnity bond in double the value of the mortgaged property, which shall be made both to the officer and the mortgagee, indemnifying each of them for the taking of the property against loss, liability, damages, costs, and counsel fees, then the officer shall take the property, and, in the case of an execution, sell it in the manner provided by law. Further provision is made for exceptions to the sufficiency of the sureties and their justification in the same manner as upon an undertaking on attachment.

[1-3] The execution was issued in an action brought by H. W. Nielsen against the mortgagor, and the sale was made, according to the stipulation of counsel, on March 26, 1923. The court found that no verified statement or bond, as required by the Code section, was presented or furnished before the sale was made. It appears from the testimony that a verified statement and two bonds were presented and furnished to the defendant, each being dated March 7, 1923; but it was testified by the latter that several days elapsed between the dates when the several bonds were furnished, and that the first failed to comply with the requirements of the statute. The bonds were identified by the defendant and introduced in evidence. The first was made to the officer, who alone was indemnified against loss or damage. This bond, however, contained certain recitals and provisions which tended to show that both were furnished after the sale had been made. After reciting a previous demand by the mortgagee for the release of the automobile, the bond further recited that, pursuant to the writ of execution, the automobile had previously been sold to the plaintiff in the action, and provided that the sureties would indemnify the officer against loss or liability by reason of the levy and sale, in the event it should be determined that the lien claimed by the mortgagee was valid. The second bond complied in form with the statute; and, although both bore the same date, the recitals and provisions of the first, together with the testimony of the defendant, which was vague and uncertain as to when the second bond was received, sufficiently supports the finding that no bond which con-

formed with the statutory requirements was furnished before the sale. The testimony also shows that the automobile was purchased in the year 1920 under a conditional sale contract made by a dealer with one M. Eksoozian, the son of the mortgagor, and until its sale under execution was registered in the name of the latter with the motor vehicle department. It was testified by the son that a part of the purchase price was paid by him, but sufficient appears from his testimony and that of the plaintiff to support the conclusion that the whole consideration was furnished by the mortgagor, for whom the son was acting as agent. Furthermore, it appears from the testimony of the son that the mortgage was executed with his full knowledge and consent, and, according to that of the plaintiff (from which it is apparent that he had no knowledge that the automobile was registered in the name of the son), the mortgagor represented himself to be the owner. It is claimed that, under the provisions of the Vehicle Act (Stats. 1919, p. 191) requiring registration, the mortgagor was not the owner of the automobile, and, as a consequence, the mortgage created no lien thereon; and, further, that the mortgage was a transfer within the meaning of the act; and, no notice thereof having been filed, the mortgage was invalid and insufficient for any purpose.

[4, 5] Section 8 of the act required that, upon a transfer of the ownership of any motor vehicle, a notice of such transfer in the form provided should be filed. Subdivision 11 of section 1 of the act provided that the word "owner" as used therein should include any person, firm, association, or corporation having the lawful use or control of the vehicle under a lease or otherwise for a period of ten or more consecutive days; the legal owner being defined by subdivision 11a of the same section as the "owner of the legal title." The act contained no provision requiring notice or a change of registration in the event of the execution of a mortgage upon a motor vehicle, nor was either required until the adoption of the act of 1923 (Stats. 1923, p. 517), which took effect after the execution of the mortgage in question. Section 17 of the latter act defined a legal owner to be "a person who holds the legal title of a vehicle or a mortgage thereon," and requires such persons to comply with its pro-

visions, but this requirement was inapplicable to a mortgage executed before the act took effect. *Davis v. Cline*, 184 Cal. 548, 195 P. 42. It is the rule, as contended by defendant, that in actions for conversion the plaintiff must prove ownership with the right to possession or actual possession at the time of the alleged conversion (*Green v. Burr*, 131 Cal. 236, 63 P. 360; *Zaro v. Dakan*, 76 Cal. 565, 18 P. 680; *Moody v. Goodwin*, 53 Cal. App. 693, 694, 200 P. 733; *Brinkley-Douglas Fruit Co. v. Silman*, 33 Cal. App. 643, 166 P. 371); and the transferee of an automobile who fails to show actual possession or a compliance with the requirement of the Vehicle Act (St. 1919, p. 191) that the automobile be re-registered in the name of the transferee cannot recover in conversion (*General Motors Co. v. Dallas*, 198 Cal. 365, 245 P. 184).

[6] But in the present case, while it was not shown that the mortgagor at any time had possession, or that, within the provisions of the act of 1919 he was the owner of the automobile, his son nevertheless was in possession, and had complied with the act, and the mortgage was executed with his consent. Neither the defendant nor the judgment creditor of the mortgagor claimed the property as against the son, the legal owner, and, had more than the oral consent of the latter been necessary to confer authority to mortgage the automobile, so long as the transaction was not questioned by the parties thereto, the defendant, who was not in privity with the owner, could not do so; and as to him the mortgage created a valid lien. *Ryan v. Tomlinson*, 39 Cal. 639; *Nelson v. Colton*, 36 Cal. App. 69, 171 P. 701; *Lackenbach v. Finn*, 26 Cal. App. 482, 147 P. 471.

[7] It is our conclusion that the mortgage was a lien upon the property, and that the defendant, by failing to comply with the provisions of section 2969 of the Civil Code, became liable for its conversion. *Phillips v. Byers*, 189 Cal. 685, 209 P. 557; *Sousa v. Lucas*, 156 Cal. 460, 105 P. 413; *Irwin v. McDowell*, 91 Cal. 119, 27 P. 601; *Lackenbach v. Finn*, *supra*.

In view of the foregoing, it will be unnecessary to consider the sufficiency of the facts to estop the defendant from questioning the title of the mortgagor.

The judgment is affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

88 Cal. App. 403

PEOPLE v. DEL CORRO. (Cr. 1411.)

District Court of Appeal, First District, Division 1, California. Jan. 19, 1928.

False pretenses $\S$ 49(1)—Evidence held sufficient to support conviction for feloniously issuing fictitious check with intent to defraud (Pen. Code, $\S$ 476).

In prosecution for violation of Pen. Code, $\S$ 476, by having willfully, unlawfully, and feloniously issued check drawn on bank signed by fictitious person with intent to defraud, evidence held sufficient to support conviction.

Appeal from Superior Court, City and County of San Francisco; Edward Henderson, Judge.

Gerard Del Corro was convicted of violating Pen. Code, $\S$ 476, and he appeals. Affirmed.

Gerard Del Corro, in pro. per.

U. S. Webb, Atty. Gen., and Lionel B. Browne, Deputy Atty. Gen., for the People.

TYLER, P. J. Appellant was charged by information with the violation of section 476 of the Penal Code in having willfully, unlawfully, and feloniously issued to one Ada Wether a check drawn on the Bank of Italy in favor of one J. Severo and signed "D. V. Higgins." That the check was issued with intent to defraud. It is charged that in truth and in fact there was and is no such person as D. V. Higgins, which fact appellant knew and that the check was fictitious. The matter came on for trial May 6, 1927, at which time appellant appeared without counsel and insisted upon conducting his own defense. He was found guilty and sentenced to imprisonment in the state prison at Folsom. He has appealed from the judgment and from an order denying him a new trial. As grounds for reversal it is claimed that the superior court had no jurisdiction over his person or to try the cause or to determine the same. It is also claimed that the trial court misdirected the jury in matters of law, and erred in the decision of various questions relating to the admission and rejection of evidence. Misconduct is also alleged. Appellant has sent us a communication from the place of his incarceration expressing the wish that we dismiss his appeal and affirm the judgment for the reason that he has no funds to employ counsel to represent him. Under these circumstances, we have deemed it our duty to carefully examine the record to ascertain if there is any merit in the appeal.

The evidence discloses that defendant had been in the employ of the Postal Telegraph Company. On February 19, 1927, he called at one of the branch offices of the company and presented the check in question, which

he indorsed as J. Severo, and asked that it be cashed. The cashier knew him as an employee of the company, but did not know his true name. The check called for the sum of \$175.37 and there were insufficient funds in the office at that time to cover the amount. Upon ascertaining this fact, defendant placed the check in his pocket and left the premises. The following Monday he again appeared and again presented the check for payment. The lady cashier thereupon paid him the amount the check called for. After he had left, the cashier was advised by an assistant that the check was signed by defendant as "J. Severo" and that his true name was Del Corro. The cashier then telephoned to the bank and later presented the check to it and ascertained that it had at no time such account. The cashier then refunded to her company the amount of the check. The prosecution then proved by other witnesses that defendant was the person who presented, indorsed, and cashed the check, and that there was no account in the bank upon which the check was drawn either in the name of Higgins, Del Corro, or Severo. No testimony was offered on behalf of defendant. The record shows that defendant was fairly tried and convicted, and there is nothing therein contained which in any manner supports his contentions. There is no merit in the appeal. The judgment and order are affirmed.

We concur: KNIGHT, J.; CASHIN, J.

88 Cal. App. 339

GOOLD v. KISHAN SINGH et al.
(Civ. 6044.)

District Court of Appeal, First District, Division 1, California. Jan. 14, 1928.

1. Quietting title $\S$ 44(3)—Finding that plaintiff vendor, when extending time of payment, had no actual notice of purchaser's contracts for resales, held sustained by evidence.

In vendor's action to quiet title to land sold under contract permitting resale of portions thereof by purchaser and requiring him to account therefor at named price per acre, finding that, at time vendor extended time of payments, he had no actual notice of purchaser's subcontracts for resales, held sustained by evidence.

2. Vendor and purchaser $\S$ 215—Recordation of purchaser's resale contracts held not constructive notice to vendor residing in another county where original contract executed (Civ. Code, $\S$ 1213).

That purchaser's subcontracts for resale of portions of land purchased were recorded in county where land was situated was not, under Civ. Code, $\S$ 1213, constructive notice of their execution to vendor residing in another county where original land contract was executed.

3. Vendor and purchaser ⚡95(2)—Vendor's acceptance of payment after purchaser's default was not waiver of right to forfeit, where at time he was unaware of resale by purchaser.

Where land was sold under contract permitting purchaser to resell portion thereof and requiring him to account to vendor therefor, vendor's right to declare forfeiture was not waived by acceptance of payments of interest after purchaser failed to pay for land resold by him, where, at time of acceptance, vendor was unaware that resale contracts had been made.

4. Vendor and purchaser ⚡95(1)—Waiver of right to declare forfeiture for breach may be implied from vendor's act after breach recognizing validity of contract.

Waiver of right to declare forfeiture for breach of condition may be implied from acts of vendor after breach by which continued validity of contract is recognized.

5. Contracts ⚡316(1)—Acts amounting to "waiver" of breach of contract must be done with full knowledge of right to declare forfeiture.

Since "waiver" is an intentional relinquishment of a known right after knowledge of facts, acts alleged to have effect of waiving breach of contract must have been done with full knowledge of right to declare a forfeiture.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Waiver.]

6. Appeal and error ⚡996—Whether acts of vendor constitute waiver of breach of contract is question for trial court unless but one inference can be drawn from evidence.

Whether there has been waiver by vendor of right to declare a forfeiture of a land contract for purchaser's breach of contract is a fact question to be determined by trial court, unless but one inference can reasonably be drawn from evidence.

Appeal from Superior Court, Fresno County; C. E. Beaumont, Judge.

Action by Charles O. Goold, also known as C. O. Goold, against Kishan Singh and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Fenston, Williams & Hansen, of Fresno, for appellants.

Peckinpah & Carter, of Fresno, for respondent.

CASHIN, J. An appeal by defendants from a judgment entered in favor of the plaintiff quieting the title to certain real and personal property.

On March 11, 1920, an agreement for the purchase and sale of the property was entered into between the plaintiff and defendant Kishan Singh. The purchase price was \$11,500, which defendant agreed to pay in installments, with interest, as follows: \$1,000 upon the execution of the agreement, which payment was acknowledged, \$1,500 on or before four years after date, and at least

\$1,500 each year thereafter until one-half of the purchase price had been paid, whereupon the plaintiff agreed to convey the property to the vendee upon the execution by the latter of a note for the balance secured by a mortgage on the real property. The vendee further agreed to improve at least 20 acres of the land annually during the first four years by planting vines and trees thereon and to cultivate and maintain the same in accordance with the best custom and practice in the locality. He was given the privilege of selling or contracting for the sale of any portion of the land; it being agreed that, if the portion sold be unimproved, the price should net the plaintiff at least \$60 per acre, but, if improved, the price should equal the value of the improvements plus the above price for unimproved land, and that all deferred payments under the subcontracts should bear interest, it being further agreed that the purchasers should deal directly with the plaintiff and pay to him the full amounts of the purchase price with interest, and that payments would be applied on the original contract. The agreement contained further provisions respecting the covenants and conditions to be inserted in the subcontracts, and, in addition to a provision that, if the defendant vendee should fail to keep and perform any agreement therein contained, his rights thereunder should terminate and all sums paid be retained by the vendor for the use of the property; it was stipulated that "time is of the very essence of this agreement and every part thereof."

The answers of the defendants alleged an extension by the plaintiff of the time for the payment of an unpaid balance of the second installment of the purchase price to November 1, 1924, that the agreement had been performed according to its terms, and that Pardhan Singh, Baram Singh, and Nama Singh, by contracts with defendant vendee, had each acquired an interest in portions of the real property described in the agreement.

The court found that the premises described had not been improved as provided by the agreement; that none of the subcontracts for the sale of portions of the property were executed in accordance with its provisions; that defendant vendee had failed to account to plaintiff for all moneys received under the subcontracts; that the agreement for an extension of time for the payment of the balance of the second installment of the purchase price was made as alleged, but that the plaintiff had no notice, actual, or constructive, of the execution of the subcontracts mentioned nor of the fact that defendant vendee had failed to account or of his failure to improve the property.

Defendants contend that the findings are unsupported, and, further, that the plaintiff

by the acceptance of certain interest payments waived the right to declare a forfeiture of their rights under the agreement.

The testimony sufficiently shows a failure to plant the land to the extent required by the agreement, and that as to material portions of that planted the care which good farming required was omitted. It also shows that, following the initial payment of \$1,000, the only amount paid on the principal of the purchase price was \$1,350, and, further that defendant vendee received payments aggregating \$2,200 on the subcontracts made by him, and that, with the exception of the above payment of \$1,350, which appears to have been derived from the sums so received, no part of these sums was paid to the plaintiff.

[1, 2] Defendants also attack the findings that the plaintiff at the time the extension was granted had no notice, actual or constructive, of the execution of the subcontracts, or that the vendee had failed to account for the sums received thereunder. The property is situated in Fresno county, while the agreement was executed in Monterey county, where the plaintiff resided. According to his testimony, he knew of the intention of the vendee to enter into subcontracts, and had heard that persons other than the vendee were in possession of the property, but was not aware that subcontracts had been executed or that payments thereunder had been received by the vendee. This testimony, in view of the circumstances, sufficiently supports the finding of a want of actual notice; and the fact, as shown, that the subcontracts were recorded in Fresno county by the vendees named therein, was not constructive notice to the plaintiff of their execution or contents (Civ. Code, § 1213).

[3] The action was commenced on February 20, 1924, and it appears from the testimony that the plaintiff accepted payments of interest after the defendant vendee had failed to perform in the above particulars, the last payment received being in the fall of 1923; and it is contended that the continued validity of the contract was thereby recognized and the right to declare a forfeiture waived.

[4-6] The right to declare a forfeiture for the breach of a condition may be waived; and a waiver may be implied from the acts of the vendor after a breach by which the continued validity of the contract is recognized. *Boone v. Templeman*, 158 Cal. 290, 110 P. 947, 139 Am. St. Rep. 126; *Stevinson v. Joy*, 164 Cal. 279, 128 P. 751; *Hermosa Beach, etc., Co. v. Law Credit Co.*, 175 Cal. 493, 166 P. 22. A waiver, however, being the intentional relinquishment of a known right after knowledge of the facts (*Wienke v. Rich*, 179 Cal. 220, 176 P. 42), the acts alleged to have had that effect must have been done

with full knowledge of the right to declare a forfeiture (*German-American, etc., Bank v. Gollmer*, 155 Cal. 683, 102 P. 932, 24 L. R. A. [N. S.] 1066; *Goodwin v. Grosse*, 56 Cal. App. 615, 206 P. 138), and whether there has been a waiver is a question of fact to be determined by the trial court (*Kerr v. Reed*, 187 Cal. 409, 202 P. 142; *Cal., etc., Hotel Co. v. Callender*, 94 Cal. 120, 126, 29 P. 859, 28 Am. St. Rep. 99), unless but one inference can reasonably be drawn from the evidence (*Lompoc Produce, etc. Co. v. Browne*, 41 Cal. App. 607, 183 P. 166). In the present case, while payments of interest were accepted after the vendee had failed to perform, the testimony of the plaintiff shows that he was not then apprised of the breaches of the contract, and sustains the conclusion of the trial court that the right to declare a forfeiture was not waived.

There was sufficient evidence to support the findings, and, no error being shown, the judgment is affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

88 Cal. App. 349

HERINGER et al. v. SCHUMACHER et al.
(Civ. 3150.)

District Court of Appeal, Third District.
California. Jan. 14, 1928.

1. Venue ⇨41—Court can look behind complaint, to see whether defendant was improperly joined to prevent change of venue (Code Civ. Proc. § 395).

On motion for change of venue, court has right to look behind the complaint, to see if any defendant was improperly joined for the purpose of preventing a change of venue, under Code Civ. Proc. § 395.

2. Principal and agent ⇨136(2)—Acts and contracts of agent in behalf of disclosed principal, within scope of authority, are acts and contracts of principal, and impose no liability on agent to third person, except in tort.

Acts and contracts of agent in behalf of disclosed principal, within scope of his authority, are generally considered as acts and contracts of principal, and involve no personal liability on part of agent to third person, except in tort.

3. Principal and agent ⇨136(1)—Whether agent of disclosed principal binds himself depends on intention, to be gathered from facts and circumstances.

Whether agent of disclosed principal binds himself depends on intention of parties, which must be gathered from facts and circumstances of each particular case.

4. Principal and agent ⇨190(1)—Presumption is that agent of disclosed principal intended to bind principal, and not himself.

It will be presumed that agent of disclosed principal intended to bind his principal, and not to incur personal liability.

5. Principal and agent ⇨136(1)—Agent of disclosed principal will not be held personally liable, except on clear and explicit evidence of intention to be liable.

Ordinarily agent of disclosed principal will not be held personally liable, except on clear and explicit evidence of intention to substitute or superadd his personal liability for or to that of principal.

6. Principal and agent ⇨136(1)—Disclosed intention of agent of disclosed principal determines his personal liability.

It is the disclosed intention of agent of disclosed principal which determines his personal liability, and not intention hidden in his mind.

7. Principal and agent ⇨136(3)—Agent will be held personally liable, where he signs own name only, without referring to principal, though avowedly acting as agent.

Agent will be held personally liable, where he signs his own name only, without referring to any principal on face of instrument, although he is known to be or avowedly acts as agent.

8. Principal and agent ⇨136(2)—Contract signed, "For Account of M., Buyer, by S., Agent," held not binding on S.

Contract reciting that A. C. S. bought beans "for account of R. J. M.," and signed, "For Account of R. J. M., Buyer, by A. C. S., Agent, as Authorized," held contract of R. J. M. only, and not binding on A. C. S.

9. Evidence ⇨418—Parol evidence held inadmissible to show that contract, signed, "For Account of M., Buyer, by S., Agent," was binding on undisclosed principal, or on one whose liability was uncertain, there being no ambiguity.

Parol evidence held inadmissible to show that contract, reciting that A. C. S. bought beans for "account of R. J. M.," and signed, "For Account of R. J. M., Buyer, by A. C. S., Agent, as Authorized," was binding on an undisclosed principal, or one whose liability was left uncertain, there being no ambiguity.

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

Action on contract for purchase of beans, brought by S. F. Heringer and another against A. C. Schumacher and others. From an order granting a motion for a change of venue, plaintiffs appeal. Affirmed.

Thomas B. Leeper, of Sacramento, for appellants.

Hadsell, Sweet & Ingalls, of San Francisco, and Downey, Downey & Seymour, of Sacramento, for respondents.

PLUMMER, J. This cause is before us upon an appeal by the plaintiffs from an order transferring the place of trial from the county of Sacramento to the city and county of San Francisco. The complaint alleges that the defendants agreed to purchase a certain quantity of beans from the plaintiffs. The title of the action purports to sue the defendants, not only

as individuals, but as doing business under the firm name of Richard J. Murphy. The complaint, however, contains no allegation of the defendants conducting business under that name. The affidavits upon which the place of trial was ordered transferred from the county of Sacramento to the city and county of San Francisco show that the defendant Schumacher was at all times a resident of the county of Sacramento, and that the defendant Murphy was at all times a resident of the city and county of San Francisco. The complaint simply alleges that the defendants agreed to purchase a certain quantity of beans. The affidavits submitted to the trial court upon the motion of the defendants set forth the contract relative to the purchase of the beans in question, which contract is in the words and figures following, to wit:

"Recleaned Bean Contract.

"Seller (Executed in triplicate) No. ———.

"Clarksburg, Cal., May 29, 1925.

"In consideration of the price herein specified, it is hereby acknowledged by the seller, Heringer Brothers, that he has this day sold, and that A. C. Schumacher has this day bought for account of Richard J. Murphy, San Francisco, Cal., the beans described as follows:

"Per 100 lbs. net weight
"2400 sacks each, of 100 lbs. net, choice recleaned pink beans at \$6.00.

"The first beans threshed on the ranch.

"Same to be delivered on or before the ——— day of ———, 1925, in new regulation bean bags of even weight. Weight and beans to be in accordance with standards set by California Bean Dealers' Association of California for the current season. Weight to be guaranteed by seller at time of shipment. Delivery to be made f. o. b. Sacramento, Cal.

"[Signed] Heringer Bros.,

"By S. F. Heringer, Seller.

"For Account of Richard J. Murphy, Buyer, by A. C. Schumacher, Agent as Authorized."

[1] The affidavits submitted on the motion for change of place of trial contained all the preliminary matters required to be set forth in such affidavits, and then further state that the defendant A. C. Schumacher was improperly joined as a defendant, and was made a defendant solely for the purpose of having the action tried in the county of Sacramento, where said Schumacher was a resident, which fact, if determined in favor of the moving parties, as provided for in section 395, Code of Civil Procedure, would entitle the defendant Richard J. Murphy to the order appealed from in this action. While the complaint upon its face apparently states a good cause of action, as against both the defendants as individuals, the law is well settled that, upon a motion to change the place of trial, where the question as to whether a defendant has been joined improperly for the purpose of having the cause tried in a particular county, the court has a right to look behind the com-

plaint, and see if any defendant has been improperly joined for the purpose of retaining the action in the county where the suit is begun. *Karst v. Seller*, 45 Cal. App. 623, 188 P. 298; *Sourbis v. Rhoads*, 50 Cal. App. 98, 194 P. 521; *Lachman v. Berry Growers' Ass'n*, 58 Cal. App. 748, 209 P. 379; *McDonald v. California Timber Co.*, 151 Cal. 159, 90 P. 548.

[2-6] Only one question is really before us for consideration, and that is whether the contract which is in truth and in fact the basis of this action is the contract of Richard J. Murphy or the contract of Richard J. Murphy and A. C. Schumacher. This involves an interpretation of the contract. It will first be observed that the principal, Richard J. Murphy, is disclosed by the person who purports to act as his agent. The only portion of the contract which gives any possible color to the argument that it is the contract of Schumacher, as well as of Murphy, is contained in these words: "And that A. C. Schumacher has this day bought for account of Richard J. Murphy, San Francisco, California." The contract is signed by Richard J. Murphy as buyer, and designates Murphy as the buyer, signed, however, by Schumacher as his agent. In 2 C. J. p. 812, § 486, we find the following:

"Where an agent acts in behalf of a disclosed principal, his acts and contracts, within the scope of his authority, are generally considered as the acts and contracts of the principal, and in the absence of an agreement otherwise, involve no personal liability, on the part of the agent, to a third person, except in an action for tort."

And further, in section 487 of the same work:

"Whether the agent of a disclosed principal binds himself depends upon the intention of the parties, which must be gathered from the facts and circumstances of each particular case. The presumption in such cases is that it was the agent's intention to bind his principal and not to incur a personal liability; and ordinarily the agent will not be personally bound except upon clear and explicit evidence of an intention to substitute or superadd his personal liability for or to that of the principal. * * * But it is the disclosed intention which governs, not any intention hidden in the mind of the agent, and accordingly the agent may render himself personally liable, although this is contrary to his actual intention if he has in fact bound himself according to the terms of the contract," etc.

While the descriptive words in the beginning of the contract referred to the defendant Schumacher as having bought for account of defendant Murphy, the contract in question is not so signed as to import that Schumacher intended to bind himself as a copurchaser with Murphy. No one but Murphy signs the contract as buyer, and, if Murphy is not bound by the contract as buyer, it would seem that there is no signature to the contract binding any one as purchaser of the beans.

The descriptive words which we have referred to in the contract show that the beans were intended for the defendant Murphy, were bought for his account, and this is followed up by the signature of the defendant Murphy to the contract as buyer. In 1 C. J. p. 823, § 106, appears a statement of the rules of law pertaining to this case:

"To exclude the personal liability of the agent, it is not always necessary that the name of the principal shall be signed, with the statement following 'by [the agent],' although this is no doubt the best form. It is sufficient if an intention to bind the principal, however informally expressed, appears upon the face of the instrument. While mere words descriptive personæ do not relieve the signer from liability, it seems that the addition of such words is significant in connection with other facts. Thus, a note stating that it was executed 'for and on behalf of' a mining company binds the company, although signed by an individual, 'Superintendent of Company'; a bill of exchange, headed with the name of the principal and to be charged to that office, binds the principal only, although signed by the agent in his own name, as agent, and a note signed by one individual, 'Pres't. Pac. Peat Coal Co.,' and by another individual, 'Sec. pro tem.,' binds the company. Obviously a note signed first in the name of a company and then by the name of an individual, 'Agent,' binds the company only."

The text from which we have quoted appears to be amply supported by the authorities cited.

[7] In the case of *Hobson v. Hassett*, 76 Cal. 203, 18 P. 320, 9 Am. St. Rep. 193, where a similar question was being considered, the court quotes from Story on Promissory Notes as follows:

"When, upon the face of the instrument, the agent signs his own name only, without referring to any principal, then he will be held personally bound, although he is known to be or avowedly acts as agent." * * * But if it can, upon the whole instrument, be collected that the true object and intent of it are to bind the principal, and not to bind the agent, courts of justice will adopt that construction of it, however informally it may be expressed."

And it further quotes from Parsons on Notes:

"And 'one who puts his name on negotiable paper will be liable personally, as we have seen, although he acts as agent, unless he says so, and says also who his principal is; that is, unless he uses some expression equivalent, to use Lord Ellenborough's language, to 'I am the mere scribe.'"

[8] In the contract under consideration, the person for whose account the beans are purchased is stated in unequivocal language, or, to express it in a different form, the principal for which the agent is acting is immediately stated, before any of the particulars relating to the merchandise to be bought or the price therefor is stated, and immediately following the terms and conditions of the con-

tract the name of the buyer is signed as the one executing the contract. In support of what we have stated, we may further cite *Hall v. Crandall*, 29 Cal. 568, 89 Am. Dec. 64; *Williams v. Harris*, 198 Ill. 501, 64 N. E. 988.

[9] Further citation of authorities seems to us unnecessary. Nor do we think it necessary to take up and consider cases which hold that parol testimony may be introduced to fix liability upon an undisclosed principal, as the wording of the contract with which we have to do in this case shows who the party to be charged is, and he is the buyer of the beans. Such being the case it is also unnecessary to take up, consider and distinguish cases where the wording of the contract leaves it uncertain as to who the party is who is to be charged.

It satisfactorily appearing to us from the record in this case that the place of trial of this action was properly transferred from the county of Sacramento to the city and county of San Francisco, the order of the trial court is affirmed.

We concur: FINCH, P. J.; HART, J.

88 Cal. App. 399

JOHNSON v. WEHNER. (Civ. 6004.)

District Court of Appeal, First District, Division 1, California. Jan. 19, 1928.

1. Municipal corporations ⇨706(5)—Evidence held to sustain finding that driver of automobile colliding with truck at intersection was not contributorily negligent by reason of speed (Vehicle Act, § 113, subd. [b], par. 2).

Evidence held sufficient to sustain finding of trial court that automobile driver was not guilty of contributory negligence as against contention that he was driving at unlawful speed, under Vehicle Act, § 113, subd. (b), par. 2 (St. 1923, p. 553), where his automobile struck a truck crossing in front of him on an intersecting street.

2. Appeal and error ⇨1011(1)—Conflicting evidence will sustain trial court's finding as to contributory negligence.

Where evidence is conflicting on issue of contributory negligence, it is sufficient to sustain finding of trial court in that regard.

3. Witnesses ⇨389—Admitting testimony to show truck driver's statement respecting collision, which he denied on cross-examination, held not error.

Admission of testimony to show statement of truck driver to another truck driver respecting collision in suit held not error, where truck driver denied, on cross-examination, that he had conversation with such other truck driver on the day in question, or that he ever made such statement to him.

Appeal from Superior Court, Santa Clara County; J. R. Welch, Judge.

Action for personal injuries by William H. Johnson against F. E. Wehner. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Louis V. Crowley, of San Francisco, for appellant.

John W. Sullivan and C. C. Cottrell, both of San Jose, for respondent.

KNIGHT, J. As the result of a collision between plaintiff's automobile and defendant's truck which was being driven by one Louis Lunford, plaintiff suffered a compound comminuted fracture of the left lower leg, and this action was commenced to recover damages therefor, plaintiff alleging that the proximate cause of the accident was the negligent operation of said truck. Defendant denied the allegations of negligence and charged plaintiff with contributory negligence. The action was tried without a jury, and the trial court found in plaintiff's favor on both contested issues, and thereupon entered judgment accordingly against defendant for the sum of \$4,633, from which judgment defendant appeals.

[1] Defendant makes no contention that the evidence is insufficient to sustain the finding as to the negligent operation of the truck, but as grounds for reversal urges that the negative finding upon the issue of contributory negligence is unsupported by and contrary to the evidence.

The accident happened at the intersection of Willow and Orchard streets, in the city of San Jose, shortly after 10 o'clock in the morning. Plaintiff was driving easterly along Willow street, and the truck was being driven northerly along Orchard street. Plaintiff testified that when his machine passed the westerly line of Orchard street and he "was approximately in the middle of the street," he observed the truck, which was then about 15 or 20 feet from the corner, traveling between 22 and 25 miles an hour, and that the driver thereof was not observing the traffic on the highway, but seemed to be looking down at his steering wheel. Seeing that if he continued to travel at the rate of speed he was then maintaining the truck would strike him "squarely in the middle," plaintiff immediately applied his brakes, but after doing so, saw that the truck driver was coming ahead without diminishing his speed or diverting his course, and, consequently, in order to avoid being struck, plaintiff first attempted to "parallel" the truck, but instantly realized that by such maneuver the force of the truck would overturn him, so he diverted his course slightly to the south in an effort to pass behind the truck, with the result that the right front wheel of his automobile collided with the left rear wheel of the truck, practically demolishing the

front end of his machine, and inflicting upon him the injury above mentioned.

Subdivision 2 (b) of section 113 of the state Vehicle Act (St. 1923, p. 553) declares that it shall be lawful to drive a vehicle at a speed not exceeding 15 miles an hour in traversing an intersection of highways when the driver's view is obstructed; and that a driver's view shall be deemed obstructed when at any time during the last 100 feet of his approach to such intersection he does not have a clear and uninterrupted view of such intersection and of the traffic upon all of the highways entering such intersection for a distance of 200 feet from such intersection. Defendant contends that the evidence proves that plaintiff proximately contributed to the collision by violating the foregoing provision of the law. This contention is based mainly upon certain asserted contradictions contained in a typed statement, prepared by an insurance adjuster and signed by plaintiff either on the day of the accident or the day following; also upon the testimony given by the truck driver, the physical facts which defendant claims existed at the time and place of the collision, and certain mathematical demonstrations founded upon defendant's conception of the evidence. On the other hand, however, we are confronted with the positive testimony of plaintiff to the effect that he was not exceeding the statutory speed limit at the time of the accident. With reference thereto he testified that upon reaching a point about 100 feet from the intersection he reduced his speed from 24 to approximately 18 miles an hour, and that when he was 50 feet from the corner he again slowed down so that upon entering the intersection and while traversing the same he was traveling between 13 and 15 miles an hour. The trial court evidently accepted plaintiff's testimony as being true; and on this appeal defendant has failed to demonstrate wherein plaintiff's testimony is inherently improbable, or so wanting in probative force as to warrant this court in declaring as a proposition of law that it is legally insufficient to support the trial court's finding.

[2] It will be seen therefore, that the evidence relied upon by defendant as establishing contributory negligence does no more

than raise a conflict, and in that state of the record the trial court's finding upon such issue is controlling on appeal, it having been repeatedly held that the question of contributory negligence becomes a question of law only where the facts are undisputed, and even then only where on the facts reasonable minds can draw but one conclusion with reference thereto. *Loftus v. Pacific Electric R. Co.*, 166 Cal. 464, 137 P. 34; *Seller v. Market Street R. Co.*, 139 Cal. 268, 72 P. 1006; *Noce v. United Railroads*, 64 Cal. App. 658, 222 P. 642; *Towne v. Godeau*, 70 Cal. App. 148, 232 P. 1010.

The circumstance of plaintiff's automobile running into the truck is readily accounted for by the fact that when the two machines drew near to each other, the truck driver increased his speed in an attempt to pass in front of plaintiff. With reference thereto, the truck driver testified in substance that he saw plaintiff as plaintiff "went for his brakes and wheel"; that he did not stop the truck, although admittedly he could have done so, but went right on his way, as he expressed it, until plaintiff "was on top" of him, and then he stepped on the accelerator to increase his speed.

[3] The automobile driven by plaintiff was a "Studebaker," and over defendant's objection the trial court allowed plaintiff to prove in rebuttal a statement claimed to have been made the day of the accident by Lunford, the driver of defendant's truck, to one Johnson, another truck driver, which was substantially as follows:

"Yes; when you hit a damned Studebaker, hit it hard. * * * I didn't see him, and when I did I stepped on her to get across."

We think the ruling admitting the statement was not erroneous, for the reason that the record shows that on cross-examination Lunford, after having his attention called to the substance of the statement and the time and place and to whom it was made, positively denied having had a conversation with the witness Johnson on that day, or that he ever made such statement.

The appeal in our opinion is without merit, and the judgment is therefore affirmed.

We concur: TYLER, P. J.; CASHIN, J.

88 Cal. App. 383

(263 P.)

CITY INV. CO. v. RACIK et al. (Civ. 5994.)

District Court of Appeal, First District, Division 2, California. Jan. 18, 1928.

Municipal corporations Ⓒ697(4)—Evidence supported findings that portable news stand in front of plaintiff's property constituted public nuisance and that plaintiff suffered special damage.

In suit for injunction, evidence held to support findings that portable news stand in front of plaintiff's property constituted public nuisance, and that plaintiff suffered damage thereby different in kind and degree from that suffered by general public, and that damage was incapable of pecuniary estimation and irreparable.

Appeal from Superior Court, City and County of San Francisco; Walter Perry Johnson, Judge.

Action by the City Investment Company against John Racik and another to enjoin the maintenance of a portable news stand. From a judgment for plaintiff, defendants appeal. Affirmed.

William A. Kelly, of San Francisco, for appellants.

Sylvester J. McAtee, of San Francisco, for respondent.

KOFORD, P. J. The judgment appealed from gave plaintiff a permanent injunction enjoining defendants from maintaining a portable news stand in front of the plaintiff's property on the west side of Third street, just south of Market street, in San Francisco. The news stand consisted basally of a 4-wheeled wagon, 4 feet wide, 10 feet long, and 6½ feet high. Daily from 9 a. m. to 9 p. m. it remained parked with two wheels in the street and two upon the sidewalk. From the photographs it appears as if one side of the wagon unfolded out over the sidewalk, forming a supplemental platform or shelf which rested on boxes placed on the sidewalk. This extension was covered on top with an awning. The three sides of the extension and the three sides of the wagon proper were walled in with racks which were filled with magazines and newspapers set up for display and sale.

Based upon appropriate pleadings, the court made findings to the effect that the news stand constituted a public nuisance, and that plaintiff had suffered damage thereby different in kind and degree from that suffered by the general public, and that such damage was incapable of pecuniary estimation and irreparable.

Respondent has carefully cited law and precedents for each legal principle involved in such an action and points out that this case is substantially the same as *Strong v. Sullivan*, 180 Cal. 331, 181 P. 59, 4 A. L. R.

343, but it is unnecessary to consider these legal principles because appellant makes one and only one point on this appeal. Appellant merely contends that there is no evidence to support the court's findings. This argument is based upon a consideration of the oral testimony on the point of what extent and in what manner the news stand obstructed the full use of the street and interfered with the plaintiff's right of ingress and egress and with its right of light, air, and view in the enjoyment of its property. This oral testimony, however, does not fail to show substantial injury to plaintiff's rights. More important and most convincing, however, are the visible and physical facts of the case, which are scarcely in dispute. Three photographic views of the news stand as set up in operation were received in evidence and are a part of this record on appeal. These alone eloquently and fully support the court's findings complained of by appellant.

The judgment is therefore affirmed.

We concur: STURTEVANT, J.; NOURSE, J.

88 Cal. App. 464

Ex parte SMITH. (Cr. 1435.)

District Court of Appeal, First District, Division 1, California. Jan. 20, 1928.

1. Municipal corporations Ⓒ631(2) — Ordinance requirement that roofing be sheathed tight was satisfied by laying composition shingles on old shingles nailed to boards with open spaces; "sheathing."

Requirement of initiative ordinance of city of Berkeley, restoring right to use wooden shingles for roofing and requiring that roof of buildings should be "sheathed tight" before roofing materials were laid thereon, was satisfied by laying composition shingles on old shingles of a roof nailed to inch boards with open spaces; "sheathing" as used in ordinance meaning a covering of any material.

2. Statutes Ⓒ191, 192—Common words are extended to objects they describe or denote, and technical terms are given their technical meaning unless it frustrates intention.

In construing a statute, common words are to be extended to all objects which in their usual acceptation they describe or denote, and technical terms are to be allowed their technical meaning and effect unless in either case context indicates that such construction would frustrate intention of lawmaking power.

3. Municipal corporations Ⓒ120—Statutes Ⓒ192—Technical words relating to trade used in statute or ordinance dealing therewith are taken in technical sense, unless contrary intent is shown.

Technical words, when relating to trade, when used in a statute or ordinance dealing with subject-matter of such trade, are to be taken in their technical sense, and will be so construed unless context or other considerations show contrary intent.

Original application for a writ of habeas corpus by Lew Smith to secure petitioner's release from custody. Writ granted.

Frank V. Cornish, of Berkeley, for petitioner.

Earl J. Sinclair, City Atty., of Berkeley, and James M. Koford, of Oakland, for respondent.

TYLER, P. J. Habeas corpus. Petitioner was convicted of violating an ordinance of the city of Berkeley which regulates the laying of shingles on the roofs of buildings. The facts of the case, as agreed upon by stipulation, may be briefly summarized as follows: An ordinance was adopted by the city council of Berkeley immediately after the conflagration in that city in September 17, 1923, known as Ordinance 927, N. S., which prohibited the use of wooden shingles on buildings. On May 6, 1924, the people of such city, upon an initiative petition, adopted Ordinance 995, N. S., which restored the right to use wooden shingles for roofing. This ordinance may not be amended or repealed except by a vote of the people. That portion of the last-mentioned ordinance which is necessary for a discussion of the proceeding reads as follows:

"Sec. 9. All metal flashings used in roof construction shall be properly incorporated with the roofing materials in a workmanlike manner. The supporting members and portion of roofs shall be constructed in accordance with the structural requirements and kinds of materials prescribed by the Building Code of the city of Berkeley for the respective classes of such buildings. The roofs of all buildings shall be sheathed tight before the roofs are laid thereon except that the building inspector may permit open sheathing to be laid not to exceed five inches (5") on centers to receive sixteen-inch (16") wooden shingles, five and one-half inches (5½") on centers to receive eighteen-inch (18") wooden shingles and seven and one-half inches (7½") on centers to receive twenty-four-inch (24") wooden shingles.

"Sec. 10. Whenever any roof or the covering thereon of any building heretofore created in the judgment of the building inspector is or becomes damaged by the elements of fire or otherwise, to the extent of fifty per centum (50%) of the area of the said roof or covering then the said roof or covering shall be reconstructed or replaced with materials of the kinds and in the manner prescribed by this ordinance for the construction and covering of roofs on buildings hereafter erected. Any roof on any addition or enlargement hereafter made to a building shall conform to the provision of this ordinance for buildings hereafter erected.

"Sec. 11. It shall be unlawful for any person, firm or corporation to violate any of the provisions of this ordinance or to cause, permit or suffer to be violated any of the provisions of this ordinance. Any person, firm or corporation violating any of the provisions of this ordinance shall be deemed guilty of a misdemeanor and upon conviction thereof shall be punishable by a fine of not more than five hundred (500) dollars or by imprisonment for not more than three

(3) months or by both such fine and imprisonment. Every day during which any violation of this ordinance continues shall be deemed a separate offense and shall be punishable as hereinbefore provided."

Prior to June 1, 1927, petitioner applied to the building inspector for a permit to lay prepared composition roofing on top of the wooden shingles of a frame building which had been erected some twenty years previously, and the permit was refused. Petitioner was, however, granted a permit to repair 50 per cent. of the roof. He proceeded to and did lay the prepared composition roofing over the entire surface of the roof. The material was laid on top of the old wooden shingles, which had been nailed to inch boards six inches in width, with open spaces between them. The composition roofing so laid complied with the requirements of the ordinance in every respect as to quality. Upon the completion of the work, a complaint was sworn to by the deputy building inspector. Petitioner was arrested, tried, and found guilty of a violation of the ordinance and sentenced to imprisonment in the county jail for a period of fourteen days. This application followed. It is petitioner's claim that he has not violated the ordinance, as its manifest object is to insure a solid base for shingles laid upon roofs of buildings so that such roofs may be safe to walk upon in the event of a fire, and the shingles as so laid by him insure this protection; that this intent is recognized by the building inspector who issues permits to all applicants to lay rigid composition roofing known as Johns Manville asbestos shingles or rigid imitation slate shingles over old shingles without requiring the open spaces between the inch boards on which the old shingles were originally laid to be filled or closed up, but refuses such permits to applicants requesting the privilege of laying the kind of prepared nonrigid composition roofing used by petitioner known as Pabco roofing, which roofing last named, as above mentioned, meets all the requirements of the ordinance as to quality. It is drawn to our attention that the fire hazard is less on buildings repaired in the manner petitioner has performed the work, as is evidenced by the fire insurance rates for frame buildings repaired with prepared composition roofing laid directly on old wooden shingles nailed on inch boards with open spaces between them, the rates under such conditions being 6 per cent. per \$1,000 valuation for three years, whereas the rate is 7 per cent. on all frame buildings with wooden shingle roofs which the ordinance permits, whether old or new. It is stipulated that the cost of removing the shingles results in an increased cost of 50 per cent., in consequence of which a large percentage of the inhabitants of the city are affected in making necessary repairs. Under the facts, petitioner contends that the roof

laid by him and for which act he was convicted is as good and fireproof as a roof of prepared composition roofing nailed directly to inch boards "sheathed tight" without old shingles under it, and that the laying of such roofs over old shingles is a laying on a surface "sheathed tight" within the meaning of the ordinance, and this is the universal practice in all other locations where composition shingles are used.

[1-3] We are of the opinion that counsel for petitioner is correct in his contention, and that the requirements of section 9 of the ordinance that roofing be "sheathed tight" is satisfied by the laying of the composition shingles on the old shingles nailed to inch boards with open spaces. It is a familiar rule of statutory construction that common words are to be extended to all the objects which, in their usual acceptation they describe or denote, and that technical terms are to be allowed their technical meaning and effect, unless in either case the context indicates that such construction would frustrate the real intention of the lawmaking power. Technical words when relating to a trade, when used in a statute or ordinance, dealing with the subject-matter of such trade, are to be taken in their technical sense, and will be so construed unless the context or other considerations show a contrary intent. The word "sheathing," so far as our investigation has led us, has never been defined by the courts, nor have we been able to find any dictionary on architects and buildings that limits the use of the word exclusively to the plates or boards covering the rafters upon which shingles are nailed. Lexicographers define the term as being a covering, and such covering is not confined to lumber alone, but may include any waterproof material. Among the various definitions we find the following:

"The first covering of boards, or of waterproof material on the outside wall of a frame house or on a timber roof; also the material so used." Webster's Dictionary.

"That which sheathes or covers, or protects, or may be used for that purpose." Century Dictionary.

"Sheathing—in carpentry, a covering or lining to conceal a rough surface, or to cover a timber frame. In general, any material, such as tin, copper, slate, tiles, etc., prepared for application to a structure, as covering." When made with asbestos or "with magnese-calcite, it is used for fireproofing." Sturgis, Dictionary of Architecture and Building.

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Under the heading of Sheathing, Roget's International Thesaurus of English Words and Phrases, sheathing is referred to as a covering, and when applied to a roof is said to include thatch, tile, or shingles. Under these definitions it seems plain to us that the word "sheathing," both in its general and technical sense, means a mere covering of any material, and that consequently the shingles on a wooden roof are as much "sheathing" as the boards which support them. They are a covering within the meaning of that term. That the boards or plates supporting shingles are "sheathing" to the extent that they in part cover a roof there can be no question, but by the same token so are shingles, for they too constitute a covering. It would have been an easy matter for those responsible for the existence of the ordinance to have defined the character of sheathing that they intended, as is usual when the term is used in building contracts, but they did not see fit to do so, for the ordinance is silent upon the subject. It follows from what we have said that the nonrigid shingles which petitioner placed upon his roof were placed upon a surface or roof that was covered or "sheathed tight" within the meaning of that term as defined by all authorities upon the subject. To hold otherwise would be to give the term employed an interpretation not sanctioned by any authority, at least not any that has come to our attention, and one that would be at variance with both its common and technical acceptance. In so far as the object of the ordinance may be considered as a protection against the fire hazard, such hazard is as much reduced by the manner of the repairs here made as it would be with the shingles removed and the open spaces filled up, and certainly more so than if wooden shingles had been installed on open spaces, which, in particular cases, the ordinance permits. The construction contended for by respondent would impose a useless expense upon the property owners and one no doubt not contemplated by them in the adoption of the measure they initiated. This conclusion renders unnecessary a discussion and determination of the constitutionality of the ordinance as being a valid exercise of the police power.

The writ is granted, and the petitioner discharged.

We concur: KNIGHT, J.; CASHIN, J.

88 Cal. App. 393

WURDEMAN v. WALLER et al. (Civ. 3375.)

District Court of Appeal, Third District, California. Jan. 18, 1928.

1. Appeal and error $\S$ 1011(1)—Court's findings in creditor's suit to enforce performance of promise by buyer of business to pay seller's obligations held binding on appeal, evidence being conflicting.

In an action by one who had lent money to another to aid him in business, against the buyer of such business, to enforce the buyers' promise to pay the obligations of the seller, the findings of the trial court were conclusive on the reviewing court, where the evidence was conflicting.

2. Appeal and error $\S$ 931(1)—All reasonable inferences are indulged in support of findings.

On appeal, all reasonable inferences are indulged in support of findings.

3. Evidence $\S$ 385—Legal effect of written instrument cannot be varied or defeated by parol.

The legal effect of a written instrument cannot be varied or defeated in whole or in part by parol evidence.

4. Appeal and error $\S$ 1052(5)—Error in admitting parol evidence to vary bill of sale to show seller retained interest held harmless, where entire interest was transferred.

Error in admitting parol evidence to vary a bill of sale of a business, by attempting to show that the seller retained an interest in the business, held harmless, where the trial court's finding showed that the entire interest had been transferred to buyers.

5. Evidence $\S$ 432—True consideration or want thereof may always be shown by extrinsic evidence for purpose of impeaching contract, though valuable consideration be stated therein (Code Civ. Proc. $\S$ 1962, subd. 2; Civ. Code, $\S\S$ 1614, 1615).

The true consideration or the want of consideration may, because of Code Civ. Proc. $\S$ 1962, subd. 2, and Civ. Code, $\S\S$ 1614, 1615, always be shown by extrinsic evidence for the purpose of impeaching a contract, notwithstanding that the contract states facts to show a valuable consideration.

6. Evidence $\S$ 419(7)—That consideration for bill of sale was defendants' (buyers') promise to pay money due plaintiff held admissible, though not stated in bill.

Where plaintiff sued the buyers of a business to collect the amount of money lent the seller, prior to sale, suit being on the ground of the buyers having agreed to assume the obligations of the seller, evidence that part of the consideration for the bill of sale was defendants' promise to pay the note to plaintiff held admissible, though such fact was not expressly stated in the bill of sale.

7. Frauds, statute of $\S$ 18(3)—Buyers' contract to pay seller's debts on buying business held not within statute of frauds, being an original obligation (Civ. Code, $\S$ 2794).

The promise of the buyer of a business to assume and pay, as part consideration for the

transfer, the obligations of the seller, held not within the statute of frauds, being such original obligation as described in Civ. Code, $\S$ 2794, which is not required to be in writing.

8. Evidence $\S$ 222(6)—In suit by third person to enforce buyers' promise to pay seller's debts on buying business, evidence of promise to pay, made subsequent to sale, held admissible as admission of liability.

In suit by a creditor of the seller of a business to enforce the buyers' promise, made in the sale, to pay the seller's obligations as a part of the consideration, evidence of buyers' promise to pay, made subsequent to the sale, held admissible as being an admission of liability on the part of the buyers, even though the action itself could not be based on promises made at such time.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by R. F. S. Wurdeman against Reba A. Waller and another, individually and as copartners doing business under the fictitious name and style of the Coast Electric & Machinery Company. Judgment for plaintiff, and defendants appeal. Affirmed.

Rush M. Blodgett, of Los Angeles, and W. W. Rennie, of Venice, for appellants.

William F. Adams, of Los Angeles, for respondent.

PRESTON, Justice pro tem. This is an appeal by the defendants, Reba A. Waller and W. J. Starr, from a judgment entered against them in the sum of \$1,528.89. The facts are briefly these:

Converse Wurdeman, the son of plaintiff, was engaged in the electrical business in Venice, Cal., under the fictitious name of "Coast Electric & Machinery Company." On May 18, 1922, Converse Wurdeman executed and delivered to the Electric Corporation, a corporation of Los Angeles county, a promissory note in the sum of \$2,000, payable in installments of \$200 per month. The plaintiff Mrs. R. F. S. Wurdeman signed this note as joint maker, without receiving any consideration therefor, for the purpose of enabling her son to obtain credit from the Electric Corporation. Converse Wurdeman was heavily in debt at the time this note was signed, and his financial condition continued to get worse, instead of better, until on or about June 13, 1922, it became apparent to him that he could conduct his business no longer. The defendants were in his employ and had considerable wages due them. A conference was held between Converse Wurdeman and the defendants, wherein it was agreed that Converse Wurdeman should transfer the entire business to the defendants, and they would assume and pay certain indebtedness of Converse Wurdeman. Pursuant to this arrangement, and on June 13, 1922, Converse Wurdeman made, executed, and delivered to defend-

ants a bill of sale for the entire business, including all of the stock of merchandise, consisting of electrical supplies and fixtures of every kind and description, also all the bills receivable, and all interest in any uncompleted contracts, together with the good will of the business, etc.; said bill of sale reciting a consideration of \$10. The defendants went into possession of the business when the bill of sale was delivered on June 13, 1922, and have conducted the business ever since.

The disputed question of fact in the case was whether this particular note of \$2,000 to the Electric Corporation was included in the indebtedness that the defendants were to assume and pay. Converse Wurdeman testified that, as part of the consideration for the transfer, the defendants agreed to assume and pay the note of \$2,000 to the Electric Corporation, and that defendants actually did pay \$200 on account of said note on July 7, 1922, and a further sum of \$35 on October 19, 1922. Converse Wurdeman further testified that, as part of the consideration for the transfer to defendants, he was to be employed by them at a salary of \$35 per week, and that he did actually work for defendants from June 13, 1922, until October 5, 1922. The defendants, and one or two witnesses, on the other hand, testified positively that this note was not included within the accounts they agreed to assume and pay, and that they had made no payments thereon. Plaintiff testified that she was present at a conference in October, 1922, and heard defendants agree to assume and pay the \$2,000 note in question. Mr. Riley, the secretary of the Electric Corporation, testified that he was also present at a conference in October, 1922, between Converse Wurdeman, Mrs. Wurdeman, and defendants, and heard defendants agree to assume and pay said note.

The trial court accepted the statements of the plaintiff and her witnesses, and found that the defendants did assume and agree to pay the \$2,000 note to the Electric Corporation, and that they had, since making said agreement, actually made two payments thereon, but had refused to pay the balance. In default of payment by defendants, the Electric Corporation demanded payment from plaintiff, and on July 7, 1923, plaintiff paid to the Electric Corporation, in full settlement of said note, the sum of \$1,408.50, and said note was assigned to her. Thereafter, and on the 17th day of September, 1923, this action was commenced, and judgment was rendered in favor of plaintiff.

[1, 2] Many contentions are made for a reversal of the judgment. It is strenuously contended by appellants that the findings are not supported by the evidence. As we have already seen, the evidence upon the material issue—that is, whether defendants agreed to assume and pay the note in question—is decidedly conflicting. The law is, of course,

well settled that the findings of the trial court upon conflicting evidence are conclusive on appeal, and all reasonable inferences are to be indulged in support of the findings. *Wilbur v. Wilbur*, 197 Cal. 7, 239 P. 332; *Treadwell v. Nickel*, 194 Cal. 243, 228 P. 25; *Gjurich v. Fieg*, 164 Cal. 429, 129 P. 464, Ann. Cas. 1916B, 111. The court's finding, therefore, that the defendants did assume and agree to pay the \$2,000 note to the Electric Corporation, being supported by substantial evidence, is conclusive on appeal.

The appellants next contend that the court erred in permitting Converse Wurdeman, the vendor, to testify that he retained an interest in the things granted by the bill of sale. The testimony complained of, which was admitted over the objection of defendants, is set forth in the bill of exceptions as follows:

"Mr. Wurdeman: Mr. Green (representing defendants) said I should sign this bill of sale, and that Mr. Starr and Mrs. Waller would carry the business on from that date; that I was to remain as manager of the company, with no change in the company; that I would receive from that date one-third of the profits; that if, during the next 60 days, I would absolve them from any liability of theirs satisfactorily that I could take over the entire ownership again; if not, that I would at all times be one-third owner in the profits; that Mrs. Waller and Mr. Starr would run it under my management. * * *

"Q. (by the Court): Then the conversation resulted, amongst other things, that you said you were still to retain an interest in the business? A. Yes, sir. * * *

[3, 4] Appellants contend that this would be varying the terms of the written bill of sale by parol evidence. This contention is undoubtedly true. The legal effect of a written instrument cannot be varied or defeated in whole or in part by parol evidence. *Arnold v. Arnold*, 137 Cal. 291, 70 P. 23; *Hendrick v. Crowley*, 31 Cal. 472; *Burkett v. Doty*, 32 Cal. App. 337, 162 P. 1042; *Feeney v. Howard*, 79 Cal. 525, 21 P. 984, 4 L. R. A. 826, 12 Am. St. Rep. 162; *Winchester v. Winchester*, 175 Cal. 391, 165 P. 965. The answer, however, expressly admits that the business was transferred in June, 1922, by Converse Wurdeman to defendants, and admits that the transfer included all the assets of the business, and that defendants took possession of the entire business upon the consummation of the sale, and have conducted the business ever since. Moreover, the court found that the entire interest in the business was transferred by Converse Wurdeman to the defendants by the bill of sale; therefore the erroneous admission of this evidence was not prejudicial to the rights of defendants.

[5] Appellants also contend that the court erred in admitting oral testimony as to the consideration for the bill of sale. There is no merit in this contention. The rule is well established that the plaintiff was not estopped by the recitals in the bill of sale with

respect to its consideration. The true consideration, or the want of consideration, may always be shown by extrinsic evidence for the purpose of impeaching a contract, notwithstanding that it states facts to show a valuable consideration. Section 1962, subd. 2, Code Civ. Proc.; sections 1614 and 1615, Civ. Code; *Field v. Austin*, 131 Cal. 379, 63 P. 692; *Shepard v. Hunt*, 43 Cal. App. 630, 185 P. 677; *Chaffee v. Browne*, 109 Cal. 220, 41 P. 1028; *National Hardware Co. v. Sherwood*, 165 Cal. 7, 130 P. 881; *Royer v. Kelly*, 174 Cal. 70, 161 P. 1148; *Braseltan v. Vokal*, 53 Cal. App. 582, 200 P. 670.

[6] It was therefore competent for the plaintiff to show by parol testimony what the consideration for the bill of sale given by Converse Wurdeman to the defendants in fact was; that is to say, to show that the consideration for the bill of sale was the agreement on the part of defendants to pay the \$2,000 note to the Electric Corporation, as well as other indebtedness of Converse Wurdeman.

[7] Appellants further contend that the agreement to assume the indebtedness of Converse Wurdeman was within the statute of frauds, and therefore invalid unless in writing. There is no merit in this contention. This principle does not apply to contracts of the character here made; it was not a contract to guarantee or become surety for the obligations of Converse Wurdeman, but was an original obligation on the part of defendants to pay the debts of Converse Wurdeman direct to the Electric Corporation, and it was based upon a sufficient consideration—that is, the transfer to defendants by Converse Wurdeman of the entire electrical business. It comes within the description of such original obligations as are set forth in section 2794, Civil Code, and need not be in writing. *Garroway v. Jennings*, 189 Cal. 98, 207 P. 554; *Fuller v. Towne*, 184 Cal. 89-96, 193 P. 88; *Tevis v. Savage*, 130 Cal. 411, 62 P. 611; *Meyer v. Parsons*, 129 Cal. 656, 62 P. 216; *Sacramento Lumber Co. v. Wagner*, 67 Cal. 293, 7 P. 705; *Doe v. Allen*, 1 Cal. App. 560, 82 P. 568; *Montgomery v. Dorn*, 25 Cal. App. 671, 145 P. 148. In *Montgomery v. Dorn*, supra, the court, quoting from 20 Cyc., page 174, said:

"The promise of a transferee of property, made in consideration of the transfer, to assume and discharge an indebtedness of the transferor to a third person, is obligatory on him although resting in parol."

[8] Appellants further contend that the court erred in admitting evidence of promises to pay the note in question, made in October, 1922. This contention is based upon the fact that the bill of sale and transfer were made in June, some four months before these promises were made, and that any promise made

after the transfer would be within the statute of frauds and invalid unless in writing. This action could not, of course, be based upon promises made in October, 1922; nevertheless, this evidence was properly admitted for the purpose of showing an admission of liability on the part of appellants.

This case in its last analysis is simply one where the evidence was decidedly conflicting upon the vital point in the case, and, the court having resolved that conflict in favor of the plaintiff, we are powerless to interfere.

We think the judgment should be affirmed; and it is so ordered.

We concur: FINCH, P. J.; PLUMMER, J.

88 Cal. App. 495

PEOPLE v. TAYLOR. (Cr. 1586.)

District Court of Appeal, Second District, Division 1, California. Jan. 20, 1928.

1. Kidnapping $\S$ 5—Evidence held to warrant conviction for child stealing by enticing and detaining two girls between 14 and 15 years of age (Pen. Code, $\S$ 278).

Evidence held to warrant conviction for crime of child stealing, in violation of Pen. Code, $\S$ 278, by enticing away from their parents two girls between the ages of 14 and 15 years and detaining them from their parents for about four weeks.

2. Criminal law $\S$ 345, 351(1)—Defendant's entire conduct before and after particular act involved may be considered to determine his intent (Pen. Code, $\S$ 21).

Under Pen. Code, $\S$ 21, in interpreting defendant's actions for purpose of determining his intent, it is proper and often necessary to consider his entire conduct before and after the particular act which is the subject of scrutiny.

3. Criminal law $\S$ 564(1)—Evidence held to warrant finding that venue of offense of child stealing occurred in county of parents' residence and where laid (Pen. Code, $\S$ 278).

Evidence held to warrant finding that offense of child stealing, in violation of Pen. Code, $\S$ 278, by enticing from their parents two girls between the ages of 14 and 15 years and detaining them about four weeks occurred in the county where girls' parents resided and in which venue was laid.

Appeal from Superior Court, San Diego County; Shelley J. Higgins, Judge.

Elmer Taylor was convicted of child stealing, and he appeals. Affirmed.

Edward J. Kelly and Nicholas J. Martin, both of San Diego, for appellant.

U. S. Webb, Atty. Gen., and H. H. Linney, Deputy Atty. Gen., for the People.

HAHN, Justice pro tem. This is an appeal from a judgment of conviction and from an order denying defendant's motion for a new trial.

Defendant was charged by an information, filed by the district attorney of San Diego county, in two counts, with the crime of child stealing. The first count charged the theft of a girl by the name of Ellen Tibbets, and the second charged the stealing of a girl by the name of Claudine Chriswell. Both girls were between 14 and 15 years of age at the time that the alleged offense was committed.

The crime which defendant stands convicted of is defined in section 278 of the Penal Code, which reads as follows:

"Every person who maliciously, forcibly, or fraudulently takes or entices away any minor child with intent to detain and conceal such child from its parent, guardian, or other person having the lawful charge of such child, is punishable by imprisonment in the state prison not exceeding twenty years."

Three grounds are urged by appellant for a reversal of the judgment of conviction: (a) That the venue was not established; (b) that the evidence is insufficient to support the judgment of conviction; and (c) that the court misdirected the jury in matters of law.

[1] According to the testimony of the two girls, the story of the events leading up to the alleged stealing and what followed until the arrest of all three in New Mexico may be briefly related as follows:

On March 16, 1925, which is the date that the offenses are alleged to have been committed, and for some months prior thereto, both girls were attending school and residing in their respective homes with their parents in the city of Oceanside, San Diego county, Cal. Several weeks previous to the date of the alleged stealing, the defendant made the acquaintance of the girls by picking them up on the street on their way home from school, and taking them for a ride in his automobile. Between that time and March 16th he had taken the girls on several rides. On the afternoon of March 15th the defendant met the girls on their way home from school and took them for a ride. On this occasion he proposed to them that they all drive to Long Beach, where a carnival was being held. The girls refused the invitation, giving as a reason that it was necessary for them to be at home that afternoon at 4 o'clock. Again on the following day defendant picked up the girls on their way home from school and again suggested to them that they drive up to Long Beach and attend the carnival. This time the girls consented to the proposal, and it was agreed that they would meet later in the evening and start out on the trip. Some time between 8 and 9 o'clock that evening, the Chriswell girl met the defendant on one of the main streets of Oceanside, and the two drove up and got the Tibbets girl at or near her home. They arrived in Long Beach late that night. They spent the night in the automobile, the girls sleep-

ing on the back seat and the defendant on the front seat. Just where the automobile was parked does not appear in the evidence, but it was somewhere in the city of Long Beach.

The following morning the defendant proposed to the Chriswell girl that they get married. After some discussion the girl assented to the suggestion, but requested that they return to Oceanside in order that she might get other clothes, as she had with her only the clothes she was wearing. Defendant objected to this suggestion and promised to purchase the necessary clothing for the girl. When the subject of marriage was further discussed defendant stated that they would have to go farther on for the marriage, as he did not consider it advisable to be married in Long Beach. The Chriswell girl demurred to the plan to go farther alone with the defendant, and so it was arranged that the Tibbets girl would accompany them. Again the question of extra clothing for the girls was raised by them, and the defendant met their proposal to return to Oceanside in order to secure the necessary clothing with the promise to provide clothing for both girls. Thereupon they left Long Beach for Yuma, Ariz. It may be observed at this point that the party did not attend the carnival at Long Beach, nor does it appear that any attempt was made to go to the carnival, nor was any explanation made for not attending the carnival.

They arrived at Yuma the following evening, and again spent the night in the automobile, the girls sleeping in the back seat, and the defendant on the floor of the car. The next day they pushed on to Phoenix, Ariz., where they spent the night, the girls again sleeping in the car with the defendant. In due time they reached Lordsburgh, N. M., where the defendant had friends, in whose home they spent two nights, the girls and the defendant sleeping in the same room on the floor. They then drove on to Portales, N. M., where they remained for some weeks and where they were eventually apprehended. At Portales, they stayed in a rooming house, the two girls and the defendant occupying the same room. In accordance with the suggestion of the defendant, the Chriswell girl went under the name of Mrs. Taylor, and posed as the wife of the defendant, while the Tibbets girl went under the name of Ellen Cloudman, and posed as the defendant's sister-in-law. The Tibbets girl testified that while staying at Lordsburgh the defendant had intercourse with her, and the Chriswell girl testified that in the rooming house at Portales the defendant had intercourse with her; that in Portales the defendant and the Chriswell girl lived and cohabited as husband and wife. On several occasions during the trip from Long Beach to Portales the Chriswell girl raised the question of their getting married, but the defendant stated that they would have to put it off as he did

not have sufficient money. After spending some days at Portales, the girls, having as yet received no additional clothing and being without any money, decided that they would try to return home and started out to walk, going down the railroad track. The defendant overtook them and induced them to return, promising that he would get work and would soon have money and secure clothing for them. The girls returned with him and continued to live in the rooming house at Portales until all were arrested.

On one or two occasions while the girls were in Arizona and in New Mexico, one or both of them suggested writing back to their parents to let them know where they were, but the defendant advised against this course, and in deference to his wishes they did not write.

The parents of both of the girls testified that they never heard from the girls during their absence until they were apprehended by officers; that they had no knowledge or intimation that the girls were going to leave home, nor had they any knowledge of the girls' whereabouts until their apprehension in Portales. The girls were away from home about four weeks and left home without the consent of their parents.

Defendant's story of the affair differs in certain respects from that of the girls. He denied that he invited the girls to go with him to Long Beach, but asserted that the Chriswell girl, learning that he was going to Long Beach to visit members of his family, requested that he take her on the trip; that he demurred to the suggestion, because of a fear of criticism that he might be subjected to, and that she overcame his reluctance to take her by promising to get her girl chum, Ellen Tibbets, to accompany them; that the Chriswell girl invited the Tibbets girl to make the trip with them; that he took the girls to Long Beach at their request, with the expectation of returning that night or the following morning to Oceanside. He further asserts that he never asked the Chriswell girl to marry him, nor did he promise to marry her; that she requested him to marry her in order to aid her out of a difficult position, in that she was pregnant and wished to cover up her indiscretion by having her child born in wedlock. Defendant further denied that it was his suggestion that they go on from Long Beach to Arizona and New Mexico, and insisted that this was a plan proposed by the girls, who represented to him that they were unhappy at home and desired to get East to some relatives of the Tibbets girl. He asserted that while the Chriswell girl was driving the car in Long Beach, she asked as to where a certain road led to, and when defendant replied, "Yuma, Ariz.," she drove the car out that road and thus they started for Arizona; that on several occasions on the trip when the Chriswell girl asked him if he would marry her, he re-

plied that he would not. The defendant further denied that he had any sexual relation with the Tibbets girl, but admitted such a relation with the Chriswell girl. On other points, defendant's testimony conflicted with that of the girls, but we do not deem it of sufficient importance to dwell further in detail upon his testimony.

Appellant urges that taking the girls' own testimony, that is, as to the circumstances of leaving Oceanside, there is nothing in the record to support the charge of child stealing as defined in section 278 of the Penal Code; that, according to the girls' own admissions, it was their intention to return to Oceanside when they left Long Beach; that at most the trip from Oceanside to Long Beach was a joy ride to visit a carnival, with the expectation of returning that night or the next day.

Appellant further urges that, if there is any evidence in the record that is at all susceptible to the inference that defendant was taking or enticing the girls away with the intent to detain and steal them from their parents, it is that evidence which relates to the events in Long Beach on the morning following their arrival there; in other words, if there is any evidence in the record that can possibly sustain the charge, it was what happened or was done at Long Beach in Los Angeles county, and not in San Diego county.

The offense with which the appellant was charged involves: (a) The taking or enticing away of a minor child; (b) a malicious intent, or the use of fraud or force in the taking; (c) an intent to detain and conceal the child from its parents. If there is evidence in the record which directly proves these requisite elements, or evidence that would reasonably justify the inference that the necessary facts and conditions existed, then the judgment must be sustained.

[2] The testimony of the girls furnishes abundant evidence to support the finding that defendant not only took the girls away, but that he also enticed them away. Conceding that when they left Oceanside it was the intention and expectation of the girls to go only to Long Beach and return on the following day to Oceanside, this would not determine what was in the mind and purpose of the defendant. In the light of the undisputed fact that when the party arrived at Long Beach they did not visit the carnival, nor was any attempt made by the defendant to attend the carnival, or give an excuse for not doing so, the jury might very well have concluded that the representation of defendant that a carnival was in progress in Long Beach, and a repeated invitation to the girls to go with him to see it, was simply a method of enticing the girls to go away with him. In interpreting one's actions for the purpose of determining the intent, it is quite proper, and indeed often necessary, to consider the

entire conduct of the individual before and after the particular act which is the subject of scrutiny. "The intent or intention is manifested by the circumstances connected with the offense, and the sound mind and discretion of the accused. * * *" Section 21, Pen. Code.

Considering further the conduct of the defendant toward the girls and subsequent events after leaving Long Beach, the inference that defendant took and enticed the girls away from home for the unholy purpose which became manifest when they reached Arizona and New Mexico becomes almost irresistible.

Appellant's contention that the utmost in the way of misconduct on the part of the defendant that may be reasonably inferred from the evidence, and particularly from the testimony of the girls as to the trip from Oceanside to Long Beach, is that he intended to and did take the girls for a joy ride to Long Beach to attend the carnival, with the intention of returning that night or the following day. Such might well have been the conclusion of the jury had the defendant returned the girls to their homes as planned, or if, as urged by appellant, the girls insisted on remaining away from their homes and going East to relatives, he had returned to his work in Oceanside. Unfortunately for his contention, his subsequent conduct after arriving at Long Beach nullifies the favorable aspect of his earlier actions.

Added support is given the theory of the prosecution, that the twice accorded invitation to the girls to accompany him on a trip to see the carnival at Long Beach shows a preconceived plan on the part of appellant to induce the girls to leave home with him, in the testimony of one Ed Hall, a watchman at Oceanside, who related a conversation had

with appellant just prior to March 16th, wherein the appellant, in reply to a comment about having his automobile newly painted, stated that he expected to go away on a trip to be gone for a while. The testimony of the appellant is so full of inconsistent statements and explanations that do not explain as to give added support to the findings of the jury.

Appellant in his brief quotes at length from the case of *People v. Black*, 147 Cal. 426, 81 P. 1099, which he asserts involve facts similar to those in the instant case. A reading of that case discloses a marked difference in certain essential matters from the facts in the instant case. To point out in detail the differentiation would only serve to extend this opinion to unnecessary length.

[3] Other considerations are readily suggested from a review of the evidence that may well have entered into the conclusion of the jury that all of the necessary elements of the offense were present when the defendant drove away with the girls from Oceanside. We are satisfied that there is abundant evidence in the record to support the judgment of conviction and also the finding that the offense was committed in San Diego county.

Involved in the last point urged by appellant are two instructions, one given by the court and the other requested by appellant, but refused. We have examined both instructions and are satisfied that no prejudicial error was committed by the court in giving the one and refusing the other.

The judgment and order denying the motion for a new trial are affirmed.

We concur: HOUSER, Acting P. J.;
YORK, J.

88 Cal. App. 372

BARRETT v. GORE et al. (Civ. 3392.)

District Court of Appeal, Third District, California. Jan. 17, 1928.

1. Trial $\Leftrightarrow$ 165—Motion for nonsuit should be denied, where evidence, given every favorable presumption for plaintiff, indicates plaintiff has proved cause of action or where doubt arises.

Upon motion for nonsuit, evidence must be construed most strongly against defendant, and every favorable inference fairly deducible and every favorable presumption fairly arising from evidence should be construed in favor of plaintiff, and, if evidence thus construed indicates plaintiff has proved cause of action, or even where trial judge is in doubt and evidence is susceptible of different constructions, plaintiff should be given benefit of doubt and motion for dismissal denied.

2. Licenses $\Leftrightarrow$ 39—Evidence as against motion for nonsuit held to constitute substantial proof of purchase of unit in oil enterprise issued in violation of statute (Corporate Securities Act, §§ 3, 12).

In action by buyer of unit in oil-developing enterprise to recover money under Corporate Securities Act, §§ 3, 12 (St. 1917, pp. 673, 679), providing that sale of securities issued without permit is void, on motion for nonsuit, evidence held to constitute substantial proof that buyer had purchased security which was void.

3. Licenses $\Leftrightarrow$ 18½—Association operating oil-developing enterprise under trust by terms of which capital was divided into units held to be "company," within Securities Act (Corporate Securities Act, § 2, subd. 3).

An association of individuals operating oil-developing enterprise under declarations of trust, by terms of which capital contributed by them to common enterprise was divided into units or interests, held within definition of "company" as defined by Corporate Securities Act, § 2, subd. 3 (St. 1917, p. 673).

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Company.]

4. Licenses $\Leftrightarrow$ 18½—Unit in association operating oil enterprise under trust held to constitute "security," within meaning of statute (Corporate Securities Act, § 2, subd. 6a).

Where association of individuals operating under declaration of trust, by terms of which capital contributed by them to common enterprise was divided into units, held, that such units constitute "securities," within meaning of Corporate Securities Act, § 2, subd. 6a (St. 1917, p. 674).

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Security.]

5. Licenses $\Leftrightarrow$ 39—Money paid for unit in association operating oil enterprise under trust sold without sanction of corporation commissioner held recoverable in assumpsit (Corporate Securities Act, § 2, subd. 6a, and § 12).

Where association of individuals operating oil-developing enterprise under trust deed, by terms of which capital contributed by them was

divided into units, held, that money paid by purchaser of unit in such company, sale of which was not sanctioned by corporation commissioner, could be recovered in an action in assumpsit for money had and received, since sale was void under Corporate Securities Act, § 2, subd. 6a, and section 12 (St. 1917, pp. 674, 679).

Appeal from Superior Court, Los Angeles County; Elliot Craig, Judge.

Action by C. A. Barrett against M. Gore and others to recover money paid for an individual interest in an oil-developing enterprise. From a judgment of nonsuit, plaintiff appeals. Reversed.

Thos. L. Clay and Mark F. Jones, both of Los Angeles, for appellant.

E. T. Lucey, of Los Angeles, for respondents.

THOMPSON, Justice pro tem. This is an appeal from a judgment of nonsuit which was granted in an action in assumpsit. The suit was brought to recover money paid for an undivided interest in an oil-developing enterprise, which unit the respondent Rosenberg sold and transferred to appellant in violation of the Blue Sky Law.

The defendants A. L. Gore, M. Gore, Adolph Ramish, and Barnett Rosenberg were the owners of equal undivided interests in a lease of oil lands at Long Beach, Cal., and an oil-developing enterprise called the Lyceum Oil Syndicate. M. Gore held these property interests as trustee for the said owners. The organization was first considered a copartnership. The defendant Rosenberg testified as follows:

"Q. Just what was said [to Mr. Barrett]? A. I told him it was only four partners, * * * and each one of us has got 15 per cent.—and they are actually four partners in these properties, but I have got another silent partner. * * *

"Q. You told him it was a partnership? A. I told him it was a partnership. * * *

"Q. What did you say? A. We were four partners and we got a trust agreement between Mr. Ramish, Mr. Gore, and myself."

Mr. Hutton, attorney for defendants, also testified:

"Q. November 25, 1922, and for three or four months prior to that date you were acting as attorney for what is known as the Lyceum Oil Syndicate? A. Yes.

"Q. Who were the members of that? A. M. Gore, Adolph Ramish, A. L. Gore, and Barnett Rosenberg.

"Q. Do you know whether on or before that time the title to the property was held in trust? A. Yes, sir [it was].

"Q. By whom? A. M. Gore. * * * Prior to November 25th, the interest of the several parties were equal, namely, Mr. Rosenberg; * * * from the record that I have, appeared to have 25 per cent.; M. Ramish 25 per cent., and each one of the Gore boys 25 per cent."

November 29, 1922, these defendants formally executed and recorded an elaborate declaration of trust empowering them to hold and operate said properties for the purpose of sinking oil wells, developing and marketing the products thereof. It was provided that the trust estate should consist of 100 equal interests of the par value of \$3,000 per unit. Gore Bros., Inc., were declared to own 29 units; J. C. Gore, one-half of 1 unit; Israel Gore, one-half of 1 unit; Adolph Ramish, 15 units; Barnett Rosenberg, 15 units; York & Sullivan, 10 units; and the remaining 30 units were set apart to defray costs of operation and to pay royalties. The form of certificate for shares to be issued to the unitholders was specified. The trustees named were authorized to sink wells, develop and market oil products, and declare and pay dividends. The trust was to continue until 1932. Operations were commenced, and a well was sunk to a depth of about 5,000 feet, and on May 15, 1923, it was abandoned as a "duster," or dry hole.

September 29, 1922, in consideration of the sum of \$2,000, the respondent Rosenberg sold and conveyed to appellant's assignor, George L. Symons, an undivided 1 per cent. of all products derived from the properties of said oil syndicate. This transfer was made "subject to all the terms * * * of that certain lease * * * assigned under date of September 5, 1922, to the Lyceum Oil Syndicate, and also subject to the trust agreement heretofore entered into by the undersigned with M. Gore, trustee. * * *" November 25, 1922, in consideration of the sum of \$2,850 a similar 1 per cent. unit of interest in the products of said syndicate was sold and conveyed to appellant by Rosenberg by an assignment couched in the same terms above specified. March 6, 1923, the respondent M. Gore wrote a letter to appellant requesting him to execute an inclosed form of reconveyance of said unit of interest to the syndicate, explaining that:

"Under the terms of the agreement, Mr. Rosenberg cannot, as an individual, assign any interest in the Lyceum Oil Syndicate, * * * [as said] certificate [is] not presumed to be a document other than a usual stock certificate. * * *"

A postscript was added to this letter explaining the reason why Rosenberg had failed, in the first instance, to issue to appellant the usual prescribed form of certificate of the Lyceum Oil Syndicate. He said:

"The error was not made on the part of Mr. Rosenberg, but was originally an error on the part of our attorney, who imagined * * * Mr. Rosenberg could execute such an assignment."

Appellant promptly executed and returned the requested reconveyance, whereupon the Lyceum Oil Syndicate, on the same date last mentioned, issued and delivered to appellant

its certificate in lieu of the former assignment, for an undivided 1 per cent. unit of interest in the products of the Lyceum Oil Syndicate. This certificate was signed by M. Gore, president, and B. Rosenberg, secretary of the syndicate, and was in the following form:

"Certificate.

"No. 10. Lyceum Oil Syndicate One Unit.

"Los Angeles, California. Capital, \$300,000.

"This is to certify that Claud A. Barrett is the owner of 1 unit, fully paid and nonassessable, for the par value of \$3,000 each, of the beneficial interest in the Lyceum Oil Syndicate, a business trust, transferable only on the books of the company by the owner thereof in person or by duly authorized attorney upon surrender of this certificate properly indorsed. This certificate is held subject to an agreement and declaration of trust dated November 29, 1922, and which is recorded in the office of the county recorder of Los Angeles county, Cal., in Book 1775, at page 85. * * *

"Said declaration of trust provides: Trustees shall at their discretion declare dividends when revenues from production of said wells shall justify, and such dividends shall be paid to the unitholders in proportion to the respective number of units owned by each as shown by the books of the trustees. And no unitholder shall ever be personally liable for any debt, covenant, demand, contract, or tort of any kind of this company.

"Witness the signature of the trustees of said company this 6th day of March, 1923.

"Lyceum Oil Syndicate, by M. Gore, Pres.

Attest: B. Rosenberg, Sec'y."

[1] Upon a motion for nonsuit, the evidence must be construed most strongly against the defendant. Every favorable inference fairly deducible and every favorable presumption fairly arising from the evidence should be construed in favor of the plaintiff. If the evidence thus construed indicates that the plaintiff has proved a cause of action, or even where the trial judge is in doubt, and the evidence is susceptible of different constructions, the plaintiff should be given the benefit of the doubt and the motion for dismissal should be denied. 9 Cal. Jur. 551, § 35.

[2] It will be observed that the units of interest involved in this action were conveyed by assignment prior to the actual execution of the final declaration of trust under which the syndicate continued its operations. But these assignments were made while the properties were being held in trust by the respondent M. Gore for the same oil-mining purposes, and for the benefit of the same unitholders who then owned equal undivided interests. The organization was known by the same name of Lyceum Oil Syndicate, and the owners were actually engaged in sinking a well on their Long Beach property. They considered this temporary organization a copartnership, and contemplated an immediate consummation of a formal voluntary trust. Within a month of the first sale to Symons, and within four days from the sale to appellant, the organization

was merged into the voluntary trust association by the execution and recording of a formal declaration of trust. In every respect the former trust served the same purpose and imposed the same obligations required under the latter trust. The respondent Rosenberg held no individual negotiable shares, but possessed merely an undivided interest in the entire enterprise, whether it be termed a copartnership, association, trust, or company. The two units in question were evidently sold to participate in the profits of the oil-mining enterprise. The specific share sold to appellant was so recognized and ratified as the act of the syndicate by the subsequent request for reconveyance, and by the formal issuing of a syndicate certificate over the signatures of the president and secretary thereof. This furnishes substantial evidence of a sale to appellant by the Lyceum Oil Syndicate of securities of an interest in its enterprise, which under the Corporate Securities Act was illegal and void, in the absence of a permit for such sale by the corporation commissioner.

It was stipulated that said Lyceum Oil Syndicate at no time held a permit from the corporation commissioner of California to sell or convey units, shares or interests in its enterprise. It necessarily follows that these sales were illegal and void. *Smith v. Bach*, 183 Cal. 259, 191 P. 14; *Wallace v. Zinman* (Cal. Sup.) 254 P. 946.

The Corporate Securities Act, as enacted in the statutes of 1917 at page 673, and subsequent amendments thereto, provides:

"No company shall sell * * * or offer for sale * * * any security of its own issue until it shall have first applied for and secured from the commissioner a permit authorizing it so to do." Section 3. "Every security issued by any company, without a permit of the commissioner authorizing the same then in effect, shall be void. * * *" Section 12.

It is not material, whether at the time of the sale the vendor's organization constituted a partnership, voluntary trust, or association. All alike are prohibited from selling such securities without the written permission of the corporation commissioner. "The word 'company' includes all * * * private corporations, associations, joint-stock companies, and partnerships, of every kind, and also trustees, as hereinafter defined." Section 2, subd. 3. "The word 'trust' * * * includes all voluntary trusts * * * expressly created by or declared in an instrument in writing. * * *" Section 2, subd. 4. "The word 'security' includes: (a) All shares or other interests or rights into which the capital, capital stock, or property of companies, or rights of stockholders or members thereof are divided. * * *" Section 2, subd. 6a. "A 'sale,' within the meaning of this act, includes every contract by which,

for a pecuniary consideration, called a price, one transfers to another an interest in property. * * *" Section 2, subd. 7.

[3, 4] An association of individuals operating under a declaration of trust, by the terms of which the capital contributed by them to a common enterprise is divided into units or interests, clearly comes within the definition of a "company" as it is defined by the Corporate Securities Act of California, and the sale of such units or interests, without a permit from the corporation commissioner, is strictly prohibited. In *re Girard*, 186 Cal. 718, 200 P. 593; *Agnew v. Daugherty*, 189 Cal. 446, 209 P. 34; *Boss v. Silent Drama Syndicate*, 255 P. 225. Certificates of interests to be sold by the owner of a lease and option to purchase certain mining property, which lease and option had been conveyed by him to trustees under a trust empowering them to receive all payments for such interests and to hold the same as a trust fund for the holders of such certificates, was held in the case of *Agnew v. Daugherty*, supra, to constitute "securities," within the meaning of the Corporate Securities Act.

[5] Money paid by a purchaser of units or shares in any company, under such void sale, may be recovered in an action in assumpsit, as for money had and received. *Smith v. Bach*, 183 Cal. 259, 191 P. 14; *Landwehr v. Lingenfelder* (Mo. App.) 249 S. W. 723, 727.

For the foregoing reasons, the judgment is reversed.

We concur: FINCH, P. J.; HART, J.

88 Cal. App. 411

GARTLER et al. v. FIRST NAT. BANK OF SAN PEDRO. (Civ. 4568.)

District Court of Appeal, Second District, Division 2, California. Jan. 19, 1928.

1. Parties ⇐14—Only persons having legal or property interest may, under statute, be joined as plaintiffs (Code Civ. Proc. § 378).

It is only persons having a legal or property interest that may, under Code Civ. Proc. § 378, be joined as plaintiffs.

2. Parties ⇐14—There can be no joinder of plaintiffs, where recovery of one would be inconsistent with recovery of the other (Code Civ. Proc. § 378).

While plaintiffs may be joined under Code Civ. Proc. § 378, where action would afford relief to each of them, even where relief would not be exactly the same, there can be no joinder of plaintiffs, where recovery of one would be inconsistent with recovery of the other.

3. Banks and banking ⇐221—Complaint by purchaser and payee of draft, showing that plaintiffs had no common interest in judgment prayed for, was demurrable for misjoinder of parties.

Where draft was purchased of defendant bank calling for payment on a Roumanian bank,

and payment was refused, complaint by purchaser and payee of draft against bank to recover money paid therefor, showing on its face that interests of purchaser were different from those of payee, was demurrable on ground of misjoinder of parties.

4. Appeal and error ⚡1036(2)—**Judgment will not be reversed for misjoinder of plaintiffs, if no impairment of substantial rights results.**

A judgment will not be reversed because of misjoinder of plaintiffs, if no impairment of substantial rights results.

5. Banks and banking ⚡226—**In action against bank on draft by purchaser and payee, complaint, not alleging purchaser's ownership or assignment to payee, or presentation and protest, as required by statute, held demurrable (Civ. Code, §§ 3199, 3233-3241).**

Complaint by purchaser of draft calling for payment on Roumanian bank, joined in by payee of draft, which did not allege that purchaser owned and possessed draft, nor that it was assigned to payee, who presented it for payment, which was refused, and draft was protested as required of a foreign bill of exchange, under Civ. Code, §§ 3199, 3207, 3233-3241, *held* demurrable.

Appeal from Superior Court, Los Angeles County; William C. Doran and Charles S. Burnell, Judges.

Action by George Gartler and another against the First National Bank of San Pedro. From a judgment for plaintiffs, defendant appeals. Reversed.

Goodspeed & Pendell, of Los Angeles, for appellant.

STEPHENS, Justice pro tem. On August 23, 1919, George Gartler, one of the plaintiffs, paid \$501.50 to defendant bank at San Pedro for a draft in favor of H. Gartler, the other plaintiff, calling for 6,250 lei, Roumanian money, from the "Banca Moldova" in the city of Jasi, Roumania. The draft was presented to the drawee bank on September 15, November 8, and December 15, and 19, 1919, but each time payment was refused. Later, H. Gartler, the payee, having meanwhile removed to San Pedro, together with George Gartler, the purchaser of the draft, brought suit against defendant bank for \$501.50 as damages, with legal interest and costs, alleging that, since presentation, 6,250 lei "have become of little or no value in dollars." Defendant submitted a demurrer upon the ground that no cause of action had been stated. Defendant also demurred for uncertainty on many grounds, among them the following: That it cannot be ascertained from the complaint whether or not protest had been made after presentation of the draft; why payment was refused; what act or omission is chargeable to defendants; whether plaintiffs are suing for rescission or for damages from breach of contract, or what date

value of the lei is to be taken in estimating damages; and upon the further ground that the complaint is ambiguous and unintelligible in all of the particulars set out in the demurrer as to uncertainty, including those hereinabove specified. A special demurrer was likewise interposed upon the misjoinder of the parties plaintiff. The demurrers were overruled, and defendant answered, putting practically all of the allegations of the complaint in issue: That the draft was a foreign bill of exchange; that defendant did everything legally required of it; and that Banca Moldova was at all times ready, willing, and able to honor said draft upon proper identification of the payee. The trial court found generally in favor of plaintiffs and against defendant, and judgment was entered according to plaintiffs' prayer. The case was appealed by defendant, and is here on a bill of exceptions.

[1-3] We think that both the special and general demurrers should have been sustained. "All persons having an interest in the subject of the action, and in obtaining the relief demanded, may be joined as plaintiffs, except when otherwise provided in this title." Section 378, Code Civ. Proc. This, of course, means a legal or property interest. *Toomey v. Knobloch*, 8 Cal. App. 585, 97 P. 529. Plaintiffs may be joined where the action would afford relief to each of them, even where the relief would not be exactly the same, but we know of no case holding proper a joinder of plaintiffs where the recovery of one would be inconsistent with the recovery of another. The purchaser of a draft generally has a very different interest in its payment than the payee, and there is no allegation in the complaint in the instant case showing any common interest in the judgment prayed for. They cannot join in one action so as to secure a judgment against the bank "going or coming." There is no allegation in the complaint that George Gartler (purchaser) has suffered in any way other than by the deprivation of the \$501.50 from date of purchase of the draft to the date of suit, and this, of course, would be legally compensated by legal interest, which is the prayer and the judgment. This could hardly be on any other basis than money had and received, or rescission, since the thing he required done has not been done. He accepts this as a fact, that the contract has failed, and asks for his money back. Upon any theory of this kind surely H. Gartler (payee) has no interest as a co-plaintiff. If any basis for a judgment against the bank (drawer) can be found in favor of H. Gartler, it must be because he has removed to the drawer's situs, and, not having received the money called for by the draft, seeks to enforce the contract and get it directly from the drawer. Such a judgment would be of no legal interest to George Gartler, but

would be upon a basis of enforcing the contract exactly opposite to the basis of any judgment George Gartler could possibly have. It follows that the demurrer upon the ground of misjoinder should have been sustained.

[4, 5] However, if "no impairment of substantial rights" results, a judgment will not be reversed on this ground. *Daly v. Rud-dell*, 137 Cal. 674, 70 P. 784. Let us see, then, if the judgment can possibly be sustained. The draft was a negotiable instrument drawn upon another and placed out of the purchaser's hands and control. Before the purchaser, George Gartler, could recover the purchase price, with interest, he would have to allege and prove his ownership and possession of the draft. There is no such allegation or proof. Before H. Gartler (payee) could recover the purchase price, as such, he would have to allege assignment of the purchaser's rights, in addition to ownership and possession of the draft; and there is no such allegation or proof. If he seeks to recover as payee, he is entitled to 6,250 lei, or its equivalent in American money, and the court finds, without any proof, that the lei is worth little or nothing. If he seeks damages over what the lei would have been worth when the draft was presented, he is attempting to hold the drawer responsible for failure of payment, and the complaint would have to allege, in addition to presentation and refusal, a protest as required by the Code in the case of a foreign bill of exchange.

"A bill of exchange is an unconditional order in writing addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time a sum certain in money to order or to bearer." Civ. Code, § 3207.

"Where any negotiable instrument has been dishonored it may be protested for nonacceptance or nonpayment, as the case may be; but protest is not required except in the case of foreign bills of exchange." Civ. Code, § 3199.

"Where a foreign bill appearing on its face to be such is dishonored by nonacceptance, it must be duly protested for nonacceptance, and where such a bill which has not previously been dishonored by nonacceptance is dishonored by nonpayment, it must be duly protested for nonpayment. If it is not so protested, the drawer and indorsers are discharged. Where a bill does not appear on its face to be a foreign bill, protest thereof in case of dishonor is unnecessary." Civ. Code, § 3233.

The protest must be made in the manner provided in accordance with sections 3234 to 3241, inclusive, of the Civil Code.

No allegations as to these requirements appear in the complaint in question, and the general demurrer should therefore have been sustained.

The complaint alleges that the dollar value of the Roumanian lei declined to practically no value in dollars after presentation of and

the refusal to honor the draft, and the findings follow this allegation. Since there was no proof on the subject, it follows that the evidence does not support the findings in that regard. In the view we take of the case, it does not matter whether or not this finding was a material one.

The demurrer as to misjoinder and the demurrer upon the ground that the complaint does not contain allegations sufficient to constitute a cause of action should have been sustained.

Judgment reversed.

We concur: WORKS, P. J.; THOMPSON, J.

88 Cal. App. 418

PATTERSON v. DE HAVEN. (Civ. 3338.)★

District Court of Appeal, Third District. California. Jan. 19, 1928.

Hearing Denied by Supreme Court March 19, 1928.

1. Sales ⇨7—Transaction by which owners of sheep gave exclusive option to another to sell them held to create agency.

Transaction by which owners of band of sheep gave exclusive option to another to sell them for owners, at designated price, held to create relationship of principal and agent as to sale of sheep negotiated by person given option.

2. Brokers ⇨65(3)—One given exclusive right to sell sheep was under duty to inform owners of price purchaser was willing to pay (Civ. Code, § 2020).

Under Civ. Code, § 2020, one given exclusive right to sell sheep at stated price for owners was under duty, as agent for owners, to inform them of price which prospective purchaser was willing to pay.

3. Brokers ⇨65(4)—Agent selling sheep held not entitled to recover commissions from purchaser, based on secret agreement whereby agent was to receive reduction in price which owners allowed (Civ. Code, § 2020).

One holding exclusive right to sell sheep as agent for owners, at stated price, who entered into a secret agreement with prospective purchaser, whereby agent was to receive any reduction which could be obtained in price from owners, held, under Civ. Code, § 2020, not entitled to recover from purchaser commissions representing reduction which owners allowed, on account of double dealing of agent and failure to inform his principals of true situation.

Appeal from Superior Court, Tehama County; H. S. Gans, Judge.

Action by C. E. Patterson against D. O. De Haven. Judgment for plaintiff, and defendant appeals. Reversed.

James T. Matlock, of Red Bluff, for appellant.

W. P. Johnson, of Red Bluff, for respondent.

PLUMMER, J. Plaintiff had judgment against the defendant in the sum of \$1,000, alleged to be due the plaintiff from the defendant for and on behalf of commissions earned in the sale of a certain band of sheep belonging to G. C. Long and his brother, J. R. Long. From this judgment the defendant appeals.

The complaint is in three counts. Judgment went for the plaintiff upon the first count, and, as the findings of the court are simply general, and to the effect that all the allegations of the first count of plaintiff's complaint are true and correct, it is necessary to set forth the same, which we do, as follows:

"I. That on the ——— day of July, 1925, plaintiff had an exclusive option to purchase from G. C. Long and J. R. Long 2,800 head of ewes, or thereabouts, at the price of \$13 per head. That thereafter the price was reduced by the said G. C. Long and J. R. Long in this, that they agreed to take for 200 of said ewes the sum of \$9 per head. That under the terms of said option plaintiff was to have the right to buy said ewes at said price or to sell the same, and, in case of sale during the life of said option, plaintiff was to be paid by the purchaser his profit or commission, and that no commission was to be paid to the said plaintiff by said Longs.

"II. That plaintiff offered said ewes to defendant for sale at said price, stating to him the terms of his said agreement with said Longs; plaintiff's commission or profit on account of said sale to be \$250. That defendant agreed to take said ewes at said price and pay said Patterson the said sum of \$250, if the said Longs would make no further reduction in the price of said ewes, but that, if said Longs did make a further reduction in the price of said ewes, he agreed that he would pay said Patterson as his profit or commission in making said sale the amount of the reduction made by said Longs, instead of the said commission of \$250. That said Patterson agreed to this.

"III. That, after said reduction by said Longs, and on or about the 1st day of August, 1925, said defendant purchased from said Longs the said ewes. That he paid the said Longs for said ewes as follows: \$9 per head for 200 of said ewes, \$12 per head for 1,000 of said ewes; and \$13 per head for the balance of said ewes. That the said Longs reduced the price on 1,000 of said ewes \$1,000, and, in accordance with said agreement between plaintiff and defendant, there became due to plaintiff from defendant on the purchase of said ewes at said reduced price the sum of \$1,000. That said ewes were delivered to said defendant by said Longs on or about the 10th day of November, 1925. That the number of ewes so delivered was 2,757 head. That defendant paid to said Longs the amount said Longs were to receive on account of the purchase of said ewes.

"IV. That the said sale was made during the life of said option. That before the sale was made to the said defendant plaintiff told the said Longs the arrangement he had made with the said defendant, and that, under the terms of the said arrangement, \$1,000 was to be paid to him by the said defendant. That the said Longs made the said sale direct to the said defendant with the agreement on the part of

said defendant that he was to pay the said plaintiff in accordance with his agreement as above set forth."

No testimony was introduced in relation to counts 2 and 3, and no findings were made thereon. Upon the conclusion of plaintiff's case, the defendant moved for a nonsuit, which was denied. Defendant also interposed a motion for a new trial after the rendition of judgment herein, which motion was also denied. This appeal raises questions as to the correctness of the ruling of the trial court upon the defendant's motion for a nonsuit; also on the motion for new trial and the sufficiency of the testimony to support the findings of the court. The point is also made that the findings and judgment are against law.

[1] Before going into the legal questions involved, it may be stated that there is no evidence whatever in the transcript to support the finding of the trial court that paragraph I of plaintiff's complaint is true. The plaintiff's own testimony in this particular is as follows:

"Q. What arrangement did you have with G. C. and J. R. Long in regard to the sale of sheep belonging to them? A. Well, about the 1st of July, 1925, he (referring to one of the Longs not named) was over to my house one day, and he wanted to know if I could sell the ewes for him; that was about the 2d or 3d of July, 1925, and I asked him when he wanted it, and he said, if he could get \$13 net a head, he would sell them, and that there would be about 2,800 head, and I said, 'Will you give me an exclusive option on them until the 25th of July, to sell them,' and he said, 'Yes; and, if they are not sold then, we can extend it,' and I said I thought I could sell them for him. Q. Were you figuring on buying them for yourself or selling them? A. I figured on selling them at a profit; I priced them to everybody at \$13.50."

There is no testimony in the record to the contrary; that the plaintiff simply had an option, or, in other words, was acting in the capacity of an agent to sell the band of sheep for the Long brothers. That this is true is further evidenced by one of the paragraphs, which we take from the opinion of the trial court set out in the transcript as follows:

"The evidence is undisputed that plaintiff was given an option to sell the sheep of Grover and Joe Long at \$13 per head; that he interested defendant in the sheep, and was to get 50 cents per head; that the Longs were not to pay him anything by way of commission or otherwise; that later the price was reduced to \$9 per head on 200 ewes, and still later a reduction was made of \$1 per head on 1,000 head of ewes."

When the findings of fact were signed, the testimony which we have quoted and the views of the trial court as to the testimony expressed when deciding the case appear to have been overlooked.

The first paragraph of plaintiff's complaint and the findings of the court to which we have referred were apparently both based on

the opinion of this court in the case of *Flint v. Giguere*, 50 Cal. App. 314, 195 P. 85. This case is set forth in the trial court's opinion, and also in the brief of respondent herein as supporting the judgment. However, as the testimony which we have quoted shows conclusively that the appellant had only an option to sell, the case of *Flint v. Giguere* is not an authority here. The difference between the case at bar and the case of *Flint v. Giguere* is readily perceived by reading the first paragraph of the opinion in the latter case. It is:

"That within two years last past the said plaintiff and D. B. Woods entered into a contract whereby the said D. B. Woods agreed to sell and deliver to the said plaintiff 365 head of cattle," etc.

The opinion then goes on to state that the contract which gave the plaintiff the option to buy said 365 head of cattle was sold to the defendant; the defendant agreeing to pay \$1 per head for said cattle. Flint negotiated with Woods as a purchaser, and he was given the right to purchase. He did not negotiate with Woods and obtain an option simply to sell the cattle for Woods at so much per head. In the *Flint Case* the plaintiff was an independent contractor, having the right to purchase the 365 head of cattle within a certain period of time, and he simply sold his contract right to the defendant in the case referred to for the sum of money therein named. No question of agency was involved in the *Flint-Giguere Case*. Here the very inception of the negotiations created the relationship of principal and agent between the plaintiff and the Long brothers. After this relationship had been established, the plaintiff looked up the defendant, and offered him the sheep at \$13.50 per head. The defendant went to the ranch or range where the sheep were kept, examined the same, and, in negotiating with one of the Long brothers, a reduction to \$9 per head was made on 200 head of sheep on account of their age. After this had taken place, the defendant and the plaintiff had an interview, which is related by the plaintiff as follows:

"Ollie (referring to the defendant) said, 'The bank won't let me buy only for \$13,' and I said it was all off, and went and stopped in front of our office, and talked a few minutes, and then went and sat on the bench in front of Fisher's, and Ollie wanted to know if I thought they would not come down a little more, and I told him no. Q. He told you he would not pay more than \$13? A. He said the bank would not let him pay over \$13. Q. That was after the reduction was made on the 200? A. Yes. Q. And then you told him the sale would have to be off, or the deal would have to be off? A. Yes; we sat on the bench and talked a little bit, and I told him I didn't think so; that Joe had told me that, if he couldn't get \$13, they wouldn't sell them, and that he had concluded not to sell them anyway, and Ollie (referring to the defendant) said, 'I believe they will come

down some more, but, if they won't come down some more, I will give you \$250 profit on it, and give it to you some other way, but, if they will come down, I will take them, and save my \$250, and whatever they come down will be yours. Q. And the arrangement with Longs was 200 at \$9—and then, if they were sold at that rate to De Haven, what would you get on them for commission? A. I wouldn't get any on them. Q. And then he made this proposition that he would take them on the \$13 proposition instead of the \$13.50? A. Yes. Q. There had already been a reduction on the 200, you stated? A. Yes. Q. And, as added to that, he was to pay you \$250 commission, is that right? A. Yes; he said, 'I will take them, but I will go back up there, and, if they won't come down any more, I will take the sheep, and pay you the \$250 profit, but I think they will come down on that, and whatever they come down will be yours, and I will save my \$250.'

Upon cross-examination, the plaintiff testified in relation to this transaction as follows:

"Q. I understood you to say in front of Johnson's office, or in front of Fisher's store, De Haven said, 'I can't pay but \$13 for the sheep, do you suppose they will come down,' and you said, 'I don't think so,' and you sat down there, and finally De Haven said, 'I will take the sheep at \$13, and I will give you \$250, but, if I can get them to come down, you can get the profit,' and that you went and told the Longs that, didn't you? A. I didn't tell them anything of the kind. I never said a word to them until they knocked them down \$1,000."

After this agreement had been entered into between the plaintiff and the defendant relative to the plaintiff receiving whatever might be the drop on the price of the sheep, the defendant entered into negotiations with Joe Long, one of the owners of the sheep, and secured a reduction on 1,000 head of said sheep, in the sum of \$1 per head. It is this drop in the price, as it is frequently called in the testimony and the briefs, that constitutes the basis of the plaintiff's action. The transcript further shows that the agreement as to the price of the sheep was made by the Longs on the ranch or range where the sheep were kept, and that, after such arrangements, the parties all came down to the town of Red Bluff, and there the money was paid over. The sheep were kept at a place called Bartels. The testimony of Grover Long as to when he obtained notice of the commissions claimed by the plaintiff is as follows:

"Q. He told you that De Haven would take the sheep at \$13 and pay him a commission of \$250, but that, if he could get you to come down, he was to have the drop? A. I don't know as he told me that he was to have the drop, but he said that he was satisfied that De Haven would take the sheep at \$13. Q. Was that at Bartels? A. Yes. Q. Why did you drop down? A. That was done—my brother done that after I left there. I wasn't at Bartels when the deal was made. Mr. Patterson got there in the evening, and I left there the next morning. Q. Did you tell your brother that then? A. I wouldn't say

whether I did or not. If I did, I don't remember it."

The brother, Joe Long, who negotiated the sale of the sheep at Bartels, and had agreed with the defendant to reduce the price on 1,000 head thereof from \$13 to \$12 per head, testified in relation to the transaction under inquiry as follows:

"Mr. De Haven never told me he would take the sheep until after we got to Red Bluff. He said nothing to me about the sheep until we got to Red Bluff. Mr. Patterson came to me in the mountains that morning before we left, and he had been down to Mr. De Haven's camp, and he said that Mr. De Haven and he had agreed on \$250, and that they would fix the deal up satisfactory to everybody down there. Q. Did he say anything to you if you dropped any that he would get the drop? A. No; I don't remember about that. Q. When did you first hear about that, that he was to get the drop? A. Well, after we closed the deal with the sheep, Mr. Patterson told me, I believe the morning before we left Bartels when we went to see Mr. De Haven, that he was to get \$250, and when we got to the valley we would fix it up satisfactorily down there. Q. Did you hear that, if you dropped in the price of the sheep, Patterson was to get the benefit of the drop? A. Yes; Mr. Patterson told me that. Q. When did he tell you that? A. After we closed the deal here. Q. You never did know that De Haven would give you \$13 regardless of the drop? A. No. Q. You never knew it until afterwards? A. No. Q. If you had held up the price, you would have gotten \$13 for the sheep? A. I don't know that. Q. Mr. Patterson told you afterwards? A. Yes; Patterson told me afterwards. Q. He told you after the money was paid? A. Yes, sir. Q. And not before? A. No, sir."

Section 2020 of the Civil Code reads:

"An agent must use ordinary diligence to keep his principal informed of his acts in the course of the agency."

This section of the Code and the principle there stated has received consideration at the hands of this court a number of times. The first case coming to our attention is that of *Tate v. Aitken*, 5 Cal. App. 505, 90 P. 836. In that case an agent was given authority to sell a parcel of real estate for \$1,000 or such less sum as the vendor might agree to receive. The remuneration provided for was such sum as the agent might receive in excess of the selling price agreed upon by the vendor. After the relationship of agent and principal had been established, the agent represented to the vendor that he had a buyer who was willing to pay the sum of \$800, and no more. The agent in fact had a buyer for the sum of \$1,300, at which sum the property was actually sold. After learning these facts, the plaintiff brought an action to recover the sum of \$500, being the difference between the represented selling price of \$800 and the actual selling price of \$1,300. The plaintiff had judgment for the sum of \$200. Upon appeal,

the judgment was affirmed. It was there held, as we must hold here, that the agreement did not give the agent an option to buy, but only an option to sell, and it was the duty of the agent to make full disclosure. Again, in *Curry v. King*, 6 Cal. App. 568, 92 P. 662, in an action involving a purchase by the agent who had been given only authority to sell, it was held:

"The relation of an agent to his principal is fiduciary in its nature, and he is bound to treat with his principal concerning the property over which he has been invested with authority in the utmost good faith, and if he fails to show such good faith affirmatively, a transaction whereby the agent acquired the ownership thereof is deemed by the law to be fraudulent."

A number of cases are cited on page 576 of this opinion (192 P. 665) supporting the rule which we have just stated, and then the following quotation is taken from the case of *Rubidoe v. Parks*, 48 Cal. 215:

"The agent and principal are not absolutely prohibited from dealing with each other in respect to the subject-matter of the agency or trust; but in all their dealings with each other, the utmost good faith is required, and the burden of proof is on the agent to show affirmatively that he acted in good faith, fairly and honestly."

In *Whitnack v. Ellworthy*, 63 Cal. App. 411, 218 P. 631, in considering the relationship of principal and agent, this court, speaking through Justice Hart, used the following language:

"The law is well settled that one who, either for compensation, or otherwise, assumes to act as an agent for another, is bound to the utmost good faith, and cannot make any secret profits or take any advantage of his position as such agent for his own benefit"—citing *Kevane v. Miller*, 4 Cal. App. 598, 88 P. 643; *Ritchey v. McMichael*, 4 Cal. Unrep. 384, 35 P. 151.

The opinion further cites the case of *Laurence v. Kilgore*, 154 Cal. 310, 97 P. 760, to the effect that, where an agent to buy secretly buys for a less figure than that represented to his principal, the principal may recover the excess paid on account of such misrepresentation. Likewise, in *Nielsen v. Richards*, 75 Cal. App. 680, 243 P. 697, this court, in considering the relationship of principal and agent, stated the rule as follows:

"The doctrine is familiar, and has been often recognized by this court, that an agent cannot, either directly or indirectly, have an interest in the sale of the property of his principal, which is within the scope of his agency, without the consent of his principal, freely given, after full knowledge of every matter known to the agent which might affect the principal. *Coat v. Coat*, 63 Ill. 74; *Ebelmessenger v. Ebelmessenger*, 99 Ill. 548; *Ziegler v. Hughes*, 55 Ill. 238; *Hughes v. Washington*, 72 Ill. 85. It is of no consequence in such case that no fraud was actually intended, or that no advantage was in fact derived from the transaction by the agent. *Kerr on Fraud and Mistake* (Bump's

Ed.) 173, 174; Perry on Trusts, par. 206; Story's Eq. Jur. par. 315; Bispham's Eq. (2d Ed.), par. 238, p. 299. The rule is not merely remedial of wrong actually committed. It is intended to be preventive of wrong. Public policy requires, as was tersely and forcibly said by the Chief Justice in *Staats v. Bergen*, 17 N. J. Eq. 554, that 'a trustee may not put himself in a position in which to be honest must be a strain on him.'

In 2 Cor. Jur. p. 763, § 430, defining the rule in relation to the action of agents acquiring adverse or secret interests, it is stated as follows:

"An agent is held to the utmost good faith in his dealings with his principal, and if, in the transaction of the agency, he represents persons having interests adverse to those of the principal, he generally loses his right to compensation, unless the principal, either expressly or by implication, from the facts and circumstances of the case, consents to the dual employment, or waives, or estops himself from asserting, any objection based thereon. This rule is based on the ground of public policy, and the mere fact that the principal had knowledge that the agent was also acting for the other party, without any consent thereto, will not enable the agent to recover compensation. An agent who represents the adverse party, without his principal's consent, not only loses his right to compensation from his principal, but he cannot recover compensation from the adverse party, on either an express or an implied promise to pay, unless the principal consents not only to the dual agency, but also to the double compensation, because a secret contract by the adverse party to compensate the agent is illegal, as tending to work a fraud upon the principal."

In one of the footnotes supporting the text just stated, we find the following taken from the case of *Bell v. McConnell*, 37 Ohio St. 396, 41 Am. Rep. 528, which is pertinent here:

"Several reasons may be given for this rule. In law, as in morals, it may be stated that, as a principle, no servant can serve two masters, for either he will hate the one and love the other, or else he will hold to the one and despise the other. Luke, 16, 13. Unless the principal contracts for less, the agent is bound to serve him with all his skill, judgment and discretion. The agent cannot divide this duty and give part to another. Therefore, by engaging with the second, he forfeits his right to compensation from the one who first employed him. By the second engagement, the agent, if he does not in fact disable himself from rendering to the first employer the full quantum of service contracted for, at least tempts himself not to do so. And for the same reason, he cannot recover from the second employer, who is ignorant of the first engagement. And if the second employer has knowledge of the first engagement, then both he and the agent are guilty of the wrong committed against the first employer, and the law will not enforce an executory contract entered into in fraud of the rights of the first employer. * * * The contract itself is void as against public policy and good morals, and both parties thereto being in *pari delicto*, the law will leave them as it finds them."

That an agent cannot recover commissions from either of the parties where there has been double dealing by him, as appears in this case, was held in the case of *Glenn v. Rice*, 174 Cal. 269, 162 P. 1020. After stating that the authorities are practically unanimous in so holding, the opinion sets forth the following reasons:

"The reason for the rule is that he (referring to the agent) thereby puts himself in a position where his duty to one conflicts with his duty to the other, where his own interests tempt him to be unfaithful to both principals, a position which is against sound public policy and good morals. His contract for compensation being thus tainted, the law will not permit him to enforce it against either party. It is no answer to this objection to say that he did, in the particular case, act fairly and honorably to both. The infirmity of his contract does not arise from his actual conduct in the given case, but from the policy of the law, which will not allow a man to gain anything from a relation so conducive to bad faith and double-dealing. And the fact that the party whom he sues was aware of the double agency and of the payment, or agreement to pay, compensation by the other party, and consented thereto, does not entitle him to recover. He must show knowledge by both parties. One party might willingly consent, believing that the advantage would accrue to him, to the detriment of the other. The law will not tolerate such an arrangement, except with the knowledge and consent of both, and will enter into no inquiry to determine whether or not the particular negotiation was fairly conducted by the agent. It leaves him as it finds him, affording him no relief."

This holding is supported by a long list of authorities. See page 272 of the opinion from which we have just quoted (162 P. 1021).

[2, 3] The facts in this case show that the plaintiff kept quiet when he should have spoken; that he did not tell the owners of the sheep that any reduction they made in the price would inure to his benefit, until after the deal had been closed. It was incumbent upon the plaintiff in this case to act fairly and honorably toward the owners of the sheep, and immediately convey to them the information that the purchaser was willing to pay \$13 a head as soon as such statement had been made to him by such purchaser. Instead of so doing, he remained silent, and is in the position of seeking to benefit by his silence, when good faith and fair dealing demanded that he should speak. This is condemned by all of the authorities, and the law will leave the plaintiff just where it has found him, and not permit him to gain by his breach of trust.

In the recent case of *Gordon v. Beck*, 196 Cal. 768, 239 P. 309, the court had occasion to review double dealing on the part of the agent, and, in condemning such action, stated the law as follows:

"Such conduct is a fraud upon his principal, and not only will the agent not be entitled to compensation for services so rendered, but the

contract or dealings made or had by the agent, while so acting also for the other party without the knowledge or consent, of the principal, are not binding upon the latter, and if they still remain executory, he may repudiate them on that ground, or, if they have been executed in whole or in part, he may by acting promptly and before the rights of innocent parties have intervened, restore the consideration received, rescind the contract and recover back the property or rights with which he has parted under it. It makes no difference that the principal was not in fact injured, or that the agent intended no wrong, or that the other party acted in good faith; the double agency is a fraud upon the principal and he is not bound."

It is further set forth that such a contract is voidable at the option of either principal. The opinion from which we have just quoted cites a long list of authorities supporting the rule just stated. To the same effect is the case of *Lem v. Wilson*, 27 Cal. App. 512, 150 P. 641.

In 1 California Jurisprudence, 810, the following summary is made of the authorities holding that no compensation can be recovered from either principal, to wit:

"The authorities, with practical unanimity, declare that if an agent is engaged by both parties to effect a sale of property from one to the other, or an exchange between them, not as a mere middleman to bring them together, but active in inducing each to make the trade, he cannot recover compensation from either party unless both parties knew of the double agency at the time of the transaction."

The rules of law governing cases such as the one under consideration, and condemning double agencies under circumstances such as are disclosed by the transcript in this case, are fully set forth in 1 California Jurisprudence, p. 790 et seq.

It necessarily follows from what we have said that the judgment herein should be reversed, and it is so ordered.

We concur: FINCH, P. J.; HART, J.

88 Cal. App. 405

HILL et al. v. MORRISON et al. (Civ. 4553.)

District Court of Appeal, Second District, Division 2, California. Jan. 19, 1928.

1. Animals ⚡100(4)—Finding orchard damaged by defendant's cattle was inclosed by substantial fence or other enclosure held supported by evidence.

In action for damage to fruit trees by defendant's cattle, finding that orchard lands trespasssed on were entirely inclosed by substantial fence or other inclosure held supported by evidence.

2. Trial ⚡404(1)—A finding should be read as a whole.

To interpret a finding, it should be read as a whole.

3. Damages ⚡112—Value of fruit trees destroyed was determinable from value of ground with trees over value of ground without trees.

In action for damage to fruit trees by defendant's cattle, damage to trees was determinable from evidence that each tree was worth a definite sum which related to the added worth of the ground with trees, over worth of ground without trees.

4. Appeal and error ⚡1071(6)—Failure of findings to cover value of loss of fruit which trees would have produced held not prejudicial to defendants.

In action for damage to fruit trees by defendant's cattle since allegation in complaint referring to fruit as an added damage was surplusage and added nothing to complaint, defendants were not prejudiced by court's failure to find value of loss of fruit which trees would have produced.

5. Damages ⚡188(2)—Testimony of orchardist figuring damage to fruit trees held to sustain damage award.

In action for damage to fruit trees by defendant's cattle, testimony of orchardist fixing damages at slightly less than \$900, and another orchardist fixing it as more than that sum, held to justify decision fixing damage of \$1,400, or in reduced sum of \$900.

6. Animals ⚡100(4)—Evidence held to warrant finding that fruit trees were injured by defendant's cattle, not by snow or other cattle.

In action for damage to fruit trees by defendant's cattle, evidence held to warrant finding that injury to trees was caused by defendant's cattle, not by weight of snow or other cattle.

7. Evidence ⚡547—Overruling objection to question to expert as to what he considered amount of damage to trees held within discretion.

In action for damage to fruit trees by defendant's cattle where expert witness was testifying as to value of land with and without trees, overruling objection to question asking him to state what he considered to be amount of damage to trees was not an abuse of discretion, where answer received was clarified by other questions and answers which brought witness' answer within proper admeasurement of damages.

Appeal from Superior Court, San Bernardino County; Benjamin F. Warmer, Judge.

Action by Fred Hill and another against F. P. Morrison, trustee, and others. From a judgment for plaintiff, defendants W. H. Glass and W. W. Glass appeal. Affirmed.

C. A. Ballreich, of Los Angeles, for appellant.

Byron Waters, of San Bernardino, and U. F. Lewis, of Redlands, for respondents.

STEPHENS, Justice pro tem. This cause is based upon an alleged damage to fruit trees by cattle belonging to, or controlled by,

the defendants W. H. and W. W. Glass. The trial court entered an order of nonsuit as to all other defendants, and they are not before this court. The trees, about 850 in number, are in a mountainous orchard in San Bernardino county which is entirely surrounded by the area known as Angeles National Forest. The action was tried before the court without a jury, and the judgment was awarded against said W. H. and W. W. Glass for the sum of \$1,400 with costs, but, after motion for new trial, which was denied, the damage judgment was reduced to the sum of \$900. Said last-named defendants, herein-after referred to as defendants or appellants, appealed, specifying several numbered points upon which they rely for a reversal of the judgment.

[1] Point No. 1:

"Judgment should be reversed for failure of plaintiffs to prove that the lands trespassed upon were entirely inclosed by a substantial fence or other inclosure."

The finding upon which appellants base the above point is as follows:

"That said orchard is and at all times mentioned in said complaint has been inclosed with a 4-barbed wire fence except where there is a trail, which fence together with said brush and the lay of the land thereat formed a substantial inclosure of said orchard."

[2] Appellants point out that there is a seeming inconsistency in the finding that there is a trail through the brush, and yet the brush together with the lay of the land thereat forms a part of a substantial inclosure. They also argue that the expression "which fence together with said brush and the lay of the land thereat formed a substantial inclosure of said orchard" is a pure conclusion and no part of a finding of fact. Therefore, there is no finding of fact from which a conclusion could be drawn that the orchard was substantially inclosed. Reading the finding as a whole, as of course it should be read, we do not find it to be fatally defective. The court finds as a fact that partially around this orchard there is a fence and partially around it there is a thick brush, and that as a fact the fence and the brush form a substantial inclosure. And this, notwithstanding there is a trail through the brush. The circumstance that the court finds that the fence and brush form an inclosure is to be taken that the trail was not such a trail as to preclude the finding that the fence, the brush, and the lay of the land thereat "formed a substantial inclosure." Without quoting extensively from the transcript, it is sufficient to say that the evidence supports this construction of the finding and supports the finding in its entirety. We however, quote the following from the testimony of R. H. Stetson, one of the plaintiffs in the case:

"Q. And the land described in the complaint has been in the possession of the plaintiffs how long? A. About 10 years, nearly 11 years now; not quite.

"Q. In the months of February, March, and April, 1922, was the tract fenced or unfenced? A. Fenced.

"Q. What kind of a fence? A. Mostly a 4-barbed wire fence, with posts 12 feet apart. A portion of the old fence that was on the place had a 3-barbed wire fence; and the north portion, the north line of the place, is very thick and heavy brush, and it was never necessary to have a fence there; the stock never penetrated it, or never did to my knowledge.

"Q. That is to say the thickness of the brush furnished the inclosure for that part? A. Yes, sir, inclosed it."

It is as easy to conceive of a fence so constructed or in such bad repair that it would not aid in substantially inclosing the ground as it would be to conceive of a brush of such tender qualities, or a lay of the land so even, that they would not aid in inclosing the orchard. But the court finds these three elements present, and that they constitute a substantial inclosure. It would, indeed, be a refinement to require in the finding the details of the fence construction posts, space between wires, etc., the density and the resisting power of the brush and the grade of the land. The evidence must be looked to for these details.

The briefs of both parties very carefully analyze the law as to whether or not it is necessary to a recovery by plaintiffs that the orchard area, situated as it is and where it is, must have been substantially inclosed. Appellants contend that if the orchard was not within an inclosure the plaintiffs cannot, as a matter of law, recover. But we need not consider this point, as we have determined that the trial court's finding that the orchard was substantially inclosed is proper in form and supported by the evidence.

[3] Point No. 2:

"The decision is against law for the reason that the trial court failed to make a finding on material issues, to wit, the loss in value of the lands or trees thereon resulting from the injuries found done to the trees, and the loss of fruit which the trees would have produced if such damage had not been done."

Appellants contend that the finding that the defendants permitted their cattle to break through plaintiffs' fence and to go into plaintiffs' orchard, and to bite, eat, break, horn, damage, and destroy trees to plaintiffs' damage in the sum of \$1,400 (later reduced to \$900) is a naked conclusion and does not suffice to constitute a finding as to the extent of the injury to or the loss in value of the lands or the trees thereon resulting from such injuries.

[4] There is no claim or intimation in this case that the plaintiffs are asking for damages on a sentimental ground. On the con-

trary, the evidence responds to the allegation in the complaint referring to damage to the trees and only to the theory of a pecuniary loss. Fruit trees, under this theory, are valuable only because they produce valuable fruit. This value may be considered by a direct evaluation of the fruit itself or as an added value of the land with the fruit-producing trees thereon. The evidence adduced was that each tree, according to its age, condition, and kind, was worth a specific sum; that those destroyed were thereafter worth nothing; and that those injured were worth sums proportionate to their normal condition. This worth, of course, related to the added worth of the ground with the trees, over the worth of the ground without the trees, and was a proper method of determining the damage. Sedgwick on Damages (7th Ed.) 276; *Montgomery v. Locke*, 72 Cal. 75, 13 P. 401; *Shearer v. Park Nursery Co.*, 103 Cal. 415, at p. 420, 37 P. 412, 42 Am. St. Rep. 125. Since the method used considered the value of the trees as fruit producers, it follows that an added sum for the crop itself would have been counting the damage twice, and hence the allegation in the complaint referring to fruit as an added damage is pure surplusage. This allegation adds nothing to the complaint, and the defendants have not been prejudiced in any way by the failure of the findings to cover it. Being an immaterial allegation, no finding thereon need be made.

[5] Point No. 3-A:

"The evidence is insufficient to justify the decision fixing the amount of damage in the sum of \$1,400, or in the reduced sum of \$900."

As may be seen from the evidence quoted and further from our comment under point No. 4, we regard the testimony relating to the method of measuring the damage as proper. Under this method one of the orchardists figured the damage slightly less than \$900, and the other as very much more than that figure. It is plain that there was substantial testimony upon which the trial court could arrive at the amount fixed in the judgment.

[6] Point No. 3-B.

"The evidence is insufficient to justify the decision that the injuries to plaintiffs' property were not in anywise done or caused by the weight of snow."

R. H. Stetson, one of the plaintiffs, testified that he had lived in the neighborhood of the orchard for many years; that he went up to the place in the early spring of 1921 and found six head of defendants' cattle in the orchard; that he observed the trees eaten, broken, and limbs twisted and broken, and that the damage was done by cattle; that never before had he sustained any considerable damage to his orchard trees except through a late frost; that when he exam-

ined the broken limbs he found the breaks comparatively recent; that around the broken and browsed trees there were many cattle tracks; that the spring buds had been browsed off up to six or seven feet from the ground. Another witness, Selover, also saw two of defendants' cattle in the orchard in March, 1921. This evidence was competent to support the finding criticized.

Points Nos. 3-C and 3-D:

"The evidence is insufficient to justify the decision that the injuries and damage to plaintiffs' property were done by the cattle of defendants, and not by cattle of other persons."

The discussion under 3-B of this point covers this subdivision of point 3 as well. We will add that, while it may have been possible that other cattle joined in causing the damage, there is no testimony to that effect and the testimony referred to was competent evidence upon which the trial court could have based the above referred to finding.

[7] Point No. 4:

"The court erred in overruling appellants' objection to the question put to the witnesses Ford and Pendleton, calling for their estimate of the amount of damage to the trees in question."

Ford and Pendleton were called as orchard experts to give in detail their experiences, and were allowed to testify. Ford was asked:

"Now, taking all these different elements into consideration, you may state what you consider to be the amount of damage to these trees."

To which the objection was made that the question asked for a conclusion on the ultimate fact and that no foundation had been laid. The circumstances as to Pendleton may be considered the same as those applying to Ford for all practical purposes. Our comments under appellants' point No. 3 will be in mind while considering this point, without specific reference. In the cross-examination, counsel for defendants asks the following questions and Mr. Ford gives the following answers:

"Q. Mr. Ford, where did you obtain the \$8 valuation that you placed on the Rome Beauty trees of that age? A. Well, that is what I would consider a fair valuation of the Stetson orchard, considering the age of the tree and the location and the variety of the tree."

"Q. Did that \$8 per tree include the land value that it is growing in? A. Well, I would say that it would be part of the land value—that is, you really might calculate the land and the trees growing together, but the trees have, I would consider, have a value themselves, \$8."

It requires no argument to arrive at the conclusion that the witness was in effect testifying that the land with these trees was worth \$8 more per tree than without them, and was worth proportionately less through

the extent of their injury. Both witnesses qualified as experts to the satisfaction of the trial judge, and we find no abuse of discretion therein, as we should have to do to sustain the objection as to qualification. We hold that the overruling of the objections was not error, and that the bases of the answers received were clarified and squarely brought within the proper admeasurement of damages in this case by the questions and answers quoted herein.

It is further contended by appellants that the estimates of damage are gross instead of net, but sufficient of the testimony has been referred to and quoted to show that it does not support this view.

The judgment is affirmed.

We concur: WORKS, P. J.; CRAIG, J.

88 Cal. App. 476

PEOPLE v. LOUGHEED. (Cr. 1436.)

District Court of Appeal, First District, Division 2. California. Jan. 20, 1928.

1. Criminal law §419, 420(11)—Police officer's testimony respecting conversation with prosecutrix in rape case to show her chastity held inadmissible as hearsay (Pen. Code, § 261, subd. 3).

In prosecution for rape, under Pen. Code, § 261, subd. 3, consummated by use of force overcoming resistance of prosecutrix, testimony of police officer as to a conversation with prosecutrix, offered to show her chastity, on the theory that it had been put in issue by defendant, held inadmissible as hearsay.

2. Criminal law §721(5), 730(10)—Prosecuting attorney's comment on accused's failure to deny rape held error, and court's failure to admonish jury to disregard it rendered error more prejudicial (Pen. Code, § 1323, and § 261, subd. 3).

Under Pen. Code, § 1323, providing that defendant's failure to testify cannot prejudice him or be used against him on the trial, prosecuting attorney's argument to jury commenting on defendant's failure to deny commission of forcible rape, in violation of section 261, subd. 3, charged against him, held error, and trial judge's failure to admonish the jury to disregard it made the misconduct more prejudicial.

Appeal from Superior Court, Contra Costa County; H. V. Alvarado, Judge.

Victor Lougheed was convicted of an attempt to commit rape, and he appeals. Reversed and remanded for a new trial.

George M. Naus, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Wm. F. Cleary, Deputy Atty. Gen., for the People.

NOURSE, J. Defendant was tried before a jury upon an information charging rape under subdivision 3 of section 261 of the Penal

Code—where the female "resists, but her resistance is overcome by force or violence." A verdict of guilty of attempt to commit rape was returned, and, from the judgment upon the verdict, the defendant has appealed on a typewritten record.

The material evidence in the case is found in the transcript of the testimony of the prosecutrix, taken at the preliminary examination (she having failed to appear at the trial of the action in the superior court) and in the extrajudicial statement of the defendant, made in the office of the district attorney shortly after his arrest. The stories of the two parties are without substantial conflict except upon the two issues of resistance and penetration. At about the noon hour of July 11, 1927, the defendant, a man of 50 years of age, picked up the prosecutrix, a woman over 21, on the streets of Berkeley, where she was soliciting subscriptions for an Oakland newspaper. He drove her in his car to a place in the hills of Contra Costa county, where the attack is alleged to have taken place about an hour later. The prosecutrix went upon the ride willingly, and permitted the defendant to engage in undue familiarities while in the car, apparently in expectation that she would secure from him a number of subscriptions to the paper by which she was employed. According to her story, she left the car and tried to escape, but the defendant followed her and accomplished the act without her consent and against her protest. The jury evidently disbelieved her story as to penetration when it found a verdict of attempt only. If her story were true and believed by the jury, it would have required a verdict of guilty of the crime charged in the information. If untrue, in this essential part, the doubt which this fact must cast upon the rest of her story merely emphasizes the importance of the errors of law herein-after considered.

The appellant insists that the evidence is insufficient to prove the essential element of resistance on the part of the prosecutrix, and points out that the most that appears from her testimony is that she resented his caresses, resisted, pleaded, fought, and struggled with him; that it does not appear that any clothing was torn, that there was any blood upon her body or clothing, or that either the prosecutrix or her assailant showed any scratches, bruises, or marks of violence; and that there is no evidence of any character tending to prove that her resistance was "overcome by force or violence." Many cases are cited by appellant touching on the question of the sufficiency of evidence to prove this issue, but we do not deem it necessary to further discuss the evidence or to consider the authorities cited, because we are satisfied from our review of the entire record that the appellant was not ac-

corded a fair trial, and the judgment must be reversed for that reason. We will rest the opinion on the two assignments in which error is confessed by the state.

[1] 1. In the direct examination of one of the Berkeley police inspectors, the district attorney asked him if the prosecutrix had said anything to him about her chastity. The appellant's objection to this inquiry was overruled on the ground that the question had been opened by him. The witness was then allowed to testify as follows:

"I asked her when this man raped her, if it hurt her, and she said, 'No.' I said, 'Have you ever had sexual intercourse with a man before?' She said, 'Absolutely not.' I said, 'That's strange; it generally hurts a woman the first time.' She said, 'I had some female trouble and had to undergo an operation, and at that time my hymen was ruptured.'"

The evidence was plain hearsay, and should have been excluded. The ruling of the trial judge was evidently based upon the theory that the question of the chastity of the prosecutrix had been put in issue by appellant. Before this testimony was taken, the appellant had, during the cross-examination of another police inspector, and for the purpose of impeaching the testimony of the prosecutrix given at the preliminary examination as to her chastity, elicited the statement that when she made the complaint to this inspector in the presence of the police matron and other police officers she said:

"I am engaged to a young man in San Francisco, and I have had sexual intercourse with him, because I expect to marry him."

Though this may have opened the door to evidence of chastity and good reputation, it certainly did not let down the bars for all kinds of incompetent and hearsay testimony.

[2] 2. During the presentation of the case in chief, the state introduced the statement of the appellant made in the office of the district attorney following his arrest. The appellant was called to the stand and testified that the statement was made after a deputy sheriff had assured him that "they would get me out of this." During the argument to the jury by the deputy district attorney, the following occurred:

"But this remains, gentlemen of the jury, he took that stand, he took that stand to tell you something, and he has never denied, while he was on the stand, that he took that girl to those hills, and he forcibly raped her. It appears to me that the proper procedure is, when they put the defendant on the stand, if they put him on at all, to ask him, 'Did you rape this girl?' is the material question in this case, and at this particular time he got upon the stand and made himself a witness in the case, and didn't deny it, and it went into the record then, gentlemen of the jury, undisputed, so far as his testimony

is concerned, after taking the stand and being sworn as a witness in this case.

"Mr. Doyle: If your honor please, we assign as reversible error, the remarks of the assistant district attorney with respect to the, or any, failure of counsel for the defendant to examine the defendant at length as to the merits of the case.

"The Court: It is best, Mr. Hoey, to refrain from reflecting upon counsel. The defendant went upon the stand and testified, and counsel has a right to refer to the evidence given by the defendant, just the same as he has a right to refer to the evidence given by any other witness, but it is best to refrain from reflecting in any way upon counsel.

"Mr. Hoey: I am not reflecting on counsel. If I did, I apologize, if they take it that way. I am referring to the testimony, and I am only trying to answer the question.

"Mr. Doyle: My objection is, in this assignment of error, we refer specifically to section 1323 of the Penal Code of the state of California, respecting the rights of the defendant.

"Mr. Hoey: Let's see it.

"The Court: Well, proceed, Mr. Hoey."

The Attorney General concedes the error, but insists that the question cannot be raised on an appeal from the judgment, citing *People v. Sansome*, 98 Cal. 235, 33 P. 202. The rule of the *Sansome* Case, that the point can be raised only on a motion for new trial, is no longer authority in this state. *People v. Amer*, 151 Cal. 303, 309, 90 P. 698; *People v. Derbert*, 138 Cal. 467, 71 P. 564. There is some confusion in the decisions as to whether the point can be raised on an appeal from the judgment when the trial judge has sufficiently admonished the jury to disregard the misconduct, but the authorities are uniform that it is properly raised on such appeal when no admonition is given, because in such a case it is an error at law on the part of the trial judge to refuse the admonition.

Section 1323 of the Penal Code provides that the neglect or refusal of a defendant to be a witness "cannot in any manner prejudice him nor be used against him on the trial." When the deputy district attorney called the attention of the jury to appellant's failure to deny the assault, he deprived the appellant of a right which the statute has accorded every defendant in a criminal case, and the failure of the trial judge to admonish the jury tended to make the misconduct the more prejudicial. It is neither proper nor fair to take advantage of a defendant on trial because of his failure to be a witness in his own behalf, so long as the statute safeguards him in that right. *People v. Morris*, 3 Cal. App. 1, 6, 84 P. 463; *People v. Sanders*, 114 Cal. 216, 238, 46 P. 153; *People v. Brown* (Cal. App.) 253 P. 735.

Judgment reversed, and cause remanded for a new trial.

We concur: BURROUGHS, Presiding Justice pro tem; STURTEVANT, J.

88 Cal. App. 354

PEAK et al. v. KEY SYSTEM TRANSIT CO.
(Civ. 6045.)★

District Court of Appeal, First District, Division 1, California. Jan. 16, 1928.

Hearing Denied by Supreme Court March 15, 1928.

1. Appeal and error ⇨1031(1)—Prejudice in procedure and practice is rarely presumed.

Where injury complained of goes only to question of procedure and practice, it is rarely that prejudice to appellant is presumed.

2. Appeal and error ⇨1170(1)—Permitting Compensation Insurance Fund to intervene as plaintiff in injured employee's action against tort-feasor, after impaneling jury, held not prejudicial error (Const. art. 6, § 4½; Workmen's Compensation Insurance and Safety Act 1917, § 26, as amended by St. 1919, p. 920, § 8).

Permitting State Compensation Insurance Fund to intervene as plaintiff after impaneling jury in employee's action against another than employer for injuries sustained in alleged violation of Workmen's Compensation Insurance and Safety Act 1917, § 26, as amended by St. 1919, p. 920, § 8, held not prejudicial error as depriving defendant of opportunity to examine individual jurors on voir dire as to connection with intervener or feelings toward latter's counsel, but at most a mere irregularity of procedure, without substantial injury to defendant within Const. art. 6, § 4½, where counsel frankly discussed situation with trial judge, and defendant knew of intervener's interest long before examining jurors, and made no request for further examination, nor any suggestion that complete re-examination would have disclosed any ground for complaint.

3. Appeal and error ⇨1170(1)—Permitting State Compensation Insurance Fund, which is state agency, to intervene as plaintiff in injured employee's action against tort-feasor, held not prejudicial error (Const. art. 6, § 4½; Workmen's Compensation, Insurance and Safety Act 1917, § 26, as amended by St. 1919, p. 920, § 8).

State Compensation Insurance Fund being an agency of state, established for purpose of administering certain portions of latter's sovereignty, there was no error prejudicial to defendant, within Const. art. 6, § 4½, in permitting it to intervene as plaintiff after impaneling jury in injured employee's action against tort-feasor, in alleged violation of Workmen's Compensation, Insurance and Safety Act 1917, § 26, as amended by St. 1919, p. 920, § 8; there being no stockholders or private interests for or against which juror might entertain a friendly, protective attitude or a prejudice.

4. Street railroads ⇨117(11)—Negligence in increasing speed of street car after driver of parked truck warned motorman to stop held for jury.

In action for injuries to driver of parked truck struck by street car, evidence that motorman increased speed of car instead of stopping as directed by plaintiff, when seven or eight feet from truck, held sufficient to take to jury question of defendant's negligence, even if neither

motorman, conductor, nor plaintiff was negligent, or plaintiff was equally negligent, until he gave such warning.

5. Street railroads ⇨117(24)—Contributory negligence of driver of parked truck, directing movement of street car colliding therewith, held for jury.

Contributory negligence of injured driver of parked truck in failing to see in time that grab handle at center entrance of street car, proceeding as directed by him, would strike truck, held for jury.

6. Negligence ⇨136(26)—To determine contributory negligence, as matter of law, undisputed facts must clearly show failure to exercise ordinary care.

To determine, as matter of law, that plaintiff was guilty of contributory negligence, it must be clearly shown from undisputed facts, judged in light of common knowledge and experience, that he failed to exercise such care as men of common prudence usually exercise in positions of like exposure.

7. Negligence ⇨136(9)—Evidence should leave no room for doubt to justify court in determining contributory negligence as matter of law.

To hold plaintiff guilty of contributory negligence as matter of law, evidence should be so clear as to leave no room for doubt, and the facts such that the inference is irresistible.

8. Street railroads ⇨90(4)—Operatives, aware of danger of collision, held bound to exercise care and watchfulness until entire street car had passed parked truck.

Street car motorman and conductor, aware of parked truck's situation near track, and danger of collision therewith, and proceeding with driver thereof in full view advising of its nearness and possibility of passage, held bound to exercise care and watchfulness until entire length of car, center entrance of which was equipped with grab handles, passed truck, not merely until front end had passed in safety.

9. Trial ⇨296(4, 5)—Instruction that street railway company is liable for injuries in collision with vehicle near tracks through its servants' negligence held not erroneous as ignoring question of contributory negligence, in view of succeeding instructions.

Instruction that street railway company is liable for injuries resulting if car collides with vehicle near tracks through its servants' inattention or carelessness held not erroneous as directing verdict for injured truck driver, regardless of his contributory negligence, if defendant's servants were negligent, in view of succeeding instructions on contributory negligence.

10. Trial ⇨228(1)—That instruction does not contain all conditions and limitations gathered from entire charge is not ground for reversal.

Trial court is not required to state all the law applicable to case in single instruction, but instructions should be considered in connection with each other, and, if charge harmonizes as a whole, and fairly and accurately states law, without straining any portion of language, reversal may not be had because separate instruc-

tion does not contain all conditions and limitations to be gathered from entire charge.

11. Street railroads ⇨118(1)—Instruction that street railway is liable for servants' "inattention or carelessness" held not erroneous as authorizing recovery for slight act of inattention.

Instruction that street railway company is liable for injuries resulting, if car collides with vehicle near tracks through its servants' "inattention or carelessness," held not erroneous as positively directing such finding, if such servants were guilty of slight act of inattention, without finding that their acts constituted negligence proximately contributing to injury, or that plaintiff was free from contributory negligence.

12. Trial ⇨296(3)—Instruction that street railway company is liable for injuries by collision with vehicle near tracks through its servants' inattention or carelessness held not reversible error, in view of other instructions (Const. art. 6, § 4½).

Instruction that street railway company is liable for injuries from collision with vehicle near tracks, through its servants' inattention or carelessness, held not so prejudicial as to require reversal, under Const. art. 6, § 4½, in view of other instructions that company is not insurer against any casualty that may happen, nor liable for merely accidental injuries, which ordinary care could not have avoided, or injury not proximately contributed to by its negligent act or omission.

13. Trial ⇨194(17)—Instruction that it is conductor's duty to watch for, and avoid, obstructions, after front end of street car safely passes vehicle near tracks, held not to invade jury's province.

Instruction that it is not only motorman's duty to see that front end of street car passes vehicle beside track safely, but conductor's duty to watch for, and avoid, obstructions that car may meet at any time before it has entirely passed, held not erroneous as invading jury's province and telling jury that motorman and conductor of car, grab handle at center entrance of which struck parked truck, were derelict in their duty, if they did not see that car passed safely and avoid obstruction.

14. Street railroads ⇨90(4)—Motorman and conductor must exercise ordinary care in passing vehicle beside tracks.

It is motorman's duty to see that front end of street car passes vehicle beside tracks safely, and conductor's duty to watch for and avoid obstructions that car may meet at any time before it has entirely passed, but each fulfills duty by exercising ordinary care and diligence under the circumstances.

15. Negligence ⇨2—Breach of duty essential to recovery for negligence.

When damages are sought by reason of negligence, it is nearly always essential that a breach of some duty owing plaintiff by defendant be established.

Appeal from Superior Court, Alameda County; E. C. Robinson, Judge.

Action by U. H. Peak against the Key System Transit Company, in which the State Compensation Insurance Fund intervened as a party plaintiff. Judgment for plaintiffs, and defendant appeals. Affirmed.

See, also, 199 Cal. 212, 248 P. 676.

Donahue, Hynes & Hamlin, of Oakland, Brobeck, Phleger & Harrison, of San Francisco (Chapman, Trefethen & Chapman, of Oakland, and Frank S. Richards, of San Francisco, of counsel), for appellants.

Ford, Johnson & Bourquin, of San Francisco, for respondent Peak.

Frank J. Creede, of San Francisco, for respondent State Compensation Insurance Fund.

PARKER, Justice pro tem. Appeal by defendant from a judgment rendered in favor of plaintiffs pursuant to the verdict of a jury in an action brought to recover damages on account of personal injuries sustained through the alleged negligence of defendant, its agents and servants.

Plaintiff Peak was injured on September 5, 1924. At the time of his injury he was employed by one Fred W. Diehl, and the nature of his employment was as driver of a truck. The said Diehl at all times embraced within our inquiry carried compensation and accident insurance with the State Compensation Fund.

In November of 1924 Peak commenced this action against defendant Key System Transit Company, alleging that his injury was sustained through the negligence of said company. Thereafter, on November 17, 1924, Peak duly notified the said State Compensation Fund that such an action had been instituted by him, and such notice stated that it was given in pursuance of the terms and provisions of the Workmen's Compensation, Insurance and Safety Act of the state of California. Thereafter, on January 29, 1925, the State Compensation Insurance Fund filed an action against Key System Transit Company. Both actions were predicated upon the same facts, but the action of State Compensation Insurance Fund contained additional facts showing the contract of insurance issued to Peak's employer by the Insurance Fund, and that the same covered the injury sustained by Peak, and that he did receive certain benefits. In both cases the defendant was represented by the same counsel. In case of Peak v. Key System issue was joined, and the case placed upon the trial calendar, while in the case of the Compensation Fund v. Key System the issue remained open pursuant to stipulations entered into between respective counsel.

The Peak Case coming on regularly for trial, a jury was impaneled, and, after the taking of testimony had commenced and a day of trial consumed, the State Compensation Fund appeared herein, and asked permis-

sion of court to intervene as a party plaintiff. After much discussion and colloquy between the court and counsel, the request was granted. Appellant vigorously assails the action of the court in this as being prejudicially erroneous.

Upon the intervention all of the allegations of the complaint of Compensation Fund were deemed denied. The main objection now urged concedes the right of the trial court to permit intervention or order consolidation for purposes of trial, but stresses the claim that, after trial commenced, the application came too late; indeed, in the court below, when the matter was first discussed, counsel for appellant then stated, "My only objection is that it comes too late."

Before discussing the point further, it may be stated that no question of fraud or inexcusable delay appears. The case of the Compensation Fund had lain dormant by request of defendant, and counsel for defendant were at all times aware of the pendency thereof and of the issues tendered thereby.

Without going exhaustively into the questions of intervention or consolidation for purposes of trial, and without reviewing the law establishing the rights of an employer for damage caused him by or through injury to servant, it is sufficient for the case to note that all parties concede the cause of action in plaintiff Compensation Fund against defendant, and concede further that, if the case had been at issue and ready for trial, the action of the court would have been correct in ordering a consolidation of the cases prior to the actual commencement of the trial of the Peak Case. The only purpose of the intervention of the State Compensation Insurance Fund was to secure for it a return of its outlay in case it was determined that the negligence of defendant caused the injury to plaintiff, and that through the injury damages were suffered. At all times the issue of defendant's negligence was the same, and was the one issue determining defendant's liability either to Peak or the Compensation Fund. The contention of the appellant here admits all of this. Concretely, appellant's argument is thus put:

"When the statute says that the right to consolidate is confined to a consolidation before trial, then the employer or his insurance carrier must apply for a consolidation prior to trial, and there can be no order permitting consolidation after trial commenced,"—citing section 26, Workmen's Compensation, Insurance and Safety Laws (St. 1917, p. 854, as amended by St. 1919, p. 920, § 8).

The controlling facts remain that the error complained of consists in the court's permitting to be done what concededly the law permits and requires to be done, but permitting it at a stage in the proceedings beyond that expressly set forth in the statute.

[1, 2] It surely would serve no useful pur-

pose for us to minutely analyze all of the possible constructions which might be suggested. After a most searching inquiry, we would be brought back to the main endeavor—to weigh the entire case to find if any substantial prejudice resulted to the rights of appellant. We must concede that errors might arise so far affecting the rights of the litigant that a reviewing court perforce must conclude that a miscarriage of justice resulted without further inquiry. But, where the injury complained of goes only to a question of procedure and practice, it is rarely that the prejudice is presumed. Such is the case here.

Appellant centers its claim of deprivation of rights upon the theory that, the intervention or consolidation being permitted after the impanelment of the jury, the defendant was deprived of the opportunity of examining the individual jurors on voir dire as to any possible connection with the intervening party, or as to the feelings of the persons examined for or against the counsel for the said intervenor. This objection seems to be merely perfunctory. Counsel in the court below were quite frank in discussing the situation with the trial judge, and it is apparent that both court and counsel were striving to meet a somewhat unusual situation. Naturally, counsel desired to preserve his record and retain for consideration the point involved. Yet, after such consideration and after trial, the claim of error finds only this one theory upon which to rest. We have not before us the record showing the scope of the voir dire of the jurors. However, the record does disclose that defendant, long before the examination of the jurors, knew the interest of the Compensation Fund in the result of the action. Further, the record here discloses that no request was made to further examine any juror, and there is not even a suggestion that, if a complete re-examination had been undertaken, it would have disclosed any ground for complaint. From our record here we must presume that a fair and impartial jury was impaneled, and it would surely be speculative in a high degree to arbitrarily conclude that, by reason of the intervention of a formal party, the complexion of the jury would be changed.

[3] We are mindful, too, that we are not considering a case where a private corporation insurance carrier is involved. The State Compensation Insurance Fund is an agency of the state, and was established for the purpose of administering certain portions of the sovereignty of the state. *Rauschan v. Gilbert* [Cal. App.] 253 P. 175. Therefore there are no stockholders or private interests involved for or against which a juror might entertain a friendly, protective attitude or a prejudice.

Going further and into the trial of the case, the State Compensation Fund took no active part in the trial. It simply offered more or

less formal proof on the facts of its claim, which was wholly conditioned upon the jury's determination on the facts presented by the other parties to the action.

We conclude that at most the action of the court could be held a mere irregularity of procedure without substantial injury to the rights of the defendant, and as such not ground for disturbing the judgment. Const. art. 6, § 4½.

[4-7] This brings us to a consideration of the merits of the appeal. For the purpose it becomes necessary to detail sufficient of the facts to illustrate the contentions made.

Plaintiff Peak, at the time of the accident, was employed as a truck driver. He had driven his truck from Oakland to Alameda, and had parked on Park street. No question is presented as to the propriety of his parking, nor is any point involved concerning local ordinances. The position of the truck when parked was in such relation to the tracks of the car system maintained and operated by the defendant corporation as to render doubtful the free passage of street cars. The plaintiff Peak, anticipating that the street car of defendant might strike the truck, walked toward the advancing street car, and raised his hand in warning, and the car stopped. Up to this point there seems little, if any, disagreement as to the facts. After the street car had come to a full stop, the plaintiff and the motorman and conductor of the car viewed the situation, and all saw the difficulties liable to be encountered in attempting to pass. Plaintiff explained to those in charge of the car that, if it should prove impossible for the car to pass, he (plaintiff) would move the truck out, and drive to a place where the truck would be entirely out of the way. After observation, it was determined by all that an effort would be made to pass without moving the truck. Accordingly, plaintiff took a position at or near the end of the truck, and signaled the car to proceed. With the motorman at his regular station in front, the attempt began. The street car in question is of a type known as a center entrance car; that is to say, that in the center of the car is the entrance for passengers as distinguished from that type of car which passengers enter from the ends. This center entrance is equipped with bars or handles, referred to throughout the case as grab handles, being bars or stanchions projecting some four or five inches from the body of the car, and the said grab handles are thus placed on either side of the entrance to facilitate the entry and exit of passengers. When the car started, the conductor remained on the step of the car, sighting along the side thereof to observe the progress of the passage. The plaintiff, as noted, stationed himself near the end of his truck, and signaled with his arms to the motorman that he might proceed. The car was started, and proceeded

cautiously towards the truck. The front end of the car passed without interference. It then appeared to plaintiff that the grab handles projecting from the side of the car could not permit through passage without collision. When these grab handles were still six or eight feet distant from the truck, plaintiff signaled to the motorman, and shouted "Stop." Thereupon, instead of stopping, the speed of the car was increased, and the collision occurred. Plaintiff was struck by the truck and injured. It further appears that the plaintiff Peak, in signaling to the motorman and conductor, and directing the advance of the car, was at all times in plain sight of said motorman and conductor. It also appears that, up to the time of the signal to stop, the car was going slowly, and at a speed that would have permitted an immediate stop.

It is true that on many details there is a conflict on the facts as we have outlined them; but appellant concedes that we must disregard this conflict and accept for the purposes of this appeal the facts as made out by the respondent. In any event, the summary of facts thus made is sufficient to present the contentions presented on this appeal.

It is appellant's contention, giving respondents the benefit of all conflict, that the facts disclose such contributory negligence on the part of respondent as to preclude a recovery. Putting it in the language of appellant, "the plaintiff and defendant motorman were in substantially the same position, and saw the same things, and reacted in the same way to what they saw, and had the same opportunity of determining whether the grab handle was or was not going to strike the truck; and the plaintiff, if he had foreseen the collision in time, could easily have saved himself from injury. Therefore, one of two things must necessarily be the case: Either the motorman and plaintiff were both negligent in failing to see in time that the grab rail was going to strike the truck, or they were both exercising due care when they failed to make that observation. It must be either one or the other, for it is impossible that one should be negligent and the other not negligent in failing to observe the same thing." We conclude, however, that the question is not so easily disposed of. Adopting appellant's theory up to a certain point, there is also the added circumstance that, while the car was still seven or eight feet away from the truck, plaintiff did anticipate the danger, and directed the motorman to stop, and that the speed of the car, wholly under control of the defendant's employee, was increased and the collision followed. We might assume that up to the point of warning neither party was negligent, or that, if there was any negligence, then plaintiff was equally guilty thereof. However, there is evidence, as stated, that both the motorman and con-

ductor were aware of the situation, and were proceeding as directed by plaintiff, and that, when directed to stop, they did just the opposite.

Without further analysis, we think that the facts presented a question for the jury, and the finding of negligence on the part of defendant's servants and employees is supported by the evidence, and that no facts appear from which the law itself concludes contributory negligence on the part of plaintiff. *Gumb v. R. R. Co.*, 57 N. Y. Super. Ct. 1, 559, 9 N. Y. S. 316. In order that this court could determine as a matter of law that respondent was guilty of contributory negligence, it must be clearly shown from the undisputed facts, judged in the light of common knowledge and experience, that a party has not exercised such care as men of common prudence usually exercise in positions of like exposure. *Nehrbas v. Central Pac. R. R.*, 62 Cal. 320. The evidence against the plaintiff should be so clear as to leave no room for doubt, and the facts such that the inference is irresistible, to justify this court in determining as a matter of law plaintiff guilty of contributory negligence. *Schneider v. Market St. R. R.*, 134 Cal. 487, 66 P. 734; *Schurman v. L. A. Creamery Co.* (Cal. App.) 254 P. 681.

[8] Many authorities are cited as to the standard of care required on the part of operators of street cars in passing persons or vehicles on or dangerously near the car tracks. It would serve no useful or other purpose to attempt a differentiation of the cases cited. In no cited case are we presented with facts similar to those appearing here. We are content to hold that in this particular case the duty of care and watchfulness remained incumbent on the servants of defendant company throughout, and until the entire length of the car had passed the truck. With two operators aware of the immediate situation and its dangers, and with the plaintiff in full view advising of the nearness of the truck and the possibility of passage, it would be indeed a harsh and unusual rule that would hold the operators free from all further care as soon as the front end of the car passed in safety.

An interesting and instructive discussion on the law applicable is found in the case of *Davidson Bros. Co. v. Des Moines City R. R.*, 170 Iowa, 467, 153 N. W. 59, Ann. Cas. 1917C, 1226. Without quoting therefrom, it is sufficient to state that the views hereinbefore expressed find ample support therein. In Annotated Cases 1917C, at page 1229, following the report of the Davidson Case, is an exhaustive annotation covering the entire subject, and citing authorities from many jurisdictions upholding the doctrine announced in the reported case.

[9] Appellant contends that the trial court erred in its instructions to the jury, and that the error thus committed prejudiced the

rights of appellant to an extent requiring a reversal of the judgment.

In this connection but two instructions given are called to our attention, viz.:

A. "I instruct you that it is the duty of the Key System Transit Company through its servants in control of its cars to exercise reasonable and ordinary care to avoid colliding with vehicles on or near its tracks, and the company is liable for the injuries or damage resulting if, through the inattention or carelessness of its servants, a car collides with a vehicle so near to the tracks that the car could not pass without striking it."

Discussing instruction A.

[10] Appellant contends that this instruction entirely disregards the question of contributory negligence, and, in effect, tells the jury that, regardless of any contributory negligence on the part of plaintiff, if the servants of the company were negligent, the company is liable for the injuries or damage resulting. Thus premised, the argument is that the instruction is the equivalent of an instruction to find for plaintiff, if the jury find that defendant was negligent. Having thus builded the case, appellant cites much authority to support the rule that, where an instruction directs a verdict for plaintiff, if the jury finds certain facts to be true, that instruction must embrace all of the things necessary to warrant the conclusion that the plaintiff is entitled to a verdict. The rule has no application here. It would be stretching the wording of the instruction beyond fair construction to hold that the jury were directed to bring in a verdict regardless of anything other than a showing of negligence on the part of defendant's employees. The scope of the instruction embraced only the substantive law of primary liability without reference to any defenses. This instruction was the first of the instructions given to the jury, excluding the general preliminary instructions on credibility of witnesses and burden of proof. The instructions which followed this very clearly and fully set forth the law of contributory negligence and its effect upon plaintiff's right to recover. The jury were instructed that the negligence of plaintiff proximately contributing in any degree whatever to plaintiff's injuries would necessitate a verdict in favor of defendant, regardless of whether or not the jury should believe the defendant negligent. A trial court is not required to state all of the law applicable to a case in a single instruction. The charge must be read as a whole. The instructions given should be considered in connection with each other; and, if, without straining any portion of the language, the charge harmonizes as a whole, and fairly and accurately states the law, a reversal may not be had because a separate instruction does not contain all of the conditions and limitations which are to be gathered from the entire charge. 24 Cal. Jur. 857, 860; *Weaver v.*

Carter, 28 Cal. App. 241, 247, 152 P. 323; Lawrence v. Goodwill, 44 Cal. App. 440, 455, 186 P. 781; Henderson v. L. A. Traction Co., 150 Cal. 689, 699, 89 P. 976.

In Mann v. Scott, 180 Cal. 550, at page 560, 182 P. 281, 285, the court uses this strikingly appropriate language: "The instruction complained of, which is one of a series, cannot fairly be torn from its context for criticism."

We might concede that the doctrine of the cases last cited would not have application where the entire charge contained instructions flatly contradicting each other, and by reason whereof it would be impossible to say what instruction the jury followed. Pierce v. U. S. Gas Co., 161 Cal. 176, 118 P. 700; Starr v. L. A. Railway Co., 187 Cal. 270, 201 P. 599. Such, however, is not the case here. There appears no conflict in the instructions.

[11] Appellant, in further attack upon this instruction, presents a second point. Before stating the contention, it is to be noted that this last ground of attack is not disclosed in appellant's opening, but was reserved for the final brief. It is contended that the instruction positively directs the jury that "the company is liable for injuries or damage resulting, if, through the *inattention or carelessness* of its servants, a car collides with a vehicle." In other words, it is contended the jury was not required to find that the acts of the company's servants constituted negligence, or that plaintiff was free from contributory negligence, or that the acts of the servants of the company proximately contributed to the injury, but it was enough to find that they were guilty of some slight act of inattention.

What has been said before with reference to the duty of appellate courts to view the instructions as a whole has equal application here. Appellant, anticipating this, argues that nowhere in any of the remaining instructions did the trial court define either the word "inattention" or the word "carelessness," so that the error was not cured by the giving of any other instructions.

The words complained of seem to require little defining. It seems plain to us that the instruction told the jury simply that the company was liable, if the collision occurred through lack of attention or lack of care on the part of the employees. Necessarily, the instruction must be applied to the then admitted facts of the case. It was admitted that, when the car started after the attention of the employees had been directed toward the conditions existing and the nearness of the truck to the car track, these employees knew of the specific hindrance to be met. The case is quite different from a situation where a sudden emergency is met. Obviously, ordinary care under the circumstances was co-extensive with attention and care during the brief space of time necessary to pass the anticipated possible obstruction. Where, as

here, the street car is moving a foot or two at a time in jerky motion, and all concerned in the transit have but one purpose, namely, to avoid an object with only a possible inch or two clearance, attention and care are essential elements of ordinary care, and the absence of either constituted negligence. A fair reading of the instruction renders it easily susceptible to this construction.

[12] In addition, the jury were told that a street railway company is not an insurer against any casualty that may happen, nor is it liable for injuries that are merely accidental, and which ordinary care could not have avoided; and were further told that, unless a negligent act or omission of the defendant contributed proximately to the injury, no action for damages could be founded upon it.

While we do not hold that in this case the instruction was erroneous, yet, if it were subject to all of the criticism offered, nevertheless, as the Supreme Court states in Hall v. Steele, 193 Cal. 602, 226 P. 854, "When the instruction complained of here is read in connection with and in the light of the other instructions in the case, of which [appellant] does not complain, it cannot be said that the instruction, though manifestly erroneous, was prejudicial to a degree which would require a reversal of this case."

[13] Instruction B. This instruction is as follows:

"I instruct you that in passing a vehicle beside the tracks it is the duty not only of the motorman to see that the front end of the car may pass safely, but also of the conductor in charge of the car to watch for and avoid obstructions the car may meet at any time before it has entirely passed."

Appellant contends that this instruction invades the province of the jury, and, in effect, tells the jury that, if the motorman and conductor did not see that the car passed safely, and did not avoid the obstruction, they were derelict in their duty. Appellant, in presenting this point for our consideration in the same paragraph, practically disposes of the contention in this language, which we might adopt:

"Probably no contention concerning instructions comes more frequently before the court than the contention that certain instructions invade the province of the jury, and it would undoubtedly be useless for us to enter into a discussion concerning the principles of law involved, principles which this court has had innumerable occasions to apply."

However, the following cases indicate that the application of these principles does not sustain appellant: Wirthman v. Isenstein, 182 Cal. 108, 187 P. 12; Robinson v. Western States Gas, 184 Cal. 401, 409, 194 P. 39.

[14, 15] The instruction complained of is manifestly a preliminary announcement, and sound enough in and of itself. In point of

law, it is the duty of the motorman to see that the front end of the car may pass safely, and it is also the duty of the conductor in charge of the car to watch for, and avoid, obstructions the car may meet at any time before it has entirely passed; but in point of law each has fulfilled his duty when he has exercised ordinary care and diligence under the circumstances. All this was abundantly set forth in numerous instructions and found in specific instructions proposed by the defendant and given by the court. *Lonnergan v. Stansbury*, 164 Cal. 488, 129 P. 770. In almost every case when damages are sought by reason of negligence it is essential that there should be established a breach of some duty owing to plaintiff by defendant. If in instructing a jury, a court is not permitted to advise the jury as to what that duty is, it would seem impossible for the jury to intelligently determine whether or not there had been any violation thereof. The case of *Wirthman v. Isenstein* is in point. There the trial court instructed the jury as follows:

"All motor vehicles upon public highways must be provided at all times with adequate brakes kept in good working order."

In approving the instruction, the court says:

"It will be noted that the court did not instruct the jury that a failure to perform the duty defined was in itself negligence, or, if negligence, a ground for recovery by the plaintiff; it merely informed the jury concerning the duty of defendants in regard to the brakes in the language of the statute. The instruction was not given for the purpose of establishing the plaintiff's right to recovery, but was purely incidental to the question as to whether or not, under all the circumstances, the defendants were driving the car negligently, and, in view of the evidence * * * was properly given."

Judgment affirmed.

We concur: KNIGHT, Acting P. J.; CASH-IN, J.

business, they are, for time being, his employees.

4. Master and servant $\S$ 284(2)—Whether relation of employee and special employer existed between electrician's helper and construction company to whom he was lent held for jury.

Evidence held to make it question for jury whether relation of employee and special employer existed between electrician's helper, lent by electric company to construction company, and construction company.

Department 1.

Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

Action by Howard Claire Umsted against the Scofield Engineering Construction Company. Judgment for defendant, and plaintiff appeals. Reversed.

Halverson & Price and Wallace W. Davis, all of Los Angeles, for appellant.

Haas & Dunnigan and H. E. Forster, all of Los Angeles, for respondent.

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**UMSTED v. SCOFIELD ENGINEERING
CONST. CO. (L. A. 8852.)★**

Supreme Court of California. Jan. 26, 1928.

Rehearing Denied Feb. 23, 1928.

1. Appeal and error $\S$ 1008(1)—Trial court's judgment based on its special finding is to be given same effect as judgment entered on directed verdict.

Judgment of trial court on basis of special finding, where court is of opinion that evidence is such that there is only one judgment which can be lawfully rendered, is to be given same effect as judgment entered by court on directed verdict.

2. Master and servant $\S$ 367—Where employee of independent contractor is working under another to whom he is hired, relation of general and special employer exists (Workmen's Compensation Insurance and Safety Act).

Where employee of alleged independent contractor comes under control and direction of other party to whom he has been hired and suffers injury, relation of both general and special employer exists, and injured employee is entitled to compensation from both general and special employer, in accordance with provisions of Workmen's Compensation Insurance and Safety Act (St. 1913, p. 279, as amended).

3. Master and servant $\S$ 367—Independent contractor's workmen under control of special employer in performance of his business are, for time being, his employees.

If workmen lent or hired by independent contractor are under control of special employer in performance of work which is part of his

SEAWELL, J. The question involved upon this appeal is whether defendant, Scofield Engineering Construction Company, a corporation, was the special employer of Howard Wilson Umsted, for whose death, alleged to have been caused by the negligence of the employees of said construction company, his father, Howard Claire Umsted, plaintiff herein, seeks to recover damages. If the construction company was, as it asserts, the special employer of decedent, plaintiff was without right to maintain an action for damages against it for the death of his son, but was limited to the remedy provided in the Workmen's Compensation, Insurance and Safety Act (St. 1913, p. 279, as amended) for injuries resulting in death.

[1] The court below, being of the opinion upon the conclusion of the trial that the evidence as a matter of law established the relation of special employer and employee between the construction company and the decedent, made a special finding to the effect that decedent was the special employee of the defendant and that the injuries resulting in his death grew out of and were received in the course of the employment of the said decedent, upon which finding was entered the judgment that plaintiff take nothing by the action. Although the court below did not follow the procedure generally adhered to in such cases and direct the jury to bring in a verdict for the defendant, which would serve as the basis for its judgment, a judgment entered by the court upon the basis of a special finding, where the court is of the opinion that the state of the evidence is such that there is only one judgment which can lawfully be rendered, is to be given the same effect as a judgment entered by the court upon

a directed verdict. Without regard to the procedure followed, the determination is, in law, the act of the court. The jury merely acts in a ministerial capacity in bringing in a verdict in pursuance of the court's direction. *Estate of Sharon*, 179 Cal. 447, 177 P. 283; *Gaskill v. Pacific Electric R. Co.*, 30 Cal. App. 593, 159 P. 200; 24 Cal. Jur. 918.

The respondent had contracted to excavate and construct a basement for an addition to the New Broadway Department Store in the city of Los Angeles, and at the time decedent received the injuries from which he subsequently died, it was engaged in excavating for the basement of said addition to a depth of over 60 feet below the level of the street. By reason of the fact that operations were being carried on during the night, as well as by day, and that much of the work was being done below the surface of the ground, it was necessary that temporary lighting facilities be installed from time to time at such places as they were needed. In addition, large quantities of electrically operated machinery were being used and the services of electricians were required for such work. Decedent, who was 18 years of age at the time of his death, was an electrician's helper on the regular pay roll of the Golden State Electric Company. The respondent had applied to the said Golden State Electric Company for electricians and said company had directed one C. F. Sims to report upon the job and had later sent decedent to assist Sims. Sims was a regular employee of the electric company. While going to a toolhouse adjacent to the premises where the excavation was in progress to obtain tools at the direction of Sims, decedent was struck by a large plank which was being used in the excavating and building operations and thus received the injuries from which he died on the following day.

[2, 3] Respondent, in denying appellant's right to maintain an action for damages, relies upon those cases holding that, where either by the terms of the contract or during the course of its performance the employee of the alleged independent contractor comes under the control and direction of the other party to whom he has been lent or hired and suffers injury in the course of and in consequence of such direction and control, the relation of both general and special employer exists and the injured employee is entitled to compensation from both the general and special employer in accordance with the provisions of the Workmen's Compensation, Insurance and Safety Act, which affords the exclusive remedy in such cases. *Famous Players Lasky Corporation v. I. A. C.*, 194 Cal. 134, 228 P. 5, 34 A. L. R. 765; *Employers' Liability Assurance Corporation v. I. A. C.*, 179 Cal. 432, 177 P. 273; *Federal Mutual Liability Ins. Co. v. I. A. C.*, 190 Cal. 97, 210 P. 628. If the workmen lent or hired are under the control of the special employer in the performance of work which is a part of his business,

they are, for the time being, his employees. *Famous Players Lasky Corporation v. I. A. C.*, supra. As such workmen may under the common law of master and servant look to the general employer for wages and to the special employer for damages for negligent injuries, so under the Workmen's Compensation Law they may, so far as its provisions are applicable, look to the one or to the other, or to both, for compensation for injuries due to occupational hazards.

[4] By taking the case from the jury and making the special finding that decedent was the special employee of the construction company, upon which finding the judgment for defendant was entered, the court below adopted the respondent's theory of the case. Unless it can be said that, as a matter of law, no other reasonable conclusion was legally deducible from the evidence, and that any other holding would be so lacking in evidentiary support that an appellate court would be impelled to reverse it upon appeal, or a trial court to set it aside, it must be held that the court erred in taking the case from the jury and itself rendering the decision. *Diamond v. Weyerhaeuser*, 178 Cal. 540, 174 P. 38; *Estate of Caspar*, 172 Cal. 147, 155 P. 631; *Estate of Baldwin*, 162 Cal. 471, 123 P. 267; 24 Cal. Jur. 912. We are of the view that the testimony as to material facts regarding the relationship between decedent and the construction company, concerning which there is no substantial conflict, is susceptible of the inference that the electrical work of a temporary nature was being done by the electrical company as an independent contractor through its employees Sims and decedent, Umsted; that the jury might have concluded, without abusing the discretion vested in it as the trier of the facts, that the electrical company at no time had surrendered to the construction company, nor had the construction company exercised, that degree of control over Sims and decedent which would give rise to the relation of special employer and employee between decedent and Sims and the construction company, but had itself retained the right to direct and control said workmen, the construction company merely indicating the result it desired to have accomplished. *Pryor v. I. A. C.*, 186 Cal. 169, 198 P. 1045; *Flickenger v. I. A. C.*, 181 Cal. 425, 184 P. 851, 19 A. L. R. 1150.

Since decedent, Howard Wilson Umsted, while working upon the job, as an electrician's helper, was directed solely by Sims, the relationship between Sims and the construction company would be determinative of the status of decedent as to said construction company. If Sims was an employee of an independent contractor, to wit, of the electrical company, and not the special employee of the construction company, decedent was likewise not the special employee of said construction company. Both Sims and decedent received payment of their wages from the electric com-

pany, being paid at a daily rate based on an eight-hour day. They kept a record of their time on time cards, which were "O. K'd" each day by the timekeeper for the construction company and turned over to the electric company by Sims and decedent. The construction company also kept a record of the time said electricians worked. They were expected to report at 8 o'clock each morning, although the regular construction company employees commenced work at 7 or 7:30 a. m. The construction company paid the electric company on what was known between the parties as a "cost-plus" basis; that is, it paid to said construction company a sum equal to the wages of all electricians who worked upon the job and the cost of all materials furnished by the electric company, and, in addition, a sum equal to 14 per cent. of the amount of said wages and material costs on account of the overhead of the electric company, and a further sum equal to 5 per cent. of said labor and material costs to said electric company, on account of profit. Since the cost of the electrical work to the construction company was dependent upon the amount earned as wages by the electricians, whose wages in turn were dependent upon the number of hours or days they worked, the fact that the construction company kept a record of their time is not conclusive evidence of a right to control residing in the construction company, for sound business practice would indicate to said company that it should keep a record of the time worked by the electricians even if it did not possess such control of them as to create the status of special employer and employee.

When asked upon the trial "how or with what means" he was to do the work, Sims replied that Mr. Sayre, who was superintendent of electrical construction for the electric company, directed him. Although it appears from the testimony of Sims, given in response to more specific questions, that the only occasions upon which he received any express directions from Mr. Sayre were when Sayre told him in the office of the electric company to go over to the job and do whatever was needed and on the following day when he telephoned to Mr. Sayre and was told to do "anything they wanted to take care of," the jury may well have inferred that the absence of more specific and detailed instructions from Sayre was to be accounted for by the fact that Sims was a skilled electrician, who did not require supervision or control as to the details of accomplishing the task to which he was assigned. It is the right to exercise control, rather than the mere fact of its exercise, which is decisive. Sims also stated that he had been assisted by several electricians besides decedent on the department store job; that he communicated with the electric company when he needed additional help and it furnished him with the desired

assistance; that the electricians supplied their own tools, such as pliers, screwdrivers, and hammers, and the electric company provided an acetylene torch; and that a small quantity of electrical materials which the construction company had on hand was used and the balance was furnished by the electric company as it was requested by Sims.

Sims further stated that when on the job Mr. La Barr, superintendent of construction for the construction company, had directed him as to what was to be done, but not "as to how to do anything." The jury might have inferred that the instructions given by La Barr were merely directions as to the result to be accomplished, such as are required in the nature of things to be given to independent contractors in any case. By reason of the character of the work, it would have been impossible for the duly authorized agents of the construction company and the electric company to have agreed beforehand as to the precise work to be done. Although the witness Sayre, superintendent of electrical construction for the electric company, stated that the electricians sent to the job were working under the direction of the construction company, other portions of his testimony and the evidence as to the circumstances surrounding the employment, as testified to by other witnesses, would support the conclusion that the control of the construction company was only as to the result to be accomplished and that it did not possess such control of the mode of accomplishment as to render it the special employer of Sims and decedent. See *Stacey, etc., Co. v. I. A. C.*, 197 Cal. 164, 239 P. 1072, and *Independence Indemnity Co. v. I. A. C.* (Cal. Sup.) 262 P. 757.

The judgment appealed from is reversed.

We concur: CURTIS, J.; PRESTON, J.

203 Cal. 262

CHILDRESS et al. v. L. DINKELSPIEL CO.,
Inc., et al. (S. F. 12241.)

Supreme Court of California. Jan. 28, 1928.

I. Evidence ⇐73—In suit to enjoin special meeting for election of director, it may be presumed that annual corporate meeting was called at regular time and directors elected (Civ. Code, § 361).

In suit to enjoin holding of special meeting for election of additional director for corporation under Civ. Code, § 361, it was presumed, in absence of proof to the contrary, that corporation and directors regularly performed their duty and called annual stockholders' meeting at regular time, and that all corporation's directors were then elected for the ensuing year.

2. Appeal and error $\Rightarrow$ 781(4)—Propriety of injunction restraining election of additional director held moot after time for regular stockholders' meeting had passed (Civ. Code, § 361).

Where time for regular meeting of stockholders of corporation had elapsed between time of proposed special meeting and hearing of appeal, court presumed that stockholders' meeting was regularly held and all directors elected for ensuing year, and question whether injunction was properly granted to prevent holding of earlier special meeting for election of additional director under Civ. Code, § 361, was therefore moot.

3. Appeal and error $\Rightarrow$ 781(1)—Appeal will be dismissed where controversy has become moot.

Where controversy existing at time appeal was taken has ceased to exist on account of matters subsequently transpiring, appeal will be dismissed as involving moot question.

Department 2.

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Action by Henry H. Childress and others against the L. Dinkelspiel Company, Inc., and others. From an order granting plaintiffs an injunction, defendants appeal. Appeal dismissed.

Dinkelspiel & Dinkelspiel and Bradley & Sipple, all of San Francisco, for appellants.

Sullivan & Sullivan and Theo. J. Roche, and Lloyd W. Dinkelspiel, all of San Francisco, for respondents.

LANGDON, J. Appeal from order granting an injunction to prevent defendants from holding a special meeting for the election of an additional director of the defendant corporation, which additional director had been provided for pursuant to section 361, Civil Code. The by-laws of the corporation provided for but five directors, and also provided that "the directors shall be elected by ballot at the annual meeting of the stockholders to serve for one year," etc. It was further provided that "the annual meeting of the stockholders may be held * * * on the last business day of the month of December of each year." This language in by-laws has been construed as mandatory and not permissive. *Pennington v. Pennington*, 170 Cal. 114, 148 P. 790; *Stabler v. El Dora Oil Co.*, 27 Cal. App. 516, 150 P. 643. After a compliance with section 361, Civil Code, the defendants called a special meeting for March 18, 1926, for the election of the additional director, which meeting was enjoined, as above stated.

[1-3] Presuming, as we must, in the absence of proof to the contrary, that the corporation and the directors thereof regularly performed their duty and called the annual meeting for the last business day of December, 1926, at which all directors of the corporation were

elected for the ensuing year, the question presented by this appeal becomes moot. As stated in *Matter of Guardianship of Ambrose*, 170 Cal. 160, 149 P. 43:

"This court is not called upon to pass judgment on a question which, when given, can have no practical effect; where a controversy existing at the time the appeal was taken has by reason of matters subsequently transpiring ceased to exist. When this appears the proper course is to dismiss the appeal."

The appeal is dismissed.

We concur: RICHARDS, J.; SHENK, J.

203 Cal. 233

CROCKER-HUFFMAN LAND & WATER CO. v. GOSS. (Sac. 3914.)

Supreme Court of California. Jan. 27, 1928.

1. Appeal and error $\Rightarrow$ 1033(9)—Defendant might not complain on appeal because trial court found smaller sum due plaintiff than was in fact due.

Defendant might not complain on appeal because trial court found that smaller portion of purchase price of hay was due to plaintiff than was in fact due to him, since error was in defendant's favor.

2. Sales $\Rightarrow$ 360(1)—Facts held to show that \$4,416.45 was due on purchase price of hay rather than \$4,692.06.

Facts held to show that \$4,416.45 was balance due to seller on purchase price of hay after subtracting conceded payments and uncontested sum in buyer's favor, rather than \$4,692.06.

3. Sales $\Rightarrow$ 200(2)—Title held to pass under contract for purchase of hay at specified price per ton, exact quantity to be later ascertained.

Title held to pass to buyer under contract for purchase of all of certain hay, stored in a specified elevator, shown to buyer, and estimated at 500 tons, at \$20 per ton, f. o. b. cars, shipment to be made on buyer's order within 60 days, and payment to be made promptly on receipt of invoices.

4. Sales $\Rightarrow$ 187—Sales contract, providing for shipment within 60 days, and payment on receipt of invoices, entitled seller to interest after specified time.

Sales contract, providing that hay should be shipped on buyer's order within 60 days, and that payment should be made promptly on receipt of invoices, held to entitle seller to interest on unpaid balances of total purchase price after expiration of 60-day period, notwithstanding that shipment of some hay had not yet been ordered by buyer.

5. Sales $\Rightarrow$ 176(4)—Contention that contract was vitiated by misrepresentations as to quality of hay held untenable, where buyer inspected hay before purchase, and subsequently wrote that it did not complain.

Buyer's contention that sales contract was vitiated by false representations that hay pur-

chased was in good condition, whereas in fact it contained a large quantity of "fox tail," *held* untenable, where buyer's agent inspected hay before it was purchased, and buyer subsequently wrote to seller that it did not complain of quality of hay.

6. Appeal and error ⚡909(5)—Appellate court will presume that no errors were made in weighing hay, where there is no dispute as to weights.

Supreme Court will presume that no errors were made in weighing hay sold at specified price per ton, where there is no dispute between parties as to correctness of weights.

7. Continuance ⚡33—Denying continuance to secure witness to testify to quality of hay purchased held proper, where buyer waived issue.

Denial of continuance, asked by buyer, to secure absent witness to testify as to bad quality of hay purchased, *held* not error, where buyer had waived issue as to quality by letter to seller, especially where absent testimony would have been merely cumulative on disputed question of fact.

In Bank.

Appeal from Superior Court, Merced County; E. N. Rector, Judge.

Action to recover balance of purchase price of hay by the Crocker-Huffman Land & Water Company against Haarer Elden Goss, doing business under the name of Chas. E. Goss & Son. From a judgment in favor of plaintiff, defendant appeals. Conclusions and judgment modified, and cause remanded, with directions.

Hankins & Hankins and Olin F. Nuckolls, all of San Francisco, for appellant.

C. W. Croop, of Merced, for respondent.

SEAWELL, J. [1] This action was commenced to recover an alleged balance due, together with interest thereon, on account of a lot of hay purchased on January 12, 1925, by appellant from respondent corporation. Appellant, Haarer Elden Goss, doing business under the name of Chas. E. Goss & Son, with offices in the city and county of San Francisco, was, at the time the contract in suit was made, and for some years prior thereto had been, engaged in the business of buying and selling hay in large quantities upon the open market.

On January 12, 1925, appellant addressed the respondent as follows:

"This will confirm our purchase from you today of all the wild oat and alfalfa hay 1924 crop belonging to you, now stored in the Merced Elevator * * * Company's warehouse at Merced and which you showed to our buyer, Mr. Bull, estimated at about five hundred (500) tons, at \$20.00 per ton f. o. b. cars Merced, in good order. Shipment buyer's order within 60 days. H. Goss, E. S. M.

"Railroad weights to govern. Payment to be made promptly upon receipt of invoices. Kindly

sign the duplicate copy as your acceptance and return to us.

"Yours very truly, Chas. E. Goss & Son.
"H. Goss."

The duplicate copy was signed and marked "Accepted" by E. S. Murchie, who was the assistant manager of respondent, in accordance with the request of appellant. The total amount of hay delivered under the contract was 999,979 pounds, representing in money \$9,999.79. The office manager presented the ledger of accounts receivable at the trial, which showed that deliveries of hay commenced January 27th, and continued until all the hay was removed. On March 12, 1925, the total amount agreed upon by the parties as the purchase price of said hay became due, and under the terms of the agreement all the hay should have been removed from the warehouse not later than that day. The only payment on account of said transaction prior to March 12th was the sum of \$2,526.40, which payment was made February 14, 1925. The amount due and unpaid on March 12, 1925, was thus reduced to \$7,473.39. The complainant, however, alleged that the amount due and unpaid on March 12th was \$7,398.51, and the court's finding that all of the allegations of the amended complaint were true by reference adopted that sum as the unpaid balance due on March 12th. The balance alleged and found to be due being \$74.88 less than the amount actually due as shown by the evidence, and the difference being in appellant's favor, the latter has no ground of complaint by reason of said inaccuracy. Other amounts were paid on account, which, according to the averments of the amended complaint, reduced the indebtedness on the day the amended complaint was verified, to wit, September 19, 1925, to \$4,692.06, plus interest on certain overdue amounts calculated from March 12th to the day of payment, in case payments were made on account of the transaction.

[2] The day on which all unpaid indebtedness became due, as shown by the evidence, and upon which computations of interest were reckoned by respondent, was March 12th. Accepting that day as the starting point, we are unable, in view of the credits allowed appellant by respondent's bookkeeper, E. N. Brown, who furnished the only figures on the subject, to justify the finding that the amount due and owing respondent at the time of the trial was the sum of \$4,692.06, or more than the sum of \$4,491.33. It is conceded that the purchase price of the hay was \$9,999.79. Respondent concedes the following payments were made: February 14th, \$2,526.40; April 10th, \$323.20; April 16th, overcharge, \$21.70; April 16th, \$2,383.25; May 28th, credit, \$253.91; total, \$5,508.46. By the process of subtraction, the demand is reduced to the sum of \$4,491.33. But, as above mentioned, the allegation of the complaint and the finding of

the court were that, on March 12th, the principal sum due was but \$7,398.51, as against the correct amount of \$7,473.39, a noncontested difference of \$74.88 in appellant's favor, which would leave \$4,416.45 of the principal unpaid at the time suit was filed, upon which sum interest should be computed at the rate of 7 per cent. per annum from March 12th. Interest on the sums of \$323.20 and \$2,383.25 from March 12th until paid was properly allowed. The appellant complains that the judgment is excessive and erroneous; that respondent was not entitled to interest on any amount prior to the entry of judgment; that title to the hay did not pass until delivery and acceptance of the hay; that said hay was fraudulently represented to be in good condition; and that the court erred in refusing to grant the defendant a continuance by reason of the absence of a foreign witness, who, it is claimed, had promised the defendant that he would be on hand. No subpoena was issued for, nor had any effort been made to take the deposition of, said witness.

[3-5] The title to the hay passed to the purchaser under the contract of January 12, 1925. *Fiddymment v. Johnson*, 18 Cal. App. 339, 123 P. 342. Payments were to be made upon each lot as per shipment, all to be performed within the limits of 60 days. A large portion of the hay was not removed within the 60-day limit, nor until some 2 or 3 months thereafter. Respondent made several demands during the month of March for payment of the balance due and the removal of the hay from the warehouse. There is evidence in the record to the effect that appellant by its authorized agent expressly agreed to the payment of interest at the legal rate from March 12th, if the respondent would forbear in its demand for immediate payment and the removal of the hay. The finding on the question, as well as the conclusion of law which necessarily follows from a consideration of the contract itself, supports the judgment as to the issue of interest. There is no substance in the claim that the contract was vitiated by the false representations that said lot of hay was in good condition, when, as a matter of fact, it was foul, in that it contained a large quantity of "fox tail." Appellant's agent inspected the hay at the warehouse before it was purchased. Moreover, this question is set at rest by appellant's letter to respondent written on March 24th in answer to respondent's demand for payment. Appellant wrote:

"We are not complaining of the quality of the hay as we looked at same before buying and that is entirely up to us but we must have an extension on the time of delivery until the end of April, which we believe you will grant us."

[6, 7] The invoices were sent to appellant upon each shipment made. There being no dispute as to the correctness of weights, it will be presumed that no errors were made.

The application made by appellant on the day of trial for a continuance because of the absence of a witness under the circumstances heretofore related did not constitute error, especially in view of the fact that the absent person would have testified only as to the quality of the hay, which would have been, at best, cumulative testimony on a disputed question of fact. Under the waiver of respondent as to this issue, as set forth in the letter last above quoted from, it is very clear that the testimony of said witness would have been unavailing.

It is ordered that the conclusions of law be amended by striking out the sum of \$4,692.06, as said sum appears twice in said conclusions of law, and, in lieu thereof, the sum of \$4,416.45 be inserted; that the legal interest thereon be computed in the same manner as it was computed upon said sum of \$4,692.06; that the judgment be corrected so as to conform with said change; that the cause be remanded to the superior court of the county of Merced to make the modifications herein directed, and, as so modified, it will constitute the judgment in said cause.

It is so ordered.

We concur: WASTE, C. J.; RICHARDS, J.; SHENK, J.; CURTIS, J.; LANGDON, J.; PRESTON, J.

203 Cal. 257

ESKEW et al. v. CALIFORNIA FRUIT EXCHANGE. (S. F. 11957.)

Supreme Court of California. Jan. 28, 1927.

1. Sales  **172—Seller unqualifiedly contracting to deliver grapes was liable for breach, though quality specified was not procurable in district named for delivery.**

Where contract for sale of grapes specifying delivery at M. station was not confined to grapes grown in M. district, seller, having made unqualified agreement for sale of five carloads of grapes, was required, after grapes of required quality could not be procured in named district after first delivery, to procure required quantity, even though in fulfilling contract it was necessary to procure grapes from another region.

2. Sales  **418(2)—Damages for seller's breach of contract to deliver grapes were properly fixed as of date it expressly refused to make delivery.**

Where contract for sale of five carloads of grapes required seller to begin delivery September 15 and ship one car every other day, on seller's breach of contract to deliver, after delivery of one carload, buyer's damages were properly fixed as of date of October 2 instead of on basis of price of grapes on date of breach of each successive delivery, since, prior to October 2, seller repeatedly promised to fill agreement and only after advance in price on October 2 did he announce refusal to comply with contract.

Department 2.

Appeal from Superior Court, Fresno County; Stanley Murray, Judge.

Action by Edgar H. Eskew and another, co-partners doing business under the firm name and style of E. H. Eskew & Son, against the California Fruit Exchange. From a judgment for plaintiffs, defendant appeals. Affirmed.

M. G. Gallaher, Gallaher, Simpson & Hays, and Gallaher & Jertberg, all of Fresno, for appellant.

Conley, Conley & Conley, W. M. Conley, Philip Conley, Matthew Conley, all of Fresno, for respondents.

RICHARDS, J. This action was instituted by the plaintiff, a copartnership, against the defendant corporation to recover damages for the alleged failure of the defendant to deliver to the plaintiff certain Zinfandel grapes during the season of 1924, pursuant to a contract in writing between the aforesaid parties so to do, which contract was in the words and figures as follows:

"Fresno, Cal., August 22, 1924.

"California Fruit Exchange, seller, has sold and E. H. Eskew & Son, buyers, have bought 5 cars Zinfandel grapes at \$77.50 per ton, unlidded L. A. lugs, f. o. b. cars at Minkler, Cal., loaded in refrigerator cars. Shipping dates: Beginning September 15, 1924, one car every other day till order is filled.

"Terms of payment: \$1,000 to be paid by buyer on signing of this contract, receipt of which is hereby acknowledged, to be applied on payment as cars are loaded at the rate of \$200 per car. Balance for each car to be paid when car is loaded.

"Said grapes to meet requirements of United States grade No. 1.

"It is understood that this sale is contingent upon climatic conditions, fire, failure of transportation service, strikes, or other casualties over which seller has no control, and seller is hereby released from all liability hereunder in event of failure to ship said fruit on account of said casualties save and except to return any part of advance payment which has not been applied on payment for cars shipped. E. H. Eskew & Son, by E. H. Eskew. California Fruit Exchange by L. G. Haight, Dist. Mgr."

Pursuant to such contract the defendant delivered to the plaintiff at Minkler, in the county of Fresno, on September 15, 1924, one car of the variety and quality of the grapes required by the terms of said contract. A day or two later the defendant loaded two cars of grapes, and these failed to pass the United States inspector as being United States grade No. 1, as required in the contract, and plaintiff therefore refused to accept these two latter shipments of grapes; whereupon the defendant notified the plaintiff that owing to weather conditions existing just prior to that time in the Minkler district no more grapes which would grade United

States No. 1 would be shipped. Upon the execution of said contract the plaintiff had advanced to the defendant the sum of \$1,000 as required by the terms thereof, and which sum was to be applied as payment on such grapes as were accepted at the rate of \$200 per car. After some conferences and correspondence between the parties, in the course of which the plaintiff urged the defendant to procure the grapes elsewhere if it was unable to supply them from the Minkler district, the defendant, on or about September 30, 1924, notified the plaintiff that it would not be in a position to fulfill its contract, and undertook to return to the plaintiff the sum of \$800, the check for which, however, the plaintiff refused to accept as in full of the defendant's obligation, and accordingly returned the same to the defendant. Thereupon the plaintiff instituted the present action, setting forth in its complaint substantially the foregoing facts, and seeking damages in the sum of \$3,173.12½ arising from the breach of said contract, and also seeking to recover the \$800, balance of the plaintiff's advancement thereon. The defendant, in its answer, undertook to plead that in entering into said contract it was acting as the agent for other persons in the sale of carloads of grapes, and that its principals were disclosed and known to plaintiff at the time of making the contract. The defendant further pleaded that the contract referred to grapes to be grown in the Minkler district and not elsewhere, and that since by reason of climatic conditions in said district it was unable to supply grapes available to meet the requirements of United States grade No. 1 after the date of shipment of the first carload of grapes, it was absolved from liability under said contract. Upon the trial of the cause the court made its findings of fact and conclusions of law, wherein it found against the defendant upon both of its aforesaid defenses and directed judgment to be entered for plaintiff in the sum of \$1,142.10 damages and for the further sum of \$800, the amount of its unapplied advancement upon said contract. Judgment having been entered accordingly, the defendant has taken this appeal.

[1] The only two contentions which are urged upon this appeal are, first, as to the proper interpretation of the terms of said contract, and, second, as to the proper estimation of damages for the breach thereof. The appellant insists that under the terms of the contract its sale and shipments of grapes were to be confined to grapes grown in the Minkler district, and that since upon the evidence and findings of the trial court no grapes measuring up to the standard required by the contract were to be procured in said district after the first delivery, it was not bound to make further deliveries under its said agreement. The interpretation which the trial court placed upon the contract was contrary

to that for which the defendant contends in the foregoing regard. From an inspection of the contract we are satisfied that the interpretation placed upon it by the trial court must be upheld, since the sale and delivery of the grapes agreed to be supplied thereunder were clearly not confined to grapes grown in the Minkler district. The contract was a general and unqualified agreement for the sale of five carloads of grapes of a certain standard, and this being so it was the duty of the seller under the terms of the contract to procure the required quantity of such grapes from whatever place or places they were procurable, and even to go into the market, if necessary, and obtain the grapes required for the fulfillment of its contract. The findings of the trial court show that grapes of the kind and quality required by the terms of the contract were procurable in the very region, though not in the precise vicinity from which its shipments were to be made. This being so, the defendant was clearly liable under the terms of its contract for its failure to procure and make delivery of the required quantity of grapes provided for in its agreement. The rule on that subject is well stated in the case of *Pearson v. McKinney*, 160 Cal. 649-654, 117 P. 919, 921, wherein it is stated as follows:

"Where one makes an unqualified agreement to sell goods to be delivered at a fixed time, or on demand of the buyer within a stated period, and it is inherently possible to obtain the goods, the fact that the seller may have expected to manufacture the goods himself, or to procure them from a certain source, and has not been able to complete or obtain them when delivery is due, does not excuse performance. In that event, his contract being unconditional and unqualified, he must go into the market if necessary and obtain the goods, and he will be liable in damages for nondelivery. 2 *Mechem on Sales*, § 1103."

[2] The next and final contention of the appellant is that the court was in error in its admeasurement of damages for the breach of said agreement. This contention is based upon the theory that the contract for the delivery of the grapes was breached as to each carload thereof upon the failure of the defendant to deliver such carload on the date specified in the contract for the delivery thereof, and that this being so the plaintiff's damages should have been reckoned upon the basis of the market price of such grapes upon the date of the breach of each successive delivery, and not upon the date when the defendant finally and expressly refused to make delivery of the remaining carloads of said grapes. We are satisfied, however, that, under the terms of the contract and the evidence in the case, the trial court was correct in its fixation of the date of October 2, 1924, as the time at which the plaintiff's damages for defendant's breach of its agreement were

to be reckoned. Prior to that date and after the defendant's first failure to make delivery, in conferences between the plaintiff and the defendant, the latter repeatedly promised to endeavor to fulfill the terms of its agreement, and it was only after the market price of Zinfandel grapes of the required quality had increased to \$100 a ton that the defendant finally and on the 2d of October, announced its refusal to further endeavor to comply with the terms of its agreement. This being so, the latter date was properly adopted by the trial court as the date upon which to ascertain the market value of grapes of the required kind and quality for the purpose of admeasuring the plaintiff's damages for the breach of the aforesaid agreement. It is not contended herein that having thus properly adopted such date the trial court made any error in calculation as to the amount of the plaintiff's recovery.

No other error appearing herein, the judgment is affirmed.

We concur: SHENK, J.; LANGDON, J.

203 Cal. 211

ROSENBERG et al. v. GEO. A. MOORE & CO. (S. F. 11757.)★

Supreme Court of California. Jan. 26, 1928.

Rehearing Denied Feb. 23, 1928.

1. Sales §89—Seller's repudiation of modification of sale contract held to excuse buyers from making further payments as prerequisite to claim against seller for defective goods.

Where wiping rags sold were defective, and seller agreed that buyers, who had paid for some shipments in full on presentation of documents, could sort them and reject those not conforming to contract, and make claim for refund, seller's later repudiation of such modification of sale contract made further payments on presentation of documents unnecessary as prerequisite to buyer's claims against seller for defect in rags furnished.

2. Witnesses §37(1)—Testimony of buyer present at sorting and weighing as to amount of goods not conforming to contract held competent.

In buyer's action against seller which had agreed that buyer could sort wiping rags sold, reject those not conforming to contract, and claim refund, one plaintiff's testimony that rags were sorted under his supervision, he being actually present most of time, that he was present when rejects were weighed, and that weight was noted on tags by employee in his presence, and that he added up items on tags and knew result was correct, was competent without testimony of employee who noted weight of rejects on tags.

3. Evidence §519—In buyer's action against seller, evidence of amount of defective wiping rags reached by averaging samples taken at random held admissible.

In buyer's action against seller which had agreed that buyer could have wiping rags sold

sorted, reject those not complying with contract, and receive refund therefor, evidence that buyers employed expert inspectors of merchandise, and that six bales selected at random were weighed, opened, and sorted by competent crew, and that actual weight of accepted and rejected merchandise was tabulated, giving average of about 75 per cent. of rejects according to weight, *held* admissible, especially in view of telegram from seller to its vendor stating that rejects would be from 75 to 80 or 90 per cent.

4. Evidence ⇨215(1) — In buyer's action against seller, latter's telegram to its vendor concerning defects in merchandise held admissible, as admission against interest.

In buyer's action against seller based on delivery of defective wiping rags sold, seller's telegram to its vendor stating that from 75 to 90 per cent. of merchandise was defective *held* admissible, as admission against interest.

5. Sales ⇨417—Evidence as to amount of defective wiping rags rejected held to support verdict for buyer against seller.

In buyer's action against seller based on furnishing defective wiping rags, evidence as to amount of defective rags *held* to support verdict for plaintiff for value of defective rags rejected, less amount of notes pleaded in cross-complaint.

In Bank.

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Action by Joseph Rosenberg and another, copartners, against George A. Moore & Co., for damages for breach of warranty and of a contract of sale, in which defendant filed a cross-complaint. From a judgment for plaintiffs, defendant appeals. Affirmed.

Knight, Boland, Hutchinson & Christin and Knight, Boland & Christin, all of San Francisco, for appellant.

Brownstone & Goodman, of San Francisco, for respondents.

SHENK, J. This is the second appeal in this case. The first trial resulted in a verdict in favor of the defendant on its cross-complaint for the sum of \$8,331.25, which included \$6,000 on account of three promissory notes executed by the plaintiffs to the defendant in connection with the transactions involved herein and expenses incurred by defendant in disposing of rejected goods in the open market. The defendant appealed from an order granting to the plaintiffs a new trial. The order was affirmed. *Rosenberg v. Moore*, 194 Cal. 392, 229 P. 34. The opinion in the disposition of that appeal is referred to for a more particular statement of the facts which gave rise to the controversy between these parties. A second trial was had, wherein a verdict was rendered in plaintiffs' favor in the sum of \$8,500. From

the judgment entered on that verdict the defendant now prosecutes this appeal.

It is conceded that the proof adduced on both trials was substantially the same. Briefly, after examining a satisfactory sample order, the plaintiffs, in February, March, and April, 1921, entered into eight contracts with the defendant for the purchase of wiping rags to be shipped from Antwerp by Heymann & Co., payment to be net cash on presentation of documents in San Francisco. Before the first shipment under these contracts arrived plaintiffs inspected a shipment of wiping rags from Heymann & Co. consigned to Charles Harley Company, which contained a large percentage of shoddy material not suitable for wiping rags, and notified defendant that, if shipments pursuant to its contracts with defendant were of that character, they would reject the entire lot. The situation became serious and Heymann came from Belgium to San Francisco. Heymann and both parties inspected the first shipment to arrive. As a result of this inspection it was found that the bales comprising the shipment contained large percentages of materials which were not wiping rags. It was admitted by the defendant and Heymann that, if the plaintiffs were to accept the shipments, they should be entitled to reject the shoddy and obtain allowances therefor. By an interchange of letters the parties then agreed that the plaintiffs would pay for and accept shipments under the contracts and that the defendant would make refund for all material rejected. Thereafter and before the sorting of the shipments had been completed the defendant questioned the amount of the rejections which should be allowed, and as a consequence of this disagreement the plaintiffs notified the defendant that they would accept no further shipments, and the defendant notified the plaintiffs that it refused to admit the right of plaintiffs to make any claim for rejects. Plaintiffs discontinued sorting, averaged the amount of rejects in the portion of the shipments which still remained unsorted, and brought action against the defendant for the amounts claimed to be due as refunds and for damages for breach of the various contracts. Defendant filed its cross-complaint, seeking recovery on said three promissory notes of \$2,000 each executed by plaintiffs as part of one of the payments, and for damages for breach of the several contracts. This court, on the former appeal, held that regardless of the European standards of wiping rags the plaintiffs were entitled, under their original contracts, to receive rags which had wiping or absorbent qualities, and that the original contracts had been modified by the interchange of letters so as to entitle the plaintiffs to reimbursement for material rejected. Those letters were dated July 11 and 12, 1921. Concerning

the effect of the letters it was held on the former appeal:

"Those letters were written after a controversy arose as to the scope of the contracts and constituted a definite proposal on the part of the plaintiffs that the rags should be sorted, and that the rags which were not wiping rags should be rejected and an acceptance of said proposal by the defendant with the understanding that the refunds would be made after the invoices had been paid. To the extent therein provided we think those letters constituted a modification of the original contracts." *Rosenberg v. Moore*, supra, pages 403, 404 (229 P. 39).

[1] It is the first main contention of the defendant that under the contracts as so modified the plaintiffs were required to accept and pay for the rags as tendered upon presentation of documents as specified in the original contracts, thereupon to sort the rags, reject such as were not wiping rags, and then make claim upon the defendant for refund. The evidence showed without contradiction that some of the shipments were paid for in full upon presentation of documents, and there would be much force in the contention of the defendant that, under the contracts as modified by the letters of July 11th and 12th, the plaintiffs could not claim refunds for rejections without first paying in full for the other shipments after presentation of documents, if it were not for the fact that the defendant repudiated the contracts as so modified by its subsequent letter of July 23, 1921, addressed to the plaintiffs and reading, so far as pertinent, as follows:

"* * * referring to ours of the 12th inst., replying to yours of the 11th inst., please note that after the inspection of the wiping rags held at your warehouse on the 19th inst., we cannot admit that you are entitled to make any claim for rejection."

After the defendant had assumed this attitude with reference to the contracts as modified, it is clear that the plaintiffs were not required to make further payments as a prerequisite to its claims against the defendant. See *Paolini v. Sulprizio* (Cal. Sup.) 258 P. 380; *Los Angeles Corp. v. Amalgamated Oil Co.*, 163 Cal. 140, 142 P. 46; *Alderson v. Houston*, 154 Cal. 1, 12, 96 P. 384; *De Prosse v. Royal Eagle Co.*, 135 Cal. 408, 411, 67 P. 502; 6 Cal. Jur. 400.

This brings us to a consideration of the second main contention of the defendant, namely, that the amount of the plaintiffs' claim on account of rejections was not proved by competent evidence. In this connection it should be observed that the defendant admitted at the trial and now admits that the plaintiffs were entitled to recover for the amount of rags actually and properly rejected from shipments which had been accepted and paid for. At the trial the defendant went further and conceded that the plaintiffs were entitled to credit for rejections, if they

were not wiping rags and were properly rejected, and that it was the province of the jury to determine how much of the material was properly rejected. The controversy is thus narrowed to the question of whether there was competent evidence to prove that the plaintiffs were entitled to recover for rejections at least to the amount of the present verdict. By their amended complaint the plaintiffs prayed for judgment for \$48,357.81, some \$16,500 of which was the aggregate amount of claims for refund and the balance was for damages for breach of the contracts in suit. When the verdict is viewed in the light of the evidence, it is difficult to resist the conclusion that the court and jury must have considered, and rightly so, that both parties had breached the contracts; that neither party was entitled to damages by reason of any breach of the buying or selling clauses of the original contracts; and that the amount of any verdict for the plaintiffs should be for the amount only of the plaintiffs' claim for rejections, less the amount due the defendant on the promissory notes and less any further amount that should be allowed to cover any alleged error in the ascertainment of the amount of the rejects. As to a considerable portion of the shipments, the bales were opened and manually sorted, the good was segregated from the bad, and each lot separately weighed and the result tabulated. This method of sorting was followed until, it is fair from the evidence to assume, the defendant took the position that it would not recognize any right on the part of the plaintiffs to reimbursement or claim on account of rejections, at which time the remainder of the bales was inspected and an average of the good and the bad was struck.

[2] It is insisted by the defendant that there was no competent evidence showing the amount of the material manually sorted and weighed. The plaintiff Joseph Rosenberg testified that these rags were sorted under his direction and supervision; that he was present from 60 per cent. to 75 per cent. of the time that the sorting was being done; that he was actually present when the rejects were weighed; that the weight thereof was noted on tags by his employee in his presence; and that he (Rosenberg) added up the items on the various tags and knew the same to be correct. If he was present when the rejected material was weighed and knew the same to be correct, it would seem to be of no consequence that he was not personally present when all the sorting was done, for when the weight of the rejects was ascertained it was a matter of computation to fix the weight of the remainder, as the total weight of the material was known and was not disputed. Nor was it necessary that the testimony of the employee who noted the weight of the rejects on the tags be pro-

duced if, as was shown, Rosenberg was present when the weights were taken and knew that the same were correct.

[3] It is also insisted by the defendant that the court erred in permitting evidence of the rejections that were averaged and not manually sorted. In order to arrive at an average of the good wipers and rejections in the remainder of the shipment, the plaintiffs employed inspectors of merchandise whose qualifications as men having expert knowledge of this class of merchandise were, we think, sufficiently established at the trial. These witnesses attended the inspection of the goods at the warehouse. Six bales were selected at random. Their actual weight was first determined; they were opened and sorted by the plaintiffs' crew employed for that purpose. That this crew properly performed its work in sorting the rags is not questioned. The actual weight of the accepted and rejected rags was taken and tabulated. The proportion of the good rags or wipers in these bales was found by one inspector to average 25.14 per cent. and the rejections to average 74.86 per cent. of the whole. This percentage was arrived at by actual sorting and weight. Other experts whose testimony was received in evidence were present when the sorting and inspection of the six bales, or some of them, took place.

The percentages of wipers and rejections in the remaining bales not opened were undoubtedly fixed in accordance with the percentages arrived at in the inspection of the six bales. The defendant produced no evidence on the subject.

[4, 5] The plaintiffs have cited cases in this and other jurisdictions and the statements of text-writers to the effect that in arriving at the total amount, weight, size, quality, etc., of produce, merchandise, and other forms of personal property which is the subject of ordinary barter and sale, estimates may be made of the whole by a definite ascertainment as to less than the whole, and that evidence of such estimates is not subject to the objection that it is merely the opinion or conclusion of the witness. These authorities need not be referred to, for the defendant does not dispute the rule, but contends that the rule does not fit the facts in this case. It is stoutly insisted that the verdict is the result, in large part at least, of averages or estimates applied by the jury without any evidence as to who averaged the goods, where they were averaged, or what basis was used for averaging. As noted, the total number of bales was a known quantity, the goods were in the warehouse, six bales were selected at random for actual sorting, and the amounts of wipers and rejects therein accurately ascertained. On the record here presented we think the jury was entitled to infer that the balance of the merchandise was the same or substantially the same as

that actually sorted, and it was not essential to a proper verdict under the particular facts in this case that some witnesses state that the average of the goods not sorted was in weight and quality the same as that sorted. If there be any doubt of the right of the jury to draw such inferences from the evidence herein, it was in evidence by a telegram from the defendant addressed to Alfred Heymann at New York City and dated July 19, 1921, to the effect that the defendant and its representatives and experts had examined the merchandise, had opened up several bales, and had agreed that certain of the rags "could not be justified as wipers before any court, and that the rejections which could be justified would run over 75 per cent. more nearly 80 to 90." The defendant seeks to avoid the effect of the admissions contained in that telegram by asserting that it was sent to Heymann at a time when the plaintiffs and the defendant were endeavoring to compromise their differences, and that the statements therein contained as to the percentages of rejections which could be justified were based on information furnished by the plaintiffs. In the first place, the telegram was from the defendant to Heymann, the defendant's European vendor, and could on no reasonable theory be deemed evidence of an attempted compromise between the plaintiffs and the defendant. It constituted an admission against interest on the part of the defendant to a third party and was admissible for that purpose. Furthermore, in said telegram the defendant stated to Heymann that on that morning, July 19th, "Juell Duval Moore and representing us surveyor Seale chief store keeper of Union Works and contractor for cleaning tankers here twenty-five years standing together with Rosenberg and two friends of his opened up several bales of heavy dark cottons and linseys one bale of dark wipers one bale of light wipers. Each and every piece was thoroughly sorted out and examined," with the results in percentages of rejections estimated by the defendant in said telegram. Juell and Duval Moore were defendant's representatives. The statements in the telegram sufficiently meet the defendant's present contentions. If such statements were true, the defendant cannot complain of an implied finding of the jury in accordance therewith. If they were not true the defendant, on familiar principles of law, should not now be heard to complain. The jury no doubt accepted as approximately correct the plaintiffs' computations as to the amount and value of the rejections. In fact, it appears that the jury gave due allowance for any exaggerated percentages of rejections and arrived at a sum much less than the plaintiffs' estimates. Deducting from the value of the rejects as found by the jury the amount of the promissory notes pleaded in the cross-complaint it is apparent

that the trial resulted in a just verdict based on sufficient evidence.

The judgment is affirmed.

We concur: WASTE, C. J.; LANGDON, J.; PRESTON, J.; CURTIS, J.; RICHARDS, J.; SEAWELL, J.

203 Cal. 286

PURITY SPRINGS WATER CO. v. REDWOOD ICE DELIVERY et al.
(S. F. 12152.)

Supreme Court of California. Jan. 31, 1928.

1. Appeal and error §417(1)—Notice of appeal may be part of paper directing clerk to prepare record (Code Civ. Proc. § 953a).

It is no objection to a notice of appeal under Code Civ. Proc. § 953a, that it is part of the same paper that directs the clerk to prepare the record, and notice so given is sufficient to give the appellate court jurisdiction.

2. Trade-marks and trade-names and unfair competition §60—Label used by defendant for bottled "Puritan Water" held not so similar to plaintiff's label for "Purity Springs Water" as to infringe.

Label used by defendant on its water bottles reading, "As pure and wholesome as its name implies (picture of Quaker girl) Puritan water, trade-mark registered," held not so similar to plaintiff's label used on its water bottles reading, "Purity Springs Water (picture of mountain stream) * * * from the mountains," as to constitute an infringement thereof.

3. Trade-marks and trade-names and unfair competition §93(3)—Evidence held to show that defendant's use of plaintiff's name "Puritan" Drinking Water in advertisement was inadvertent and through error of printer.

In action to restrain defendant's alleged infringement of plaintiff's label, used by it for bottled water, on which name "Purity Springs Water" was printed, evidence held to show that defendant's advertisement, using plaintiff's name, "Purity Drinking Water," instead of "Puritan Drinking Water," as sold by defendant, was an inadvertence, and was caused by error in printer making up advertisement.

4. Trade-marks and trade-names and unfair competition §7—Designation of term "water" in label for bottled water could not be exclusively appropriated (Civ. Code, § 991).

Under Civ. Code, § 991, plaintiff could not exclusively appropriate the term "water" as used in its label reading, in part, "Purity Springs Water."

Department 1.

Appeal from Superior Court, San Mateo County; George H. Buck, Judge.

Action by the Purity Springs Water Company against the Redwood Ice Delivery, a corporation, and others. From a judgment for defendants, plaintiff appeals. Affirmed.

A. J. Stebenne, of Redwood City, for appellant.

Ross & Ross, of Redwood City, for respondents.

PRESTON, J. This is an appeal by plaintiff in an action for the recovery of \$5,000 as damages and for a perpetual injunction to restrain the alleged infringement by defendant of a certain label, device, or trade-mark used by it for bottled water.

[1] Defendant suggests that this court is without jurisdiction to entertain the appeal because of the failure of plaintiff to give any sufficient notice thereof. The record shows that plaintiff duly filed with the clerk of the superior court a paper entitled, "Request for Transcript under section 953a, Code of Civil Procedure," which contains the following clause: "* * * You will please take notice that plaintiff in the above-entitled action desires and intends to appeal from the judgment heretofore given. * * *" It is no objection to a notice of appeal that it is a part of the same paper that directs the clerk to prepare the record and, in recent decisions, construing the precise language above quoted, it has been held that "while it would be more satisfactory if the notice had been more explicit, * * * it must be held sufficient to give the appellate court jurisdiction." *Anderson v. Standard Lumber Co.*, 60 Cal. App. 445, 213 P. 65; *Wright & Hogan, Inc., v. Heide*, 72 Cal. App. 16, 236 P. 219.

Plaintiff and defendant are California corporations, both licensed to do business in San Mateo county. The complaint alleges the claim of plaintiff to a registered trade-mark under the law of California consisting of the words "PURITY SPRINGS WATER" appearing on labels used by it in its business of bottling, selling and distributing drinking water, and the infringement of said trade-mark or label by defendant. It further alleges that defendant, a company engaged in manufacturing and selling ice, represented plaintiff during the year 1917 and part of 1918 in the establishment of an agency for the sale of plaintiff's product in said county; that as a result of said agency defendant secured a list of the names of customers of plaintiff and consumers of its product, which list said defendant afterwards used without right and to the damage of plaintiff in selling and distributing the product of Mountain Springs Water Company, and still later in connection with the sale of bottled water under the alleged infringing label here involved. The labels used by both parties are made exhibits to the complaint, as is also copy of an advertisement published by defendant in a San Mateo county paper, of which complaint is made.

Defendant filed a demurrer to the complaint upon the ground that it failed to al-

lege facts sufficient to constitute a cause of action, and also numerous affidavits in support thereof denying that it had ever represented plaintiff as agent or received a list of plaintiff's customers or consumers of its product; and likewise denying and explaining other allegations of said complaint, as will more fully hereinafter appear. The court sustained the demurrer, saying: "The only thing copied or imitated in this matter is 'water,' and that word is not subject to any trade-mark. Demurrer sustained." Plaintiff failed to amend within the ten-day period allowed for that purpose, and judgment was accordingly entered for defendant, from which this appeal is taken.

Appellant concedes, as indeed it must, that the complaint does not attempt to allege a cause of action for unfair and unlawful competition, and the use of the list of its customers and consumers by respondent, nor is there any attempt to predicate a cause of action upon breach of the contract between the parties at the time it is alleged the names of the customers were delivered to respondent. It is unnecessary, therefore, to discuss certain grounds of demurrer urged by respondent, to wit, that two causes of action are set forth in the complaint and not separately stated, one an alleged cause of action for unfair competition and unlawful use by respondent of said list of customers and consumers of the product of appellant, which cause respondent urges is barred by the provisions of sections 338, 339, and 343 of the Code of Civil Procedure, and the other an alleged cause of action for unlawful infringement of appellant's trade-mark or label by respondent.

[2] The vital question is whether respondent's label was in fact an adoption and colorable imitation of the label of appellant, and was used by it in the advertising and sale of bottled water in such a manner and under such circumstances that the public and purchasers would be deceived or be likely to be deceived and led to believe that they were buying the product of appellant. On this point an inspection of the record can lead to but the one conclusion, that upon the merits said demurrer was properly sustained. Appellant's label reads in part:

"PURITY SPRINGS WATER (picture of mountain stream) * * * from the mountains of Marin County, delivered in all Bay Cities, * * * 2050 Kearny St., S. F., phone Sutter 2197."

Respondent's label reads in part:

"As pure and wholesome as its name implies (picture of Quaker girl) PURITAN WATER, trademark registered, for home and office use (picture of bottle of water). * * * Bottled by Redwood Ice Delivery, Redwood City, Calif., telephone Redwood 155."

Without attempting to convey the exact contour and form of said labels or their complete wording, it is sufficient to say that they

are utterly dissimilar in shape, design, lettering, size, wording and coloring. A most casual glance should reveal to any purchaser by what company the water is sold.

[3] The advertisement of which appellant complains reads as follows:

"PURITY—Drinking Water—PURE ICE—Redwood Ice Delivery, phone Redwood 155 (printed in the Ikozian)."

An affidavit made by the bookkeeper for respondent avers: That neither this advertisement nor any similar one was published by respondent, but that while she was in respondent's employ, at the request of students of the Sequoia Union High School, she assisted them by offering to have published in the school paper known as "Ikozian" an advertisement of respondent's Puritan water, as follows: "Puritan Drinking Water, pure ice. * * *" That she was informed that through inadvertence and mistake of such students the first word of said advertisement was printed "Purity" instead of "Puritan"; that when the attention of respondent was called to the mistake it was rectified immediately. There is fully quoted in said affidavit a letter of apology from the business manager of the school paper, in part as follows:

"I regret very much our unfortunate mistake which occurred in one of the advertisements of our school paper the Ikozian. I want to sincerely apologize for this mistake and I assure you that it will not happen again. The editor of the paper substituted the word 'Purity' for 'Puritan' and this caused all the trouble. Hoping that you will pardon us for this mistake, I am. * * *"

[4] As above stated, the only real question is whether the label used by respondent is so similar to that of appellant as to constitute an infringement thereof. We hold that it is not. It is true that both labels advertise bottled "water," but no one can "exclusively appropriate any designation, or part of a designation, which relates only to the name, quality, or the description of the thing or business, or the place where the thing is produced, or the business is carried on." Section 991, Civ. Code. This principle is established by the early case of *Falkinburg v. Lucy*, 35 Cal. 52, 95 Am. Dec. 76, which has been consistently adhered to in later decisions, and which discusses fully the law applicable to the facts of the instant case. The plaintiffs there claimed their entire label as their trade-mark and asked to be protected in the use of it as a whole in advertising their product, a washing powder. The court found the labels were the same in three respects only—the words "Washing Powder," the directions as to use, mode of making soft soap, and the color of the paper upon which they were printed. In all other respects they were unlike. Holding that the words "washing powder" could not be appropriated as a trade-mark, the court said:

"The owner of such peculiar marks, provided they are original with him, will be protected in their exclusive use by the courts; but only so far as such marks serve to designate the true origin or ownership of the goods to which they are attached. He will not be protected in the use of figures, or symbols, or combinations of words, which serve merely to indicate the name, kind, or quality of the goods to which they are attached, notwithstanding they may be interblended with others which indicate origin and ownership."

In *Burke v. Cassin*, 45 Cal. 467, 478 (13 Am. Rep. 204), the rule is repeated in this language:

"* * * A word, figure, etc., in common use, which indicates the name, nature, kind, quality, or character of the article, cannot be appropriated as a trademark. * * *"

See, also, to the same effect, *Choynski v. Cohen*, 39 Cal. 501, 2 Am. Rep. 476; *Schmidt v. Brieg*, 100 Cal. 672, 35 P. 623, 22 L. R. A. 790; *Spieker v. Lash*, 102 Cal. 38, 36 P. 362; *Italian Swiss Colony v. I. Vineyard Co.*, 158 Cal. 252, 110 P. 913, 32 L. R. A. (N. S.) 439; *Dunston v. Los Angeles, etc., Co.*, 165 Cal. 89, 131 P. 115.

Judgment affirmed.

We concur: SEAWELL, J.; CURTIS, J.

203 Cal. 270

MAHER v. DEVLIN et al. (S. F. 11839.)★

Supreme Court of California. Jan. 30, 1928.

Rehearing Denied Feb. 27, 1928.

1. Libel and slander ☞93—Defense of privilege in publication must be specially pleaded as affirmative defense, where complaint does not indicate publication under privileged circumstances (Civ. Code, § 47, subds. 3, 4).

The defense that a publication allegedly libelous is privileged under Civ. Code, § 47, subds. 3, 4, must be specially pleaded as an affirmative defense to be available, where there are no facts set forth in the complaint indicating that publication was made under circumstances which would render it privileged.

2. Embezzlement ☞11(2)—"Misappropriation" relative to money is synonymous with embezzlement (Const. art. 2, § 1; Pen. Code, § 424).

Under Const. art. 2, § 1, and Pen. Code, § 424, relative to the embezzlement or misappropriation of public money by public officials, the term "misappropriation" is synonymous with embezzlement.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Misappropriation.]

3. Libel and slander ☞15—To be libelous, publication need not charge crime.

In order for a publication to be libelous, it need not charge the accused with the commission of crime.

4. Libel and slander ☞16—Newspaper article as to recall of mayor and "misappropriation" of funds held libelous per se in exposing mayor to contempt and obloquy (Civ. Code, § 45).

Where a newspaper published an article relative to proceedings looking to the recall of mayor and council of the city and in such article referred to the misappropriation of public funds by the mayor, *held*, that the article tended to expose the mayor to contempt and obloquy, and therefore was libelous per se, making the publishers liable, under Civ. Code, § 45, for damages, in view of Const. art. 2, § 1, and Pen. Code, § 424, wherein the expression "misappropriation" of public money is synonymous with "embezzlement" thereof.

5. Libel and slander ☞123(2)—Meaning of alleged libelous language, if unambiguous, is for court.

In a suit for damages because of an alleged defamatory publication, the meaning of the language used is, if unambiguous, a question for the court.

6. Libel and slander ☞123(2)—Where article is susceptible of two meanings, one harmless and one defamatory, sense in which understood is for jury, but court determines whether language is capable of defamatory meaning claimed.

In an action for an allegedly libelous publication, if the words are susceptible of two meanings, one harmless and the other defamatory, it is for the jury to say in which sense they were used and understood, but it is for the court to determine whether the language used is capable of the defamatory meaning claimed for it by the plaintiff.

7. Libel and slander ☞104(1)—In suit for libel, evidence to show use of term "misappropriation" of public funds was innocent held inadmissible.

In action by the mayor of a city against newspaper publishers for an allegedly libelous article published relative to the mayor's misappropriation of public funds and contemplated recall proceedings, defendants *held* not entitled to introduce evidence to show that in stating "misappropriation" of funds they had used term in sense showing no want of integrity on part of mayor, in view of "misappropriation" in such circumstances conveying "the idea of crime."

8. Libel and slander ☞104(1)—Newspaper article itself is best evidence of its meaning.

In action for damages for publication of allegedly libelous article in newspaper, article itself is best evidence of its meaning.

9. Libel and slander ☞93—To state defense that publication, false in fact, charging officer with crime, was privileged, all that is necessary is to allege publication was without malice (Civ. Code, § 47, subd. 3).

In order to state a defense, under Civ. Code, § 47, subd. 3, and permit evidence thereon that a publication, allegedly libelous and false in fact, was privileged, where the article allegedly charged a public officer with the commission of a crime, all that is necessary to plead such privilege and permit evidence thereunder is to charge that the publication was without malice.

10. Libel and slander ☞98—Refusing defendants permission to amend pleading held not error, where proposed amendment did not relate to alleged libel.

In action by the mayor of a city against newspaper publishers for an allegedly libelous article referring to the mayor's misappropriation of public funds and to contemplated recall proceedings, refusing defendants permission to amend pleading to incorporate matters as defense relative to former council's designative manner in which money from sale of bonds should be used and that had nothing to do with the alleged misappropriation *held* not error.

11. Libel and slander ☞100(1)—In action for allegedly libelous newspaper publication statement relative to mayor's evidence as to mismanagement of public funds held not admissible, where article pleaded charged misappropriation.

Where in a libel action by the mayor of the city against a newspaper for the publication of an allegedly defamatory article in which mayor's misappropriation of public funds was stated, court's refusing to permit defendants to prove that the respondent had mismanaged the public funds of the city *held* not error.

12. Libel and slander ☞124(6)—Instruction that there was no evidence tending to prove publication was fair or true report of judicial proceeding held not error.

In an action by mayor of a city against a newspaper for publication of an allegedly libelous article relative to misappropriation of funds and a proceeding for the recall of the mayor and city council, the court's instruction that there was no evidence tending to prove that the publication was a fair or true report of said judicial proceeding *held* not erroneous.

13. Libel and slander ☞42(1)—Untrue report of recall proceedings of mayor and council held not privileged (Civ. Code, § 47, subd. 4).

In an action by the mayor for the publication of an allegedly libelous article relative to recall proceeding for wrongdoing in office, report *held* not privileged, under Civ. Code, § 47, subd. 4, where evidence showed it was untrue.

14. Libel and slander ☞121(1)—Amount of verdict is largely within sound discretion of jury.

In an action for libel, the amount of the verdict is largely within the sound discretion of the jury.

15. Libel and slander ☞121(1)—Evidence held not to show abuse of discretion on part of jury in fixing mayor's damages of \$3,000 for newspaper publication.

Where, in an action by the mayor of a city against newspaper publishers for an allegedly libelous publication relative to misappropriation of funds and recall proceedings, the jury fixed the damages at \$3,000, *held*, that evidence did not show such action on the part of the jury was an abuse of discretion.

In Bank.

Appeal from Superior Court, Santa Cruz County; H. C. Lucas, Judge.

Action by John B. Maher against E. J. Devlin and another. Judgment for plaintiff, and defendants appeal. Reversed.

Devlin & Devlin, of Sacramento, and J. L. Johnson, of Stockton, for appellants.

Wyckoff & Gardner, of Watsonville, for respondent.

CURTIS, J. Action for libel based upon the publication by the defendants in the Santa Cruz Evening News, a newspaper of general circulation, published in the city of Santa Cruz, of the following article:

"A peremptory writ of mandate to compel the mayor and city council of Santa Cruz to call an election within sixty days, to enable the citizens of the city to vote on the proposed recall of these officials, 'for mismanagement and misappropriation of public funds,' was issued here today by the District Court of Appeal."

The complaint further set forth that the plaintiff was at the date of the publication of said article, and at the commencement of said action, the duly elected, qualified, and acting mayor of the city of Santa Cruz; that the defendants meant by said publication and were understood by those who read said publication to mean that the plaintiff had been guilty of want of integrity in his conduct of said office, and of the felonious embezzlement of the public funds of said city; that said publication was false and defamatory; and that by reason of said false and defamatory publication the plaintiff had been damaged in the sum of \$10,000. It was not alleged in said complaint that the article was maliciously published, and no demand was made for punitive or exemplary damages. The answer admitted the publication and alleged that the articles set forth in the complaint was a part only of a more extended article published in said newspaper, the entire article as set forth in the answer being as follows:

"Court Orders Recall Election.

"Appellate Justices Make Former Writ Peremptory in Effect.

"San Francisco, Sept. 4.—(AP)—A peremptory writ of mandate to compel the mayor and city council of Santa Cruz to call an election within sixty days, to enable the citizens of the city to vote on the proposed recall of these officials, 'for mismanagement and misappropriation of public funds,' was issued here today by the District Court of Appeal. The writ was issued on the petition of O. H. Beeler, a resident of the city, acting for a number of other petitioners.

"City Attorney El. R. Vaughn, of Santa Cruz, announced that he will take an appeal to the state Supreme Court if instructed to do so by the defendant city officials.

"According to the allegations made by the petitioners Mayor John B. Maher and the councilmen, George C. Pratchner, Fred C. Royse, Chas. W. Balzari and George R. Gray, committed repeated acts as administrators of the city's welfare indicating their unfitness for public posi-

tion, one in particular being the purchase of an automobile not needed by the municipality.

"The case was first entered in the state Supreme Court, where it was sent to the appellate court. To-day's mandate followed the failure of the accused officials to file an amended complaint when instructed to do so by the court.

"To-day's proceeding in the District Court of Appeal at San Francisco marks the culmination of the efforts of the city administration to balk those citizens who had invoked the city charter in a movement to have the voters pass on the acts of the administration.

"It will be recalled that many more than the full number of names required by the charter were secured to petitions asking that an election be called for the retirement of mayor and council. These petitions were scrutinized carefully as to each name by City Clerk Evans, who then referred them to the council with the statement that they met with the legal requirements and that it was up to the council to take the action they prayed for.

"Instead, to the surprise of every one apparently save the mayor and council, City Attorney Vaughn brought legal objections to the petitions, asserting that many of the signatures were those of persons who had not read the preamble and did not know what they were signing. Thereupon the mayor and council declined to call the election. This left it up to the interested citizens to apply to the courts for a writ of mandate to compel mayor and council to act. Application was made both to the Supreme Court and the District Court of Appeal. The Supreme Court left the matter to the disposal of the Court of Appeal, which proceeded to issue an alternative writ of mandate. The mayor and city council employed a high-priced lawyer in San Francisco to aid the city attorney in further fighting the recall movement. These lawyers then alleged fraud in the circulation and filing of the petitions. It was expected that when the matter came up to-day they would produce witnesses to sustain their allegations, but there does not appear to have been a single witness to substantiate the fraud allegations.

"The court has disposed of the matter by making the writ of mandate peremptory, which means that the mayor and city council have been ordered to call an election for their own recall."

The answer further denied that defendants meant by the words set out in the complaint, or that said words were understood by those who read said publication to mean that plaintiff had been guilty of want of integrity in his said office or that plaintiff was guilty of felonious embezzlement of the public funds of said city. For a second defense the defendants alleged that the article published by them was a true report of the proceedings before the District Court of Appeal, and therefore justified, and for third and fourth separate defenses the defendants alleged that the publication was privileged under the provisions of subdivisions 3 and 4 of section 47 of the Civil Code of California. Upon the trial before a jury a verdict for \$3,000 was rendered against defendants, and from a judgment based thereon said defendants have appealed.

It is first contended by appellants that the judgment should be reversed for the reason

that the complaint fails to state any cause of action against defendants, or either of them. Libel, as defined by section 45 of the Civil Code, is:

A "false and unprivileged publication by writing, printing, picture, effigy, or other fixed representation to the eye, which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation."

Any false publication, therefore, which is unprivileged and which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation, is libelous.

[1] It is alleged in the complaint that the publication complained of was false. There are no facts set forth in the complaint indicating that the publication was made under circumstances which would render it privileged. Therefore the defense that the publication was privileged must be specially pleaded by the defendants as an affirmative defense. *Swan v. Thompson*, 124 Cal. 193, 56 P. 878; *Stevens v. Snow*, 191 Cal. 58, 64, 214 P. 968. In determining, therefore, the sufficiency of the complaint, the only question left for consideration is whether the publication of the article by the appellants exposed the plaintiff to hatred, contempt, ridicule, or obloquy, or caused him to be shunned or avoided, or tended to injure him in his occupation. If it had either or any of these effects then it was libelous per se. *Schomberg v. Walker*, 132 Cal. 224, 227, 64 P. 290; *Stevens v. Snow*, 191 Cal. 58, 62, 214 P. 968. In the first of these two cases, after quoting the definition of civil libel as found in section 45 of the Civil Code, this court said:

"This definition is very broad, and includes almost any language which, upon its face, has a natural tendency to injure a man's reputation, either generally or with respect to his occupation."

The article published by the appellants, and set out in the complaint, contains the statement that the proposed recall of the plaintiff and other officials of the city of Santa Cruz was for mismanagement and misappropriation of public funds. This in effect charges that the recall of the plaintiff was sought on the ground that he, as mayor, had misappropriated the public funds of said municipality. In our opinion the natural tendency of such a publication would be to expose the plaintiff to the contempt and obloquy of the citizens of said community who might read said publication. Quoting again from the case of *Stevens v. Snow*, supra (page 62 [214 P. 969]), we find the following statement:

"Considering the publication herein, * * * it in effect charges the plaintiff with procuring by crooked methods an unjust change in the boundaries of a school district and with being actuated by bad faith in so doing. So regarded,

it cannot be doubted that the natural tendency thereof would be to expose the plaintiff to obloquy, which is the equivalent of censure, reproach, blame, or reprehension."

[2] To charge a public official with the misappropriation of public funds coming into his custody, or over which he may have control, is a direct attack upon his honesty, integrity, and fitness for public service. That such a charge would bring the official into disrepute among his fellow citizens, in our opinion, admits of no argument. So serious is this offense—misappropriation of public funds—that the Constitution of the state has provided that:

"No person hereafter convicted of the embezzlement or misappropriation of public money, * * * shall ever exercise the privileges of an elector in this state." Article 2, § 1, Constitution of California.

Similar stringent penalties for the offense are imposed by the provisions of the penal laws of this state, making the offense a felony punishable by imprisonment in the state prison and forever debarring the accused from holding public office in this state. Pen. Code, § 424. As thus used, misappropriation is synonymous with embezzlement, and it has been so held at least twice by this court. *Fox v. Hale & Norcross S. M. Co.*, 108 Cal. 369, 426, 41 P. 308; *Winchester v. Howard*, 136 Cal. 432, 444, 64 P. 692, 69 P. 77, 89 Am. St. Rep. 153.

[3] We do not mean to hold that it is necessary in order for a publication to be libelous that it should charge the accused with the commission of crime. Such is not the law, and it was so held in *Stevens v. Snow*, supra (page 62 [214 P. 969]), where Mr. Justice Myers, speaking for the court, said:

"Appellants complain that the trial court erred in instructing the jury that the publication was libelous per se, and they invoke the rule that 'it is never libelous to accuse a person of having done that which he may legally and properly do.' The validity of this rule may be conceded, but in its application, the words 'and properly' must not be ignored. It is not sufficient answer to a charge of libel to show that the publication only accuses the plaintiff of having done that which he may legally do. It has never been the law that a publication, to be libelous, must accuse a person of having committed a crime or otherwise violated some law."

[4] Neither do we mean to hold that the publication by charging the plaintiff with the misappropriation of public funds necessarily charged him with the crime of embezzlement as defined by the penal statutes of this state. We do intend to hold, however, that the publication of the article complained of tended to expose the plaintiff to contempt and obloquy, and therefore made the appellants liable for damages under the provisions of section 45 of the Civil Code.

Appellants contend, however, that the meaning of the word "misappropriation" is defined in standard lexicons as simply synonymous with misapplication and denotes merely wrongful or improper appropriation; and when used to designate the conduct of a public official in disbursing public funds does not impute to such public official any want of integrity or dishonest motive, but, on the other hand, it merely charges a misuse of such funds by said official. There are some authorities which are cited by appellants and which might appear to give some support to this contention. These authorities, however, are from other jurisdictions, and, in so far as they attempt to apply a meaning to the word "misappropriation" when used in connection with the wrongful use of public money, they are at variance with the weight of authority in this state. The meaning which some of these authorities ascribe to the word "misappropriation" is so different from that generally accepted and applied to it by people generally that we do not feel that they should be followed by this court. We are, therefore, of the opinion that the article published by the appellants regarding the plaintiff was libelous per se. It follows, therefore, that the complaint stated a cause of action against said defendants.

[5, 6] It is next contended by appellants that the court erred in instructing the jury that the publication was libelous per se, and refused to permit the appellants to prove that the words were used and understood in an innocent sense. We have already held that the publication was as a matter of law libelous per se. As to the duty of the court in passing upon the libelous character of the publication, we think the rule is correctly stated as follows:

"The meaning of the language used in an alleged defamatory publication is, in the first instance, a question for the court. Where the language is unambiguous, it is the province of the court to determine its construction, and to decide whether it is actionable per se. If, however, the words are susceptible of two meanings, one harmless and the other defamatory, it is for the jury to say in which sense they were used and understood. But it is for the court to determine whether the language used is capable of the defamatory meaning claimed for it by the plaintiff." 16 Cal. Jur. 121, citing *Lyon v. Fairweather*, 63 Cal. App. 194, 218 P. 477; *Tonini v. Cevasco*, 114 Cal. 266, 46 P. 103; *Dauphiny v. Buhne*, 153 Cal. 757, 96 P. 880, 126 Am. St. Rep. 136; *Mellen v. Times-Mirror Co.*, 167 Cal. 587, 140 P. 277, Ann. Cas. 1915C, 766.

In view of these authorities it was proper for the court to instruct the jury as to the defamatory character of the publication complained of. Appellants sought to show at the trial that the objectionable words published were meant and understood in an innocent sense. There was in evidence the recall pe-

tition against the respondent herein, the said John B. Maher. This petition was the basis of the "proposed recall" mentioned in said publication. In this petition were set forth the reasons or grounds upon which the recall of respondent was asked. Those reasons as set forth in said petition were as follows:

"(1) Elected upon a platform of economy, efficiency, and progress, his official acts and methods have demonstrated his unfitness to act as mayor of our city.

"(2) He caused the passage of the merchants' license tax, sponsored and is attempting to continue the expensive and inefficient system of city assessments, and changed the plans of the water system, which will result in the city being deprived of an adequate supply of wholesome water, all without consulting the people and against their protest and wish.

"(3) He is retarding the progress of the city by holding up the pavement of streets where property owners are anxious to pave.

"(4) He dominates and controls city affairs to the extent that his will is substituted for that combined judgment of five officials intended by the charter.

"(5) By his arbitrary management of city affairs and the expenditure of city revenues from taxes and bonds, he has forfeited the confidence of the taxpayers and should not be allowed to remain in office and expend the remaining money voted for city improvements."

[7] Appellants then sought to prove that the words "misappropriation of public funds" were used by them and understood by the public not in the sense that imputed to respondent any want of integrity, but simply to mean that respondent had diverted funds of the city provided for a particular purpose from the purpose for which they were voted to an entirely different purpose or object, and that in that sense said publication was true. While appellants do not admit that the publication complained of does not on its face show that they understood the use of these objectionable words in an innocent sense, yet they did not rely on said publication for its true meaning, but sought to show by other evidence the innocent sense in which said words were used and understood. The evidence offered by them was to the effect that a former council of the city of Santa Cruz had passed a resolution outlining the plan to be followed in the improvement of the water system of said city and the particular purpose for which the funds to be derived from a proposed bond issue for said improvement were to be expended; that this preliminary step formed the basis of a bond election, which resulted in the voting of bonds in the sum of \$400,000 by the electors of said city; that, notwithstanding said resolution and the plan adopted thereby, the respondent and associates diverted and expended a large portion of the proceeds of such bonds in a manner entirely different from that provided for in the resolution, so that insufficient money remained to carry

out the plan originally adopted. The trial court refused this offer of proof and held that such matters were inadmissible either to prove the meaning in which said objectionable words were used or understood or to prove the truth of the publication. In so ruling, we are of the opinion that the trial court was correct.

To obtain a proper understanding of this question we must go back to the recall petition filed against respondent, and to the reasons therein set forth for respondent's recall. None of the reasons therein assigned for the recall of respondent mentions or in any manner, directly or indirectly, refers to any misappropriation, misapplication, or diversion of public funds of the city. These reasons and these alone formed the basis of and constituted the sole grounds of the recall proceedings against respondent. As nothing was stated in any of them regarding the misuse of public funds, and as the publication charged that the proposed recall of respondent was for the misappropriation of public funds, it is quite obvious that the evidence offered in no way tended to prove the truth of the article published. Had the recall proceedings against the respondent been based upon the claim that he had diverted funds properly belonging to the water system to some other public improvement of the city, then there might have been some semblance of an excuse for designating his act as a misappropriation of such funds, and evidence of such acts might have been admissible to prove the truth of the publication. Such evidence might also have been admissible as tending to prove the meaning in which the words were used in the article published, and that they were intended thereby to refer to respondent's action in directing or misusing the funds of the city rather than to a misappropriation of said funds in the sense these words are generally understood. But as respondent had not been charged in the recall petition with the diversion of any of the public funds the proffered evidence had no bearing whatever upon any question in the case, and it was properly rejected by the trial court.

[8] We have referred to the fact that appellants did not rely upon the article as published as proof that words claimed to be libelous were used in an innocent sense. This article is quoted in full in the preceding pages of this opinion. The first part was evidently a telegraphic dispatch sent from San Francisco; the remaining part of said article is apparently the personal comment of appellants upon the proceedings before the District Court of Appeal, of which the first part purports to give an account. It will be noticed by reference to this article that neither in the telegraphic dispatch nor in the personal comment thereon by appellants is there any intimation that by the use of the

words "misappropriation of public funds" it was intended to refer to the act of the respondent and his associates in diverting the water bond money to purposes other than those for which it was voted. The appellants in their comments following the telegraphic dispatch purport to give a brief account of the proceedings from the filing of the recall petition up to the order of the District Court of Appeal issuing the peremptory writ of mandate. In this account no attempt was made to explain the words "misappropriation of public funds," nor was there any mention of the purported misuse of the water bond funds, nor any intimation that the "misappropriation of public funds" had reference to the acts of the respondent in the expenditure of money raised by the sale of said water bonds. The article itself is the best evidence of its meaning. It is free from ambiguous terms and technical language of any kind. We are not able to see how a reading of the published article as a whole, or otherwise, would lead to the belief that by the use of the words "misappropriation of public funds" it was intended thereby to refer to the manner in which the officers of said city expended the water bond money.

In the third separate defense of the answer of appellants, as already stated, they claimed the publication was privileged under subdivision 3 of section 47 of the Civil Code. In setting up this defense appellants specially pleaded their publication of the newspaper, the Santa Cruz Evening News, their interest in the news relative to the respondent, their duty to disseminate such news to the public, also interested therein; that the portion of said article which contained the words "misappropriation of public funds" was received by them through the news service of the Associated Press, of which they were members; that they published the same believing it to be a true and correct account of the occurrences and happenings at the hearing before the District Court of Appeal, and solely upon their said obligation and without any malice or intent to injure respondent. At the trial the court held this plea, that the publication was privileged, was insufficient, and refused to permit appellants to prove the allegations of this special defense on the ground that it failed to allege honest belief on the part of the appellants that respondent had misappropriated public funds. In support of this ruling respondent relies upon the case of *Snively v. Record Publishing Co.*, 185 Cal. 563, 198 P. 1. In that case this court held that the privileged character of a publication as defined by subdivision 3 of section 47 of the Civil Code applied to an article published in a newspaper regarding the official conduct of a public officer. "This is the correct rule, but it does not arise from the fact that the publication is made in a newspaper. It is based on the

fact that the official conduct of public officers, especially in a government by the people, is a matter of public concern of which every citizen may speak in good faith and without malice. The privilege of the newspaper is in no wise different from that of any citizen of the community." 185 Cal. 571, 198 P. 3; *Snively v. Record Publishing Co.*, supra.

It was further held in that case that in order for a publication to come within the protection of subdivision 3 of this section it was not necessary that it be true. Prior to the rendition of that decision it was the established law of this state that the plea of privilege under this subdivision of the section in the publication of an article claimed to be libelous would not avail against a false charge. In other words, a false article was not a privileged communication. *Dauphiny v. Buhne*, 153 Cal. 759, 96 P. 880, 126 Am. St. Rep. 136; *Jarman v. Rea*, 137 Cal. 350, 70 P. 216. But in the case of *Snively v. Record Publishing Co.*, supra (page 576 [198 P. 5]), the court held:

"We are satisfied that *Dauphiny v. Buhne* and *Jarman v. Rea* went too far in declaring that a privileged communication must be true in order to make it privileged, and that they should be overruled so far as they so declare."

Continuing, this court said, on the same page of the opinion in that case (page 576 [198 P. 5]):

"With regard to this form of qualified privilege, no logical distinction can be made between a false charge of crime and a false charge of any other fact of a defamatory character. The occasion and the relations between the one making the charge and those to whom it is made being such that the communication would be privileged, the right of the publisher to speak or write is complete and unqualified, under the Code, except that he must speak or write 'without malice.' When under these conditions he honestly believes that the person of whom he speaks or writes is guilty of a crime of a nature that makes the fact material to the interests of those whom he addresses, it is as much his right and duty to declare to them that fact as it would be to tell them any other fact pertinent to the occasion and material to their interests. If the publisher of a newspaper honestly believes that a public officer has committed crime of a nature which would indicate that he is unfit for the office he holds, we think he is not liable for damages under the Code in a civil action for libel when, without malice, and so believing, he publishes a statement to that effect to the community served by the officer."

[9] It is this language which the respondent evidently relies upon to sustain the ruling of the trial court, in which it held that appellants' plea of privilege under subdivision 3 of section 47 of the Civil Code was insufficient and refused to admit any evidence in support thereof. The question thus pre-

sented is a matter of pleading. No such question was before the court in the case of *Snively v. Record Publishing Co.*, supra. The language last quoted was not used in passing upon the merits of any pleading in that case, but was employed in discussing the extent to which the publisher of a newspaper might go in commenting upon the acts of a public officer and still keep within the protection of subdivision 3 of said section of the Civil Code. The court held that, according to the Code section, the article must have been published without malice in order to be privileged, but that to show an absence of malice the publisher was not required to prove that the article was true, but only that he honestly believed it to be true, or in the case then before the court where the publication had accused the officer of a criminal offense, which was false, it was necessary for the publisher, in order to prove an absence of malice and, therefore, that the publication was privileged, to prove that he honestly believed that the officer had committed the offense charged. The court then went on to show in the *Snively* Case that the kind of malice contemplated by the provision of the Code upon the subject of libel and slander was actual or express malice or distinguished from "that somewhat fictional form of malice sometimes described as 'a wrongful act done intentionally without just cause or excuse,' or as 'the absence of legal excuse.'" It is quite obvious that the court in these discussions had under consideration the subject of malice, and the probative facts necessary to prove its existence, or want of existence. The answer in the *Snively* Case, setting up that the article published was privileged under subdivision 3 of section 47 of the Civil Code, contained no allegation that the defendant in that case believed that the article published was true, or that the defendant believed the officer charged was guilty of the crime charged. It simply alleged the article was published without malice, and in effect was precisely like the answer in the present action. Its sufficiency was neither raised by the parties nor considered by the court, and we are unable to construe any language in that case as holding that in pleading that a publication, false in fact, was privileged under subdivision 3 of section 47 of the Civil Code, it was necessary to allege in addition to the fact that the article was published without malice, that the publisher honestly believed it to be true, or that, where the article charged a public officer with the commission of a crime, the defendant must allege that he honestly believed the officer guilty of the crime charged. All that is necessary in such cases is to charge that the publication was without malice. It was, accordingly, error for the trial court to have refused to permit appellants to introduce evidence in support of their third separate defense.

[10,11] It was not error for the trial court to deny appellants' application to file an amendment to this separate defense. The proposed amendment offered during the trial referred simply to the action of the former council of said city, already referred to, in passing a resolution designating the manner in which the money derived from the sale of bonds, voted by said city for the purpose of improving its water system, should be spent, and that respondent and his associates on the city council diverted this money to other purposes. As already stated, the acts of the respondent in reference to the expenditure of said bond money was not included in the grounds or reasons assigned for the recall of respondent, and they therefore cannot in any manner be relied upon as justifying the publication of that portion of the article, wherein it is stated that the proposed recall of respondent was for the misappropriation of public funds. For the same reason the court did not err in denying appellants' offer to prove that respondent had mismanaged the public funds of the city.

[12,13] The court instructed the jury "that there is no evidence tending to prove that said publication was a fair or true report of said judicial proceeding." Appellants complain of the giving of this instruction. As we have stated, the recall proceedings against respondent were not based upon any charge of misapplication or misappropriation of public funds, and we do not think that appellants seriously contend to the contrary. They do claim, however, that the recall proceedings against some of the members of the city council were based upon what they assert was an improper diversion of the water bond money from the purpose for which it was voted, and that the report of the proceedings before the District Court of Appeal did not single out the respondent, but referred to him and his associates, and that the "proposed recall of these officials" was "for mismanagement and misappropriation of public funds." In other words, appellants contend that evidence that some of "these officials" were charged with the misappropriation of public funds justified the publication as true of the article stating that all of said officials had been so charged, even though no such charge had been made against respondent. We are not impressed with this argument. If A and B were in court, A charged with speeding and B with larceny, a report of the proceedings that A and B were before the court charged with larceny could hardly be considered a true report of said proceedings, in so far as the same related to A, and we are inclined to the belief that he would have just and legal cause to object to the publication of such a report, and we hardly believe it could be successfully contended that evidence that the report was true as regards to the charge against B would be any evidence that it was

true as to the charge against A. The instruction of the court was therefore justified by the evidence adduced at the trial. The report as published being untrue was not privileged under the provisions of subdivision 4 of section 47 of the Civil Code. To sustain their plea that the publication was privileged under this provision of the Code, the appellants offered in evidence the affidavits filed in the recall proceedings against the members of the city council setting forth the grounds or reasons upon which it was sought to recall these officials. The court sustained an objection to these affidavits. From what we have already said it is apparent that these affidavits were inadmissible in evidence against this respondent, and the ruling of the court thereon was correct. Neither did the court err in the giving of an instruction regarding damages nor in refusing to give a proposed instruction upon the same subject offered by the appellants.

[14, 15] It is finally contended that the verdict was excessive. This was a matter largely within the sound discretion of the jury. We cannot say from the evidence that there was any abuse of discretion on the part of the jury in fixing the amount of damages sustained by respondent.

For the error of the court in refusing to permit appellants to offer evidence in support of their third separate defense, the judgment is reversed.

We concur: WASTE, C. J.; SEAWELL, J.; LANGDON, J.; RICHARDS, J.; SHENK, J.

PRESTON, J., deeming himself disqualified, did not participate in the foregoing opinion.



88 Cal. App. 379

DENNING et al. v. GREEN et al. (Civ. 6013.)

District Court of Appeal, First District, Division 1, California. Jan. 18, 1928.

1. Taxation ⚡810(3)—Where plaintiffs and defendant both claimed title through same person, plaintiffs need not show such person had title to recover.

In suit to quiet title, in which defendant set up tax deed on sale for nonpayment of taxes by grantor of plaintiffs showing conveyance from such grantor to plaintiffs, without further establishing that grantor had title, was sufficient to authorize recovery for plaintiff.

2. Quieting title ⚡12(1)—Plaintiffs, suing to quiet title, need not have possession.

Proceeding to quiet title may be maintained by claimant not in possession, and plaintiffs, suing to quiet title, need not prove possession, especially where court's findings determine that defendant was never in possession.

3. Taxation ⚡814(1)—On showing defendant, claiming under tax deed, received rent greater than taxes, penalties, and costs, judgment quieting title in plaintiff, not conditional on payment of such items, held proper.

In suit to quiet title, where defendant claimed under tax deed, and finding supported by evidence showed defendant had received in rents more than taxes, penalties, and costs paid, and that tender of such items had been made in open court and refused by defendant, judgment for plaintiffs, not conditional on payment of such items, was proper.

4. Taxation ⚡734(7)—Quieting title against defendant, whose tax deed was not based on compliance with requirements of law, held proper.

In suit to quiet title, in which defendant claimed under tax deed, where findings, supported by evidence, showed legal requirements with respect to sale for taxes were never complied with in many particulars, quieting title in plaintiffs was proper.

Appeal from Superior Court, Sonoma County; R. L. Thompson, Judge.

Action by Marie D. Denning, formerly known as Marie Darling Fyfe, and others, against M. Green and others to quiet title. From a judgment for plaintiffs, the named defendant appeals. Affirmed.

Robert L. Levy, of San Francisco (A. L. Pierovich, of Jackson, of counsel), for appellant. J. L. Smith, of San Francisco, for respondents.

TYLER, P. J. Action to quiet title. The complaint is in the usual form. A dismissal was entered as to defendants C. B. Murphy and Oak Peters, and defendant Lillie F. Anderson filed a disclaimer. Issue was joined by defendant Green's amended answer and cross-complaint. Plaintiff claimed title through one Lucy J. Benjamin. Defendant and appellant Green claimed under a tax sale of the property at a time when it was assessed to Lucy J. Benjamin. At the trial plaintiffs offered this deed from Lucy J. Benjamin in evidence, and rested. Defendant Green, for the purpose of defeating plaintiffs' title and quieting his claim as against them, thereupon offered in evidence a certain alleged deed from the tax collector of the county of Sonoma to one Lichtenberg and a quitclaim deed from Lichtenberg to himself. The admission of the deeds was objected to on the grounds: (1) That defendants' answer and cross-complaint failed to set forth that the proceedings leading up to the execution of the tax deed had been complied with; (2) that there was no foundation laid for the admission of the deed, in that no deed to the state of California was offered showing the right of the tax collector to make the deed, and the deed itself contained no such recital. Certain other objections were made against the recep-

tion of the deeds in evidence. The deeds were admitted subject to the objections.

At the conclusion of the trial, the court, among other facts, found that Lucy J. Benjamin, a widow, was, on the 23d day of November, 1910, the owner in fee simple absolute of the real property in question, and that while such owner she conveyed to the plaintiffs as joint tenants her interest therein, subject to a life estate reserved in herself; that thereafter she died, and plaintiffs thereupon became, and ever since have been, and still are, the owners of the property as joint tenants, with the right of survivorship as recited in the deed of Lucy J. Benjamin. It further found that no deed by the tax collector of the county of Sonoma was ever made to the state of California of the property described in the action, at the expiration of five years after a purported sale to the state for nonpayment of state and county taxes for the year 1916; that, prior to the purported sale of the property by the tax collector to Lichtenberg, neither the tax collector nor any one on his behalf ever mailed a copy of the delinquent list or notice of sale of the property to the state, nor to the party to whom the property was last assessed at his last known place of address; that the property was so assessed to Lucy J. Benjamin. Additional findings are to the effect that plaintiffs did in open court offer to pay to defendant Green the full amount of all taxes, penalties, and costs paid out and expended by J. Lichtenberg in pursuit of the state's title to the property sold, less the amounts of rents collected from said property by said defendant, under and by virtue of the purported sale by the state to Lichtenberg, but that defendant Green refused to accept the same. As conclusions of law, the court determined that plaintiffs were entitled to possession of the property and to a decree quieting their title thereto as against the defendant Green, and judgment was entered accordingly. Defendant Green appeals from the judgment. He claims that it is against law, and that the evidence is insufficient to support it or the findings of the court, for the reasons: (1) That plaintiffs failed to prove any title in themselves or in their grantor Lucy J. Benjamin; (2) that there is no proof that the plaintiffs or their grantor were in possession of the property; (3) that plaintiffs must prove title in themselves, and, failing to do so, cannot be affected by defendant's adverse claim; (4) that, even conceding respondents to have proved their title, the judgment herein is defective, for the reason that it does not require, as a condition precedent to the quieting of plaintiffs' title, the payment by the

plaintiffs to the defendant of the amount of the assessment, penalties, and costs and the legal rate of interest thereon, without which such judgment and decree cannot be given.

[1-4] The evidence as above recited shows that both plaintiffs and defendant acquired their title from Lucy J. Benjamin, for the deed offered by defendant in evidence recites that the property was assessed to Lucy J. Benjamin in 1916, and was sold to J. Lichtenberg for nonpayment of taxes for that year. Hence the record shows that defendant claims by virtue of a quasi conveyance from Lucy J. Benjamin because of the nonpayment of her taxes. Both parties therefore claim under a common source of title. Under these circumstances it was sufficient for plaintiff to show a conveyance of title from that source without further establishing that the grantor herself had title. *McGorray v. Robinson*, 135 Cal. 312, 67 P. 279; *Phillips v. Menotti*, 167 Cal. 328, 139 P. 796; *Rockey v. Vieux*, 179 Cal. 681, 178 P. 712; *Jeffers v. Hulen*, 52 Cal. App. 590, 199 P. 350. Nor was it necessary for plaintiffs to prove possession in order to maintain their action. Such a proceeding may be maintained by a claimant not in possession. *Phillips v. Menotti*, *supra*. Moreover, by its findings the court determined that defendant was never in possession. Equally without merit is the claim that the judgment should have been made conditional on the repayment by plaintiffs to the defendant of all taxes, penalties, and costs paid for by him in pursuit of his title. The record shows that such tender was made in open court and refused by the defendant. The findings which are supported by the evidence further show that the defendant wrongfully collected the sum of \$920 in rents from tenants occupying the property, and that he has ever since retained the same to his own use and benefit. They further show that the total sum paid by Lichtenberg in taxes, penalties, and costs, with interest, amounted to but the sum of \$254.49. The defendant therefore already had an amount greatly in excess of that to which he was rightfully entitled. The findings, which are fully supported by the evidence, show that the requirements of the law with respect to the sale of property for nonpayment of taxes were never complied with in many particulars, and the court was justified in concluding that the purported sale of the property to Lichtenberg was invalid and void, and that plaintiffs were entitled to a decree quieting their title.

The judgment is affirmed.

We concur: KNIGHT, J.; CASHIN, J.

PEOPLE v. TUBB. (Cr. 1585.)

District Court of Appeal, Second District, Division 2, California. Jan. 21, 1928

1. Criminal law $\Rightarrow$ 1169(12)—Admission of conversation with defendant, amounting to confession and its later exclusion, held not prejudicial, where facts stated in confession were admitted by defendant.

Admission of conversation with defendant, which amounted to a complete confession, and later exclusion of confession, with instruction to jury to disregard it, *held* not prejudicial, where facts disclosed by confession were all testified to by defendant.

2. Criminal law $\Rightarrow$ 511(2)—Corroboration of accomplice is sufficient, if it tends to connect defendant with commission of crime.

Corroboration required to support testimony of accomplice may be slight, and, although entitled to but little weight standing alone, it is sufficient, if it tends to connect defendant with commission of crime.

3. Criminal law $\Rightarrow$ 511(1)—Corroboration of accomplice held sufficient to sustain conviction of robbery.

Corroboration of accomplice *held* sufficient to sustain conviction of robbery in the second degree.

Appeal from Superior Court, Los Angeles County; Carlos S. Hardy, Judge.

Frederick Tubb was convicted of robbery in the second degree, and he appeals. Affirmed.

Milton H. Silverberg, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and John L. Flynn, Deputy Atty. Gen., for the People.

CRAIG, J. The appellant and one Erbert Gottwald were jointly charged with having committed the crime of robbery in the county of Los Angeles on or about July 6, 1927. Gottwald pleaded guilty, and testified as a witness for the people. Tubb was convicted of robbery of the second degree, moved for a new trial, which was denied, and appeals from the judgment and from the ruling on said motion.

It appears that appellant, at the time of the alleged offense, had been employed as a general handy man by one Weitzman, the owner of a hotel or apartment house on Beacon street, and of a residence on Fifth avenue, in Los Angeles city. Late in the afternoon of the date last mentioned, while the Weitzman family and appellant were seated at the dinner table in the Fifth avenue house, Gottwald entered, commanded them to put up their hands, took \$80 and a check from Weitzman's person, Tubb tied their hands with rope, placed a blue bandana around the head and over the mouth of each of the family, and

was then in turn likewise tied by Gottwald, who entered an adjoining room and closed the door; that Gottwald opened the door several times, threatening to shoot if any one should move, and finally escaped. Weitzman freed himself from the rope, and, upon searching for his revolver, discovered that Tubb had taken it. Weitzman then started in an automobile in search of Gottwald, whom he overtook in the near vicinity, and, with the assistance of other persons, returned him to the house, where detectives were then waiting, and placed him under arrest. About two days later appellant was arrested, and, upon being questioned at the police station, admitted to the officers that on July 1, 1927, he had planned the holdup; that on the 6th he caused Gottwald to hide in the garage near by; and that, when the family were seated at the table, appellant went to the garage, and gave a signal, and returned. Gottwald testified that appellant told him the Weitzmans were millionaires, and that he would like to get \$25,000; that appellant and the witness met at a theater, in a restaurant, a mission, and in one of the city parks; and that Tubb made all of the plans, explained them, and rehearsed Gottwald on each occasion, furnished him with funds, instructed him to buy a gun, and "asked me if I was game to come out there." This witness swore, however, that he did not purchase a revolver, but procured a cigarette case which resembled one, which he ultimately used in the holdup, and as to this fact there is no controversy. Upon cross-examination Gottwald was asked if it was not "planned between you and Tubb that this was only going to be a fake robbery; he was going to assault you and chase you out of the house, and let you get away?" To which he replied, "Not as far as I know." Counsel for appellant then asked: "As far as you heard, it was going to be a real robbery? A. Yes."

Appellant's testimony and his whole contention at the trial was that he feared he was not in as good standing with his employers as he desired to be, although he had worked for them about 18 months, and was trusted by them; had the keys "to every door in the building," including the basement, and on many occasions was left alone at their home. Tubb did not attempt to deny the occurrences above recited as to the actual robbery, and as detailed by Weitzman, Mrs. Weitzman, and Gottwald, but firmly maintained that "it was all a jest; it was a myth," or was intended to be; that it was planned to be a "fake robbery," in which Gottwald was to be "frustrated eventually, and Gottwald was to get away from the house"; that he "did not imagine Mr. Weitzman would ever think it would be otherwise, my devotion on behalf of those people being my sole mission; I did not en-

ertain any intention of robbery; I did not picture myself as an ostensible hero, but I visualized what I would do if such an occasion should ever arise." He said:

"When I saw the transformation of Mr. Weitzman's money to Gottwald's pocket, that made me fear an attempt to rob, and, putting aside discretion, I charged him, and, during the scuffle he hit me on the head with the gun, cut the right side of my head; it wasn't much of a wound."

[1] The principal ground assigned for reversal arises from alleged errors of the trial court in admitting in evidence certain confessions of appellant, which were later stricken out, and the jury instructed to disregard them. Weitzman swore that he had a conversation with appellant at the police station, and, before being allowed to state it from the witness stand, defendant's counsel requested permission to examine the witness on voir dire, which the court refused, stating that counsel might cross-examine him at the proper time. Weitzman thereupon related what amounted to a complete confession, but said that he remarked to appellant at the time:

"Why don't you tell the truth? I know the whole story, what has happened. You might as well come clean with it and tell the truth, and it will be easier for you."

The trial court, in view of the apparent promise of leniency by Weitzman, struck out the confession so made, as well as others claimed to have been made to police officers thereafter.

Appellant strenuously insists, and cites authorities tending to support his position, that in denying him the right to examine the witness on voir dire, and in admitting the alleged confessions, the damage was done, and that it became too late to cure the error by striking out such statements. If this be conceded to be a sound argument, still the details of the robbery were placed before the jury, not only by the testimony of Weitzman, Mrs. Weitzman, and Gottwald, but by the admissions of the defendant upon the stand. Therefore the sole inquiry for the jury was as to appellant's intentions, which would determine whether his acts constituted a "jest" or a robbery. Tubb swore, and Weitzman admitted, that the defendant positively declared it to be but an attempt to obtain the employer's "good graces." All of the evidence plainly indicated, and appellant admitted, that he planned the holdup. Hence neither confession prejudiced him. Such facts as appellant's previous meetings with Gottwald, the purchase of meals at a restaurant, supplying Gottwald with money, the latter's presence in the garage, the robbery, and

Tubb's part in it, Gottwald's escape with Weitzman's \$80, and its subsequent recovery, all are verified by Tubb's testimony upon the trial. He reiterated his good intentions in staging the holdup, which he admitted having instigated. It would be idle to discuss at length the contention that appellant's accomplice was not corroborated with sufficient evidence to support the verdict and judgment. The question of intent was stressed to the exclusion of all other considerations, and as to that the jury may well have concluded that the defense was novel, but not meritorious, and this we think is a fair estimate of it.

[2, 3] The trial court committed no error in denying a motion that the case be dismissed, made by appellant's counsel, when the prosecution rested. The corroboration required to support the testimony of an accomplice may be slight, and, although entitled to but little weight, standing alone, it is sufficient if it tends to connect the defendant with the commission of the crime. *People v. Wilson*, 76 Cal. App. 688, 245 P. 781; *People v. Martin*, 19 Cal. App. 295, 125 P. 919; *People v. Garwood*, 11 Cal. App. 665, 106 P. 113; *People v. McLean*, 84 Cal. 480, 24 P. 32. Some of the corroborating evidence in this instance is that Tubb arranged to have the Weitzmans present at the Fifth avenue residence upon this occasion, though they did not reside there, and had not been there for a period of two weeks. When Gottwald held them up, Tubb bound and gagged Weitzman, Mrs. Weitzman, and their daughter. Later Tubb apparently pretended to interfere with Gottwald, but Tubb was the one who demanded the key to the safe, and he made no effort to release either of the victims from their bonds. Appellant's conduct, as detailed by them as witnesses, was susceptible to a conclusion that his efforts to aid them were feigned. After Gottwald had departed, Weitzman's revolver was found to be missing from its proper place in a drawer, and it developed that Tubb had it in his possession. When told by Weitzman to fire it, Tubb at first failed to do so, at the time when Gottwald was running away. After Weitzman had repeatedly demanded that Tubb shoot, and appellant had stated that it would not work, he finally did fire, but Weitzman testified that Tubb shot in the air. There are other incidents corroborative of Gottwald's testimony, but these are amply sufficient.

No other points requiring attention are advanced by appellant.

The judgment and order denying a new trial are affirmed.

We concur: WORKS, P. J.; THOMPSON, J.

88 Cal. App. 589

PEOPLE v. GATLIFF et al. (Cr. 1011.)

District Court of Appeal, Third District, California. Jan. 24, 1928.

1. Indictment and Information $\S$ 176—Information for manufacturing liquor, alleging that offense was committed "on or about" April 22d, held not at variance with evidence that on May 13th defendants had still and liquor with large alcoholic content.

Information for unlawfully manufacturing intoxicating liquor, alleging that offense was committed "on or about the 22d day of April, 1927," held not at variance with evidence that on May 13, 1927, defendants were in charge of still in full operation and had large quantity of corn mash nearby and a quantity of liquor having an alcoholic content of 36.86 per cent.

2. Intoxicating liquors $\S$ 236(19) — Evidence held to sustain conviction of manufacturing liquor.

Evidence held sufficient to sustain conviction of unlawfully manufacturing intoxicating liquor.

Appeal from Superior Court, Humboldt County; Harry W. Falk, Judge.

S. Gatliff and another were convicted of unlawfully manufacturing intoxicating liquor, and they appeal. Affirmed.

J. T. Fraser and H. L. Ford, both of Eureka, for appellants.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

FINCH, P. J. The appellants were convicted of the crime of unlawfully manufacturing intoxicating liquor. This appeal is from the judgment of conviction and the order denying a new trial.

[1] Appellants contend that there is a fatal variance between the allegations of the information and the proof as to the time of the commission of the offense. It is alleged in the information, filed July 2, 1927, that the crime was committed "on or about the 22d day of April, 1927." The proof shows that on May 13, 1927, the defendants were in charge of a still in full operation, and had about 28 barrels of corn mash near the still and a quantity of liquor having an alcoholic content of 36.86 per cent. Appellants' contention is wholly without merit. *People v. Goodwin*, 132 Cal. 368, 372, 64 P. 561; *People v. Singh*, 62 Cal. App. 450, 452, 217 P. 121.

[2] The only other point made by appellants is that the evidence is insufficient to sustain the conviction. The foregoing facts were proved at the trial without contradiction. It thus appears that the appellants' second contention is as devoid of merit as their first.

The judgment and the order are affirmed.

We concur: HART, J.; PLUMMER, J.

88 Cal. App. 369

OCEAN ACCIDENT & GUARANTEE CORPORATION v. INDUSTRIAL ACC. COMMISSION et al. (Civ. 6105.)*

District Court of Appeal, First District, Division 1. California. Jan. 17, 1928.

Hearing Denied by Supreme Court March 15, 1928.

1. Master and servant $\S$ 414—Mistaken stipulation between applicant and supposed employer that latter was employer held not binding on commission (Workmen's Compensation Insurance Act, $\S$ 19b).

Stipulation between applicant for compensation and person thought to be employer that latter was in fact employer of deceased held not binding on Industrial Accident Commission under Workmen's Compensation Insurance Act, $\S$ 19b (St. 1917, p. 848), where it appeared stipulation was based on mistake.

2. Master and servant $\S$ 361—One leasing trucks and reserving control over operation held employer of truck driver as against claim that lessor of trucks was employer.

As between person leasing trucks for delivery purposes, in return for monthly payments for their use and for his services as superintendent of deliveries, and one receiving trucks, who expressly agreed to engage all drivers and pay their salaries and who was to have absolute control of operation of trucks, person receiving trucks was liable as employer in compensation proceedings for death of truck driver.

3. Master and servant $\S$ 388—Father who conveyed his property to son and relied solely on him for support held totally dependent.

Father living with son in house in which father transferred his interest to son held totally dependent on son in compensation proceedings for son's death, where son's earnings were sole source of father's support.

4. Insane persons $\S$ 100—Compensation award held properly entered in favor of applicant notwithstanding adjudication of incompetency following application and subsequent appointment and appearance of guardian.

Where claimant in compensation proceedings was adjudged incompetent after commencement of proceedings, guardian subsequently appearing did not become party to proceeding, and award was properly entered in favor of applicant.

5. Insane persons $\S$ 100—Applicant for compensation, adjudged incompetent between time of application and award, held nevertheless bound by award.

Applicant in compensation proceedings, who after time of application was adjudged incompetent, was nevertheless bound by award of compensation entered in his favor after appointment of guardian.

Proceedings under the Workmen's Compensation Act by Patrick Brazel for the death of Frank I. Brazel, opposed by the Ocean Accident & Guarantee Corporation, which claimed that William Froehlich was a joint

employer. From an award of the Industrial Accident Commission in claimant's favor, the insurer brings certiorari. Award affirmed.

R. P. Wisecarver and Redman & Alexander, all of San Francisco, for petitioner.

G. C. Faulkner, of San Francisco, for respondents.

CASHIN, J. Certiorari to review an award by the Industrial Accident Commission.

Frank I. Brazel, now deceased, was the son of Patrick Brazel, who applied to the commission for the adjustment of a claim for compensation based upon the fact that the death of the deceased was caused by an accidental injury arising out of and in the course of his employment. The deceased was employed as the driver of a delivery truck, and at the time of the injury was engaged in the delivery of parcels for Raphael Weill & Co., the insured, under an agreement between the latter and William Froehlich, who was also joined as a defendant. An award was made by respondent in favor of the applicant and against the insured; and it is contended by petitioner, which was the insurer, that Froehlich was a joint employer of the deceased, that the award should also have been against him, and, further, that the applicant was not a dependent.

[1, 2] By the terms of the agreement mentioned Froehlich leased to the insured certain trucks which were used for delivery purposes, one of which was being driven by the deceased at the time of the injury which caused his death. The agreement provided for the payment to Froehlich of certain lump sums monthly for the use of the trucks and for his services as superintendent of deliveries, from which sums, however, were to be deducted the wages of the drivers and certain other expenses, it being expressly provided "that the first party (the insured) shall engage all drivers employed to operate the said trucks and shall pay their salaries, and shall have absolute control of the operation of said trucks, and shall designate the routes to be covered by the same, and any superintendence or direction undertaken by the second party (Froehlich) shall be as an agent or employee of the first party and not as an independent contractor." While at the first hearing in the proceeding it was stipulated between the applicant and Froehlich that the latter was the employer of the deceased, the commission was not bound thereby (Workmen's Compensation Insurance Act, § 19b [St. 1917, p. 848]); and, as now claimed by it, the conclusion that the relation existed was based upon an obvious mistake by the parties, and the provisions of the contract, together with the testimony, fully support the finding that

the deceased was employed by the insured and not by Froehlich.

[3] The testimony shows that the wife of the applicant acquired title to a dwelling house in Oakland, to which, upon her death in 1916, the applicant and his sons, Frank and Edward Brazel, succeeded. The applicant and his son Frank continued to reside in the dwelling until the year 1925, when they removed therefrom, and the house was sold in 1926. With the exception of his interest in the dwelling the applicant was without estate, and this interest was shortly before the sale of the dwelling conveyed by deed of gift to his son Frank. This son during the years following the death of Mrs. Brazel was the sole support of the applicant with the exception that the latter occupied the dwelling as above stated. It further appears that after the death of his son, the appraised value of whose estate was \$2,500, the applicant was allowed by the probate court a monthly sum payable from the estate for his temporary maintenance. The applicant testified that the reason for the transfer of his interest in the dwelling to the deceased was that the latter had supported him; and while it was doubtless the intention of the deceased to do so, the record discloses no promise to furnish future support, nor evidence that the transfer was made in trust.

The facts of the present case are analogous to those in *London Guarantee & Accident Co., Limited, v. Industrial Accident Commission et al.* (Cal. Sup.) 263 P. 196, and were sufficient to support the finding of total dependency.

[4, 5] Petitioner also contends that the applicant was an incompetent person at the time the award was made and was not represented in the proceedings by his guardian. The proceedings were commenced on January 29, 1927, and after the matter had been partially heard the applicant was on April 19, 1927, by the superior court of the city and county of San Francisco adjudged to be an incompetent person. His son Edward Brazel was thereupon appointed and duly qualified as the guardian of his person and estate, and as guardian appeared in the subsequent proceedings before the commission. The guardian, however, did not thus become a party to the proceeding (*O'Shea v. Wilkinson*, 95 Cal. 454, 30 P. 588; *Estate of Callaghan*, 119 Cal. 571, 51 P. 860, 39 L. R. A. 689), and the award was properly entered in favor of the applicant, who, though an incompetent, was bound thereby (*Redmond v. Peterson*, 102 Cal. 595, 36 P. 923, 41 Am. St. Rep. 204; *Welsh v. Koch*, 4 Cal. App. 571, 88 P. 604).

The award is affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

88 Cal. App. 545

GENAZZI v. MARIN COUNTY et al.
(Civ. 6090.)Henry E. Greer, Dist. Atty., of San Rafael,
for respondents.

District Court of Appeal, First District, Division 1, California. Jan. 24, 1928.

- 1. Eminent domain** ⇨106—Generally, right of abutting landowner on public highway of easement and user for access purposes cannot be damaged or taken without due compensation.

Generally, abutting landowner on public highway has a special right of easement and user in public road for access purposes, and this is a property right of easement which cannot be taken or damaged without due compensation.

- 2. Highways** ⇨85—Landowner is not entitled, as against public, to access to lands at all points in boundary between land and highway.

A landowner is not entitled, as against public, to access to his land at all points in boundary between it and highway, and, if he has free and convenient access to his property, he has no cause for complaint.

- 3. Highways** ⇨120(1)—Power to provide for drainage of surface water from highways is incidental to power to build and repair highways.

The proper authorities have power to provide for drainage of surface water from highways and to build ditches and culverts; such power being incidental to power to lay out, build, and repair, highways.

- 4. Highways** ⇨120(1)—Courts cannot control discretion of proper authorities in providing for drainage of surface water from highways, unless private rights are invaded.

Discretion of proper authorities in providing for drainage of surface water from highways and building of ditches and culverts cannot be controlled by courts, except where private rights are violated.

- 5. Injunction** ⇨118(1)—Complaint held to state mere conclusions, and not sufficient to state cause of action for injunction against diversion of stream into ditch.

Complaint by owner of land abutting highway that, by reason of diversion of stream into a wide and deep ditch between his land and highway, instead of permitting it to cross highway, road will in all probability be destroyed by reason of large quantities of water which will be backed up on plaintiff's land, and that it will be impossible for plaintiff to obtain ingress and egress to large body of his land, held mere conclusions, and insufficient to state cause of action for injunction against maintenance of dam and ditch.

Appeal from Superior Court, Marin County; Edward I. Butler, Judge.

Action by Fred Genazzi against the County of Marin and others. From an order sustaining demurrer to complaint and from judgment in favor of defendants, plaintiff appeals. Affirmed.

G. P. Hall, of Petaluma (J. Hall Lewis, of Petaluma, of counsel), for appellant.

TYLER, P. J. Action for damages and mandatory injunction. The proceeding was brought by plaintiff against the county of Marin and the supervisors for the purpose of preventing defendants from continuing to divert a stream from its natural course to plaintiff's damage. The complaint, in substance, alleged that plaintiff was the owner of about 500 acres of land in Marin county. That for more than 40 years last past, and until the year 1927, there had been in said county a natural stream of water commonly known as Olema Creek, which flowed along and across the southerly portion of the lands of plaintiff, and thence upon and across the main county road leading from Point Reyes to Olema; that, at a point where the said Olema Creek crosses the said county road, there had, for many years, existed a bridge, and the waters of the creek, in their natural course, flowed across the road under said bridge; that on or about July 1, 1926, the defendants, the supervisors of the county of Marin, executed a contract with the defendants Cuffe and White for certain improvements on the county road, and in the process of the work it was decided to divert the stream from its old crossing, and carry it in a northerly direction, along the easterly side of the county road, by means of a wide and deep ditch some 500 feet in length constructed along said easterly side of said road in front of plaintiff's land, to a point about 500 yards northerly from the point where the creek flows out upon the county road from the lands of plaintiff; that the construction of the ditch results in preventing ingress and egress to the plaintiff's property without the use of bridges. Other allegations recite that defendants have entirely filled the creek bed across the county road, thereby forming a dam. It is the contention of the plaintiff that the probable result which will follow this diversion of the water will be the backing up of storm flood waters onto his land, inundating the same, and destroying the roadway. As an additional element of damage, it is alleged that the construction of the ditch along plaintiff's property frontage prevents ready egress and ingress to a large portion thereof, save by the construction of numerous bridges. An injunction is prayed for restraining the defendants from the continued maintenance of the dam and ditch, and for their removal, so as to permit the waters to flow along their natural course. Damages are also claimed in the sum of \$1,000. A demurrer was filed to the amended complaint on the ground that it did not state facts sufficient to constitute a cause of action. The demurrer was sustained without leave to amend, and judgment was entered in favor of defendants and

against the plaintiff. This is an appeal from the order and judgment.

[1-5] It is appellant's contention that the diversion of the waters onto the main road creates a nuisance per se, which limits the use of his land, and which entitles him to injunctive relief and to nominal damages. That this being so, the complaint states a cause of action. We do not think so, as we are of the opinion that the demurrer was rightfully sustained. Generally speaking, an abutting landowner on a public highway has a special right of easement and user in the public road for access purposes, and this is a property right of easement which cannot be damaged or taken from him without due compensation. But an owner is not entitled, as against the public, to access to his land at all points in the boundary between it and the highway, although entire access cannot be cut off. If he has free and convenient access to his property, and his means of ingress and egress are not substantially interfered with by the public, he has no cause of complaint. 29 Corp. Jur. p. 547. The proper authorities have power to provide for the drainage of surface water from highways, and to build ditches and culverts, such power being incident to the power to lay out, build, and repair highways. Of course, the construction of the drains must be performed with care and skill so as not to damage the land of an abutting owner. But the question of obstructing a highway or changing the natural course of the stream so as to cast it upon the land of plaintiff, where it had not previously been accustomed to flow, thereby damaging his land, is not involved in this proceeding. The complaint proceeds upon the theory that the improvement complained of prevents ingress and egress to a portion of plaintiff's frontage, and anticipates that damage might result in the event of freshets. But an abutting owner has not the right to insist that the authorities so construct and repair roads in such a manner that he may travel unobstructed without any act whatever on his part, directly over the highway to any portion of his adjoining land. He may construct bridges to gain access thereto, and it is here alleged that it is possible to do so. As above stated, in the construction of highways the proper authorities have power to provide for the drainage of surface waters and to build ditches and culverts, such power being incident to the power to construct and repair the same, and their discretion in the matter cannot be controlled by the courts, except where private rights are violated. Here the complaint contains nothing except the conclusion of the pleader that plaintiff's rights have been invaded. It is alleged that the waters from the creek, by reason of the change, are carried along the county road by a wide and deep ditch, and

that during the rainy season, by reason of the conversion of the stream, the road under construction will in all probability be destroyed by reason of very large quantities of waters which will back up on the land of plaintiff; that by reason of the construction it will be impossible for plaintiff to obtain ingress and egress to a large body of his land lying along said county road; that defendants will continue to divert the waters unless restrained, to plaintiff's great and irreparable injury. These allegations are but mere conclusions, and are wholly insufficient to state a cause of action for an injunction in the absence of facts from which such conclusions may be adduced. It may be, under certain facts, that an improvement might be enjoined where it interfered with the right of an easement of access to land until damages were paid which would follow such use, but a complaint, whether seeking damages after the construction, or an injunction before, must show some actual or threatened injury to a private property right of a plaintiff. The conclusion by the pleader that such a result will in all probability follow is a mere averment of opinion or conclusion too general and indefinite to afford a basis for relief by injunction. *Brown v. Rea*, 150 Cal. 171-175, 88 P. 713; *Willis v. Lauridson*, 161 Cal. 106, 118 P. 530.

The order and judgment are affirmed.

We concur: KNIGHT, J.; CASHIN, J.

88 Cal. App. 481

BOWMAN v. MARYLAND CASUALTY CO.
et al. (Civ. 5977.)*

District Court of Appeal, First District, Division 2, California. Jan. 20, 1928.

Hearing Denied by Supreme Court March 19, 1928.

1. Principal and surety $\S$ 100(1)—Verbal agreement to extras and deductions held mere noncompliance with procedural requirements of building contract, not releasing surety on contractor's bond.

Action of building contractor and owner in agreeing to extras and deductions verbally, instead of in writing, as contemplated by contract, was only a failure to comply with procedural requirements, which is not such a change in contract as to release surety on contractor's faithful performance bond.

2. Principal and surety $\S$ 100(1)—Surety on building contractor's bond held not released by noncompliance, due entirely to contractor's fault, with requirements that deductions and extras be agreed to in writing.

Failure to comply with requirements of building contract that deductions and extras be agreed to in writing did not release surety on contractor's faithful performance bond, where such failure was due entirely to contractor's fault and neglect.

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

★Hearing denied by Supreme Court.

3. Trial $\hookrightarrow$ 395(3)—Finding that building contractor failed to submit, or agree on manner of determining, prices for extras or allowance for omissions, ordered sometimes orally and sometimes in writing, held not too general.

In owner's action on building contractor's bond, finding that failure of plaintiff and contractor to agree on prices of extras or allowance for omissions was not caused by plaintiff's fault, but that contractor failed to submit prices or agree on manner of determining them before proceeding to complete extra work or omit work, as instructed sometimes in writing and sometimes orally, held not too general, though not specifying which extras and deductions were made orally and which in writing; judgment being properly the same as to each class.

4. Principal and surety $\hookrightarrow$ 113—Damages for building contractor's delay and defective work held properly deducted from balance of price in owner's hands before discharging liens.

Amount of damages allowed owner for building contractor's delay in completing work and uncorrected defective work held properly deducted from balance of contract price in owner's hands, as against contention that such balance should be used first to discharge liens, in view of provision specifically authorizing owner to retain enough money due contractor to pay such damages.

5. Principal and surety $\hookrightarrow$ 113—Surety on building contractor's bond cannot object to deduction of damages for delay and defective work from balance of price in owner's hands before discharging liens.

Surety on building contractor's bond cannot object to deduction of damages, allowed owner for contractor's delay in completing work and uncorrected defective work, from balance of contract price in owner's hands, on ground that such balance should be used first to discharge liens; that being matter for lien claimants to object to.

6. Principal and surety $\hookrightarrow$ 113—Surety on building contractor's bond held not injured by deduction of damages for delay and defective work from balance of price in owner's hands without first deducting amount of mechanics' liens (Code Civ. Proc. § 1183).

Surety on building contractor's bond was not injured by, and hence could not complain of, deduction of damages, allowed owner for contractor's delay in completing work and uncorrected defective work, from balance of price in owner's hands without first deducting amount of mechanics' liens, as in latter case money judgment would result in favor of contractor against surety in amount of such liens and owner could recover judgment against surety for such damage; bond being answerable to lien claimants under Code Civ. Proc. § 1183.

7. Mechanics' liens $\hookrightarrow$ 240—Building contractor, not owner, held chargeable with interest on unpaid mechanics' liens.

Building contractor not paying mechanics' liens, as required by contract before payment of price, held properly charged with interest thereon; owner not being obliged to pay such interest from balance of price in his hands

in order to save contractor expenses of lien foreclosure suits.

8. Damages $\hookrightarrow$ 189—Evidence held to warrant allowance of \$6,000 damages to owner for building contractor's failure to wire-brush front concrete surface according to specifications.

In owner's action on building contractor's bond, plaintiff's testimony that building was worth \$15,000 less than if front concrete surface had been wire-brushed according to specifications, evidence that such brushing could be accomplished even if building inspector did not permit removal of forms until after five days, contractor's express agreement to observe city building ordinances, and evidence that owner, after directing contractor to experiment with other means of finishing front, changed his mind, held to warrant allowance of \$6,000 damages to owner for failure to do such work.

9. Contracts $\hookrightarrow$ 234—Deduction of \$6,041.20 from building contract price for omitted work, which owner, claiming deduction of \$9,150, let to another contractor for \$5,900, held proper.

Deduction of \$6,041.20 from building contract price for glass and metal work, which owner, as permitted by contract, directed contractor to omit, and subsequently let to another contractor for \$5,900, which surety on contractor's bond conceded was proper deduction, held proper as against contention that owner was guilty of bad faith in claiming deduction of \$9,150, which was contractor's preliminary estimate of cost, where both owner and contractor claimed too much and conceded too little.

10. Contracts $\hookrightarrow$ 232(2)—Contractor's right to allowance for extra work and material depends on whether they are included in contract price, not on validity of liens therefor.

Whether building contractor is entitled to allowance for extra work and material depends on whether they are included in contract price and specifications, not on validity of liens therefor.

11. Contracts $\hookrightarrow$ 232(2)—Allowance to building contractor for extra labor and material, for which liens were allowed, held properly refused, in absent showing they were not included in contract price.

Refusal of allowance to building contractor for extra labor and material, for which recovery was permitted to certain lien claimants, held not error, in absence of showing that such liens were not for labor and material, which contractor was obliged to supply for contract price, under terms of contract, and specifications.

12. Attorney and client $\hookrightarrow$ 140—Court may fix amount of attorney's fees with or without expert testimony and need not award all fees asked merely because attorney was only witness on subject.

Court may fix amount of attorney's fees, with or without expert testimony as to value of attorney's services, and is not bound to award all such fees asked for by attorney merely because he was only one who testified on subject.

13. Contracts ⚡322(4)—Evidence that cement floor broke because of contractor's admitted failure to comply exactly with specifications held to warrant allowance of damages therefor.

Testimony that breaking of cement floor was caused by contractor's admitted failure to comply exactly with specifications of contract as to tamping and settling of earth before laying floor held to warrant allowance of damages for failure properly to execute such portion of contract.

14. Trial ⚡404(1)—Finding that exhibit annexed was true copy of contract held not equivalent to finding that agreement for liquidated damages was valid.

Court's finding that exhibit annexed thereto was a true and correct copy of parties' contract held not equivalent to finding that agreement therein for liquidated damages was valid.

15. Appeal and error ⚡1033(8)—Assessment of actual, instead of larger liquidated, damages for building contractor's delay, was not injurious to surety.

Error, if any, in assessing actual, instead of liquidated damages for contractor's delay in completing building, was not injurious to surety on contractor's bond, where liquidated damages for number of days' delay before filing of notice of completion by owner exceeded amount of actual damage allowed.

16. Damages ⚡85—Tenant's payment of rent for portion of time before delayed completion of building did not suspend liquidated damage clause of building contract.

Rule of liquidated damages for building contractor's delay in completing work should be applied up until day of completing building, though tenant paid rent during portion of such time; provisions for such damages being either entirely valid or void when contract was made and at all times thereafter.

17. Damages ⚡85—Validity of liquidated damages covenant is not affected by amount of actual damages.

Validity of covenant for liquidated damages is not affected by fact that actual damages subsequently ascertained are less or more than amount agreed on.

Appeal from Superior Court, Los Angeles County; Ira F. Thompson, Judge.

Action by H. D. Bowman against the Maryland Casualty Company, Earl B. Newcomb, and another, in which named defendants filed cross-complaints. From the judgment rendered, defendant casualty company appeals. Affirmed.

Bicksler, Smith & Parke, of Los Angeles, for appellant.

Gibson, Dunn & Crutcher and H. F. Prince, all of Los Angeles (Homer D. Crotty, of Los Angeles, of counsel), for respondents.

KOFORD, P. J. This was an action brought by Bowman, plaintiff, the owner, against defendant Newcomb, the contractor,

and defendant Maryland Casualty Company, surety company, upon the faithful performance feature of a bond given under Code of Civil Procedure, § 1183, for the construction of the Westinghouse building in the city of Los Angeles. The action was consolidated with many mechanics' lien foreclosure suits. The liens were determined in amount, paid or provided for by the judgment, and none of the lien claimants are appellants herein. The judgment determined many points of dispute between the owner and contractor, and was in a general way like an accounting between the owner and contractor. The full contract price was \$330,000. In the settlement made by the judgment, compensation for extra work and material was allowed to the contractor in the sum of \$5,441.66, and deductions from the contract price on account of work and material omitted were allowed in the sum of \$15,285.40. These extras and deductions changed the total contract price named in the contract to \$320,156.26. The amount of progress payments which had been paid to the contractor at the time of suit was \$285,150. The balance of the reduced contract price remaining in the hands of the owner was by the judgment distributed as follows: Allowed to the owner attorneys' fees, \$2,500; damages for defective performance of work on front of building, \$6,000; damages due to delay in completing the building, \$12,041.25; damages for defective performance of work on first floor, \$4,000. The balance then remaining in the hands of the owner, being \$10,465.01, was ordered distributed amongst the lien claimants pro rata. The lien claimants for the unpaid part of their claims were given liens against the owner's property and judgments against appellant surety company by virtue of the lien feature of the bond.

The points presented by the appellant on this appeal are as follows: First, it is claimed that the extras and deductions agreed upon between the owner and contractor and in some instances even the breaches of contract by the contractor amounted to such a change of and departure from the terms of the written building contract as to release and discharge the surety from its obligation upon the faithful performance bond. Second, objection to deducting owner's damages for breaches from the contract balance before all liens were paid out of that balance. Third, certain objections to the specific items of extras, deductions, and damages. Fourth, objection to the allowance by the court of actual damages for delay instead of liquidated damages provided for by the contract.

[1-3] The main point of appellant is that the extras and deductions verbally agreed upon between the owner and contractor, and not in writing as provided for by the written contract, constituted such a change in the

contract as to release the surety. This point has been disposed of by the case of *Roberts v. Security Trust & Savings Bank*, 196 Cal. 557, 238 P. 673, which was decided after appellant's opening brief was filed herein. It was there held that the failure of the owner and contractor to comply with procedural requirements with regard to deductions and extras was not such a change in the contract as would release the surety company on its faithful performance bond. We think the action of the owner and contractor in the instant case in verbally agreeing to the extras and deductions instead of in writing as contemplated by the contract amounts only to a failure to comply with procedural requirements, and, under the authority referred to, does not have the effect of releasing the surety company upon its bond. The building contract, article 4, and paragraph 22 of the specifications, expressly provided for extras and deductions and consequent modification of the total contract price, without expressed limit in amount, although it also provided that this should be done in writing. The contract in specifying the full contract price also says, "\$330,000, subject to additions and deductions as herein provided." Therefore the building changes were not changes in the contract nor departures from the contract, but, on the contrary, they were expressly contemplated and provided for in the building contract upon which appellant became surety. Such action was only a breach of procedure provided by the contract, which consisted of following a different method of doing the things which the contract provided might be done. In addition to this, there is a further reason why such failure to comply with the procedural requirements of the contract does not release the surety. The court expressly found, in finding No. 53, that it was through no fault or neglect of the owner that such procedural requirements were not followed, but was due entirely to the fault and neglect of the contractor. It was not so much a change then as a breach and that breach was made by the contractor of the very contract for the faithful performance of which by him the surety company had agreed to become liable. This finding (No. 53) is attacked as being too general and not specific enough to respond to the pleading of appellant. We quote it for this reason, and also because of the facts which it sets forth:

"That during the progress of said work in the construction of said building it became necessary to add certain extra work not included in the original plans and specifications; or to omit certain work therefrom; that when said extras or omissions were desired the plaintiff, H. D. Bowman, instructed the contractor, Newcomb, to submit estimates for the price of said extras, or reductions for omissions, some of said instructions being in writing and some of said instructions being oral; that in certain cases said

contractor, Newcomb, submitted prices for proposed extras or deductions before said extra work was commenced or omissions made, and in other instances the extra work was done by said contractor, Newcomb, or omissions made before he had submitted the price therefor to the plaintiff, H. D. Bowman; that the failure of said H. D. Bowman and Earl B. Newcomb to agree upon the price of all or any of said extras or the method of determining the price of all or any of said extras before the said extra work was done or the allowance for omissions, was not caused through any fault or neglect of the plaintiff H. D. Bowman; that the said H. D. Bowman was at all times ready and willing to take up with the defendant Earl B. Newcomb the price of said extras or omissions, but that said Earl B. Newcomb failed and neglected to submit prices or agree upon the manner of determining the price therefor with said H. D. Bowman, but proceeded to complete said extra work or omit work in a number of cases prior to the price therefor or the method of determining the price therefor being fully agreed upon; that said H. D. Bowman and Earl B. Newcomb did not at any time enter into any contract, written or oral, modifying the written contract of March 1, 1922, or waive any provisions thereof, and that any departure from the method provided in said contract, plans, and specifications for the doing of extra work, or omitting work called for by said contract, plans, and specifications, was not caused by the fault or neglect of said H. D. Bowman, and said departures were not material and did not prejudice or affect the liability of the Maryland Casualty Company as surety or hinder or delay in any manner the construction or completion of said building."

This finding correctly sets forth the material ultimate facts in respect to the subject-matter treated, having regard for the fact that the issue was presented for the purpose of showing alleged changes of the contract by the owner of a nature to discharge and release the surety. True, the court might have specified which extras and which deductions were made orally and which in writing, but it is immaterial which ones were and which were not in writing, because the judgment is properly the same as to each class.

The amount in value of all the extras and deductions, added together, whether made pursuant to writing or not, is not great in proportion to the price of the entire contract. Considering the extras, \$5,441.66, allowed by the court and claimed by the appellant in its pleading, whether in writing or not, as offsetting in part the total amount of deductions, \$15,285.40, the net amount of change in contract price would be less than \$10,000 or only about three per cent. of the contract price. Of the total amount of deductions allowed, the appellant and contractor conceded a large proportion to be proper deductions to be made.

[4] It is claimed that it was error to deduct from the balance of the contract price remaining in the hands of the owner the amount of the several items of damages allowed. It is claimed that the balance of the

contract price should be used first for the discharge of liens. *Roberts v. Spires*, 195 Cal. 267, 232 P. 708, 37 A. L. R. 763, is cited as authority for this contention. In that case it was held to be unfair to lien claimants to thus reduce the contract price without any notice given to them in the contract as recorded because the contract price balance was a fund for the protection of lien claimants. It was there said, however, that—

"The owner might well have protected herself against the failure of the contractor to complete the work on time by the insertion of the requisite stipulations in the contract."

Here the contract (article 6) specifically authorized the owner to retain sufficient of any moneys due the contractor remaining in the owner's hands to pay damages caused by the contractor's failure to complete the entire work on time. This disposes of the contention in so far as the item of damage for delay is concerned.

Now, as to the other items of damage. Article 20 of the specifications reads as follows:

"Deductions for Uncorrected Work.—If the superintendent deems it inexpedient to correct work injured or not done in accordance with the contract, the difference in value, together with a fair allowance for damage, may be deducted."

This provision is an express warrant for deducting from the balance of the contract price damages for uncorrected defective work.

[5, 6] These contract provisions may not embrace all of the four items of damage deducted, but there are further reasons why appellant is not injured by this method: First, this is a matter for the lien claimants to object to, but they are not objecting. They are evidently content with their liens upon the owner's real property and personal judgments against the contractor and surety. Second, it does not injure the appellant, because, had the court followed the method contended for by appellant and first deducted mechanics' liens and only applied the balance of the contract price to the owner's damages, a money judgment would result in favor of the contractor against the surety company in exactly the same amount as the lien claimants' liens and judgments against the surety company would be thereby reduced. In other words, if the contract balance of his contract and as a condition precedent which he must perform before payment lien feature of the bond would be reduced to that extent; but, on the other hand, if the owner was not thus permitted to offset his damage against the contract balance in his hands, but was required to turn that balance over to the lien claimants, he would recover a judgment against the surety for such damage upon the faithful performance feature of the bond. Inasmuch as we have held that

the surety is not released from liability upon the faithful performance features of the bond, we need only inquire whether a money judgment in favor of the owner for damages would be more welcome or less onerous to appellant than a judgment in the like amount in favor of lien claimants. Appellant has suggested no reason, and we can think of none, indicating any difference between the two. On the contrary, the judgment as given is more in keeping with the spirit of the contract and bond. The contract expressly required the contractor to pay and discharge all liens and supply proof of that fact as a condition precedent for each progress payment and the final payment; the bond, of course, was by its terms and by the provisions of the Code of Civil Procedure, § 1183, expressly and directly answerable to the lien claimants.

[7] What we have just said is applicable to a contention of appellant that the owner and not the contractor should have been charged with the interest allowed lien claimants upon their liens. It was the duty of the contractor to pay the liens as a part of the performance of his contract and as a condition precedent which he must perform before payment of the contract price became due to him. *Holmes v. Richet*, 56 Cal. 307. If the contractor wished to avoid paying interest to lien claimants, he should pay them as he had agreed to do in the contract. In this case, had the contractor paid lien claimants, he would have recovered a judgment against the owner for so much of the unpaid contract price as was by the court awarded to the lien claimants. Such judgment could have carried interest. It has been held that the owner is not obliged to pay liens out of the contract balance in order to save the contractor the expenses of a lien foreclosure suit. *Covell v. Washburn*, 91 Cal. 560, 27 P. 859, *Clancy v. Plover*, 107 Cal. 272, 275, 40 P. 394. The same rule applies to interest.

[8] The \$6,000 item of damage is objected to by appellant. This item represents the amount of damages allowed to the owner on account of the failure of the contractor to wire-brush the concrete surface on the front of the building as provided for by the specifications. This operation was intended to remove part of the cement from the surface and leave pebbles and stones protruding, thus producing a special surface finish. This item is objected to upon the grounds: First, that the brushing out was rendered impossible by the action of the building inspector in preventing the removal of the concrete forms before the expiration of five days; second, that the owner consented to a change of this part of the contract or at least waived performance of this provision; third, that the evidence is insufficient to support this amount of damages. All of the objections to this item go to the weight and sufficiency of

the evidence. The record shows that there is substantial evidence to support this finding in face of each objection. The owner testified that the value of the building when completed without this work was \$15,000 less than if it had been completed according to specifications. There was also evidence that the brushing of the surface to the effect desired could be accomplished, even though the forms were not permitted to be removed by the building inspector until after five days. The contract was entered into with the city building ordinances in view. The contractor expressly agreed to observe them while prosecuting the work. While there was some evidence that the owner, upon first learning of the action of the building inspector, directed the contractor to experiment with other means of finishing the front of the building, he subsequently changed his attitude upon learning additional facts. The evidence on this point is also sufficient to support the court's finding or implied finding. After making this deduction, the court, on the one hand, refused to allow the contractor an extra of some \$1,200 for attempting to "bush hammer" the front of the building, an attempted substitute for brushing out; and, on the other hand, refused the owner a further deduction of some \$1,100 for finish coating the concrete exterior surface, also a substitute for brushing out.

[9] An item of \$6,041.20, allowed by the court as one of the deductions from the contract price and forming a part of the total deductions of \$15,285.40, is also objected to by appellant. This item differs from other items of deduction only in being larger in amount. The owner, as permitted by the provisions of the contract, directed the contractor to omit the performance of that part of the contract providing for glass and metal work on the front of the building. The owner thereupon let this part of the work to another contract or for the price of \$5,900. The owner claims in his complaint that for the omission of this work he was entitled to deduct \$9,150, because that was the preliminary estimate of the cost of this work by the contractor. On the other hand, the contractor claimed that the owner was entitled to a deduction of only \$5,900, because that was the amount the contractor paid a third party to do the work. The amount allowed by the court for this deduction was \$6,041.20. The small difference between this sum and the \$5,900 is not explained in the briefs, but the amount of the allowance is not attacked.

Appellant's briefs are vague in presenting its objections to this \$6,041.20 deduction item. Appellant states that the owner was guilty of bad faith in claiming \$9,150 for a deduction when he relet this work to another contractor for \$5,900. The owner's testimony that his claim was the same in amount as the contractor's preliminary estimate of the

cost of this work seems a sufficient answer to this charge, but it is by no means an uncommon thing for a litigant to claim too much. In this action both owner and contractor did so. A column of the deductions claimed and extras conceded by the owner, compared with a second column of the extras claimed and deductions conceded by the contractor, and the two columns compared with a third one of the extras and deductions allowed by the judgment show that the trial court was of the opinion that both parties had claimed too much and conceded too little, as its decision on nearly all items lay in the mean between the two extremes of the claims and concession of the two parties.

It is also stated that the deduction of this \$6,041.20 from the contract price constituted such a change in the contract as to release the surety. The point is without merit, in view of the express provisions of the contract permitting this very thing to be done. The appellant can hardly claim that this deduction is not a proper one in principle, because it was conceded at the trial and in the pleadings that \$5,900 was a proper deduction to be made for this item.

[10, 11] Error is claimed in the court's refusal to allow the contractor an extra for certain labor and material for which recovery was permitted to certain lien claimants. This argument is based upon the assumption that, if certain work and material made a valid lien, it should for that reason alone form the basis for an extra for the contractor. Obviously this is not true. Whether or not the contractor is entitled to an extra depends upon whether or not the work and material claimed as an extra is included in the contract price and specifications. For aught that is said in appellant's brief, the liens referred to might very well be for labor and material which the contractor was obliged to supply under the general and special terms of his contract and for the contract price. Appellant does not discuss the subject-matter of these liens in a way to compare it with the extras refused the contractor so as to indicate whether the subject-matter of these liens was of the nature of extra work and material not provided for in the specifications and within the contract price.

Three other points raised by appellant deserve passing notice. The record shows no lack of evidence to support the court's finding that the owner and contractor had not entered into a partnership agreement supplanting the building contract.

[12] The court allowed the appellant surety company \$2,500 attorney's fees as against the contractor. The only point stated with respect to this item is that "there is no evidence to support the finding that the surety company is only entitled to \$2,500 attorney's fees." It is well settled that the court may fix the amount of attorney's fees with or

without expert testimony as to the value of such services. *Freese v. Pennie*, 110 Cal. 467, 42 P. 978; *Estate of Dorland*, 63 Cal. 281; *Spencer v. Collins*, 156 Cal. 298, 307, 104 P. 320, 20 Ann. Cas. 49. The court was not bound to award all the attorney's fees asked for by the attorney merely because he was the only one who testified upon the subject.

[13] The court allowed \$4,000 damages for failure of the contractor to properly execute that portion of the contract which required tamping and settling of the earth of the ground floor before laying the cement floor thereon. This work admittedly was not done exactly as required by the specifications, and there was testimony to the effect that the breaking of this cement floor was caused by the failure of the contractor to comply with the specifications in this regard.

[14, 15] Finally, the appellant claims the court erred in allowing damages for the contractor's delay in completing the building upon the basis of actual damages instead of upon the basis of liquidated damages as provided for in the contract. Plaintiff's amended complaint pleaded that the contractor had agreed to pay \$100 per day for delay in completing the building and in this connection set forth the part of the contract providing for liquidated damages and then added an additional allegation to the effect that plaintiff had been actually damaged equal to or in excess of the amount of the liquidated damages provided, "but that the extent of such damage is incapable of being approximated or estimated." The complaint also alleged that the building, instead of being completed on the 31st of July, 1922, was not completed until the 4th of December, 1922, which was alleged to be a delay of 126 days. In the appellant's answer the contract provisions were admitted. The answer denied the amount of the delay, and denied that the extent of damage was incapable of being approximated or estimated. The court found that the parties had agreed as set forth in the written contract. The court did not make an express finding upon the statement in the complaint, "but that the extent of said damage is incapable of being approximated or estimated." The evidence showed that the owner had entered into a lease in 1921 by which the tenant should take possession on the 1st of August, 1922, but, owing to the delay in completing the building, the tenant did not take possession until the 4th of October, 1922, with the exception of a small portion of the basement, for which a small amount of rent was paid. The actual amount of rent lost to the owner by the delay was the amount which the court allowed the owner as delay damage. The court also found that the building was not completed until January 15, 1923, notwithstanding that the owner filed a notice of completion on Decem-

ber 4, and also in spite of the evidence that the tenant paid rent under his lease from the 4th of October, 1922. This finding is not attacked by appellant.

[16, 17] Plaintiff and respondent, who came into court upon a complaint apparently declaring for liquidated damages now defends the judgment for delay which is based upon actual damages. On the other hand, the appellant, which denied plaintiff's allegation that the damages were incapable of being approximated or estimated, is now claiming that the court erred in applying the rule of actual damages instead of liquidated damages. Appellant claims that the finding of the court, that an exhibit annexed to the findings is a true and correct copy of the contract between the parties, amounts to a finding that the agreement for liquidated damages therein is valid. The finding simply finds that the copy of the contract annexed was a true and correct copy, and does not find to be true all the statements in the contract (including the statement therein "that the said damages of \$100 per day are liquidated because it is impossible to approximate or estimate the damage * * *"). But even granting appellant's claim that the court did find the liquidated damage provision of the contract to be valid, the judgment for damage for delay would be thereby increased against appellant instead of diminished. If the court erred in assessing actual instead of liquidated damages, the error was injurious to respondent and not to appellant. Considering the building as having been completed on December 4, 1922 (instead of later, on January 15, 1923, as found by the court), a delay of 126 days occurred. At \$100 per day this amounts to \$12,600. This amount is in excess of the amount of actual damage allowed for delay by the court (\$12,041.25). It seems to be the position of appellant that the rule of liquidated damages should be applied up until the day, but not further than the day, the tenant began to pay rent. This, of course, cannot be done. Whatever uncertainty there may be in this record on this point, one thing at least is certain, and that is that either the one or the other rule must be applied to the exclusion of the other straight through to the completion of the building. Appellant, who insists upon the liquidated damage provision, must necessarily pay \$100 per day until the day of completion of the building, regardless of the fact that the tenant paid rent during a portion of that time. The fact that the tenant paid rent before the building was completed was a fortuitous occurrence. It must be regarded as a piece of good fortune for the owner, but it did not have the effect of suspending the liquidated damage clause of the contract. That clause was either entirely valid or void at the time the contract was made and remained either valid or void at all times thereafter. Hanlon

Drydock, etc., Co. v. McNear, 70 Cal. App. 204, 232 P. 1002. Once granting a covenant for liquidated damages to be valid, it is equally valid whether actual damages subsequently ascertained be either less or more than the amount agreed upon.

The amount of damage for delay allowed by the court being equal to the actual damage and less than the liquidated damages, appellant has no substantial grievance to urge in respect to this item of the judgment.

The judgment is affirmed.

We concur: NOURSE, J.; STURTEVANT, J.

88 Cal. App. 385

LOS ANGELES COUNTY v. SCHAFFNER
et al. (Civ. 5008.)

District Court of Appeal, Second District, Division 1, California. Jan. 18, 1928.

1. Appeal and error ⇐907 (3)—Appellate court on appeal submitted on judgment roll alone was required to accept finding of trial court.

On appeal from judgment for plaintiff in action on bail bond submitted on judgment roll alone, court was required to assume that finding of absence of defendant and counsel at time of arraignment under Pen. Code, § 977, was supported by evidence.

2. Bail ⇐75—Presence of defendant's counsel at arraignment held no defense, in action on bail bond, where no appearance was made at date to which arraignment was postponed.

Where defendant failed to appear, either in person or by counsel, at date to which hearing on arraignment was postponed, it was no defense to sureties on bail bond that defendant's counsel may have been present and ready for arraignment when case was originally called.

Appeal from Superior Court, Los Angeles County; Ralph H. Clock, Judge.

Action by the County of Los Angeles against Fannie Schaffner and another. From a judgment for plaintiff, defendants appeal. Judgment and order denying new trial affirmed.

Stanley Visel, of Los Angeles, for appellants.

Edward T. Bishop, Co. Counsel, Arthur T. George, Mortimer A. Kline, and W. Sumner Holbrook, Deputies Co. Counsel, all of Los Angeles, for respondent.

HAHN, Justice pro tem. This is an appeal from a judgment in favor of the plaintiff rendered in an action to recover on a bail bond. The case comes up on the judgment roll alone.

It appears from the complaint that one Dan Dubreville was arraigned on a charge of violation of the Wright Act (St. 1921, p. 79). He waived preliminary examination and was bound over for trial to the superior court, at

which time the committing magistrate fixed his bond at \$1,000. The defendants qualified as sureties on this bond, and Dubreville was released from custody pending trial. The bail bond in this action is in the usual form, the sureties undertaking that Dubreville would hold himself amenable to the orders and process of the court, etc.

It further appears from the complaint that after his release the district attorney of Los Angeles county on October 5, 1923, filed in the superior court an information charging him with the offense for which he was bound over. The complaint further alleges that on October 8, 1923, the case of People of the State of California, Plaintiff, v. Dan Dubreville, Defendant, being No. 20877, was duly and regularly called in department 12 of the superior court for the arraignment of the defendant, and that at the said time and place the defendant did not appear and was not present; that the court duly and regularly continued said cause for arraignment until the 15th day of October, 1923, and that on said date the case was again called for arraignment, and that at the said time and place the said defendant did not appear and was not present to answer said charge pending against him and did not render himself amenable to the orders and process of said court; that thereupon the court ordered the bail of said defendant forfeited, and that such order was duly entered in the minutes, and that such order of forfeiture has not been set aside.

The amended answer filed by the defendants admits the execution of the bond, but denies that Dubreville did not render himself amenable to the order and process of the court. The amended answer contains the further allegation that on the occasions when the case in question was called for arraignment, namely, on October 8, 1923, and October 15, 1923, the defendant Dubreville was "present by counsel, ready and willing to proceed with such arraignment, and present to answer said charge, * * * and to abide the order and process of the court." The judgment was in favor of the plaintiff as prayed for.

Two grounds are urged by appellants for reversal of the judgment: First, that the charge in the information against Dubreville was a misdemeanor, and under section 977 of the Penal Code Dubreville was not required to be in court personally for the arraignment, but he had the right to appear for arraignment by counsel, and that he did so appear by counsel. Hence the court had no legal right to forfeit the bond; second, that the findings in the case do not cover all of the material issues raised by the pleadings.

[1] The first point may be readily disposed of by pointing out that in the findings by the court appears the following finding of fact:

"That on the 15th day of October, 1923, the said case of the People of the State of Cali-

fornia, Plaintiff, v. Dan Dubreville, Defendant,' No. 20877, was duly and regularly called in department 12 of said superior court, and at said time and place the said Dan Dubreville did not appear and was not present in person or by counsel to answer said charge pending against him as hereinabove set forth, and did not render himself amenable to the order and process of said court."

We must assume, inasmuch as the case is here on the judgment roll, that there was abundant evidence to support this finding.

[2] As to the second point, that the court failed to find on material affirmative issues in the amended answer, appellants urge that the court failed to find on his allegation that he was present in court by his counsel on October 8th, the first time the case was called for arraignment.

While it is true the findings are silent on the question of whether or not counsel for Dubreville was present and ready for the arraignment of his client on October 8th when the case was called, it becomes wholly immaterial for the reason that it clearly appears from the findings that there was no such appearance for him on October 13, 1923, at which time the bail was forfeited for nonappearance.

There is no merit in the appeal, and the judgment and order of the court denying the motion for a new trial are affirmed. It appearing to the court that this appeal, being devoid of any merit, was taken for the purposes of delay, it is further ordered that the appellants pay to respondent as damages the sum of \$100, which amount shall be included in the costs to be allowed respondent on this appeal.

We concur: HOUSER, Acting P. J.; YORK, J.

88 Cal. App. 383

LOS ANGELES COUNTY v. GRANNIS et al.
(Civ. 5009.)

District Court of Appeal, Second District, Division 1, California. Jan. 18, 1928.

1. Bail $\S$ 74(2)—Justice's continuance of preliminary examination in felony case on account of defendant's absence held authorized, permitting recovery against sureties on forfeited bail bond.

Where defendant did not appear at hearing of preliminary examination in felony case, justice had authority to continue hearing and to declare forfeiture of bond on failure of defendant to appear at continued hearing, and continuance was therefore no defense to sureties sued on forfeited bail bond.

2. Appeal and error $\S$ 731(2)—Where particular omitted issues were not pointed out, court was not required to review alleged failure to make findings.

Alleged failure of court to make specific findings as to denials in answer and affirmative

matter set up therein was not required to be reviewed, where particular issues on which court failed to find were not pointed out.

Appeal from Superior Court, Los Angeles County; Ralph H. Clock, Judge.

Action by the County of Los Angeles against E. W. Grannis and another. From the judgment for plaintiff defendants appeal. Judgment and order denying new trial affirmed.

Stanley Visel, of Los Angeles, for appellants.

Edward T. Bishop, Co. Counsel, Arthur T. George, Mortimer A. Kline, and W. Sumner Holbrook, Deputies Co. Counsel, all of Los Angeles, for respondent.

HAHN, Justice pro tem. This is an appeal from a judgment entered in favor of the plaintiff and against the defendants in an action on a bail bond. The case comes here upon the judgment roll alone.

It appears from the complaint that on August 20, 1923, the defendant H. S. Leonard, who was charged with the offense of forgery and in custody, appeared in the justice court of Los Angeles township for arraignment for the purpose of preliminary examination. At said time and place, the preliminary examination was set for August 29, 1923. On August 21, 1923, the justice of the peace before whom the arraignment was to take place fixed a bond for the defendant in the sum of \$2,000, and that both of the defendants in this action executed said bond and qualified thereon as sureties. Upon the filing of the bond the defendant Leonard was released from custody. On August 29, 1923, the date upon which the preliminary examination was to take place, the court duly and regularly continued the hearing of the preliminary examination to September 4, 1923, at which time and place the preliminary examination was again "duly and regularly continued" until September 5, 1923. On September 5, 1923, when the case was called for preliminary examination, the said defendant did not appear and was not present to answer the charge pending against him and he did not render himself amenable to the orders and process of the court; that thereupon the court declared the bail forfeited and entered such order in the minutes of the court.

The answer does not deny the execution of the bond by the defendants, but does deny all of the other allegations of the complaint and in addition set forth, under what is designated as a separate and distinct defense, allegations that on August 29th, the defendant Leonard was in court, but that on September 4, 1923, to which date the preliminary examination was continued, the defendant Leonard was not personally present in

court, but that notwithstanding his absence the court continued the hearing until 2 o'clock of the afternoon of that date, at which time the defendant again was absent, and the court continued the hearing until September 5th, at 2 o'clock p. m.; that on September 5th, the defendant still not appearing, the bail was forfeited. The answer furthermore alleges that there was a stipulation whereby the forfeiture was stayed for some 30 days, but we do not consider this a matter of importance in the case.

[1] The reasons for the reversal urged by appellants are based upon two grounds: First, that the justice court did not have the right or power to continue the hearing of the preliminary examination in a felony case without the presence of the defendant; and, second, that the trial court failed to find specifically upon certain material allegations set up in the defendant's answer.

We find no merit in either of the points urged. There is no allegation in the answer that any one of the continuances was made without the consent of the defendant or his counsel, nor is there anything in the findings to support such a conclusion. The findings in fact specifically declare that the postponement was duly and regularly made. Furthermore, it appears from the answer filed by the defendants, that on September 4th, when the case of *People v. Leonard* was called for preliminary examination in the justice court, the defendant was not present either in person or by counsel, and the continuance was had until the following day, presumably to give the defendant an opportunity to appear. The defendant Leonard failing to appear on September 5th, there was no error committed by the court in declaring a forfeiture of the bond. *People v. Boren*, 139 Cal. 210, 72 P. 899.

Appellant has cited no authority to support his contention that, under circumstances similar to those as they appear in the record in the instant case, it has been held that the court has lost jurisdiction of the case of the defendant.

[2] As to appellants' contention that the court failed to make specific findings as to the denials in the answer and the affirmative matter set up in the answer, counsel for appellants do not point out any particular issue upon which the court has failed to find. Under the circumstances, we feel the matter does not merit any extended discussion in this opinion.

The judgment and order denying a motion for new trial are affirmed. It appearing to the court that this appeal, being devoid of any merit, was taken for the purposes of delay, it is further ordered that the appellants pay to respondent as damages the sum of \$100, which amount shall be included in the

costs to be allowed respondent on this appeal.

We concur: HOUSER, Acting P. J.; YORK, J.

88 Cal. App. 391

LOS ANGELES COUNTY v. GRANNIS et al.
(Civ. 5010.)

District Court of Appeal, Second District, Division 1, California. Jan. 18, 1928.

1. Bail ⚡61—Bail bond held not void as to sureties because approved by court commissioner instead of by judge (Code Civ. Proc. § 259).

Bail bond was not rendered void because approved by court commissioner instead of by judge of circuit court, in action against sureties, since Code Civ. Proc. § 259, permits court commissioner to examine sureties and approve bonds.

2. Bail ⚡60, 61—Examination of sureties and approval of bail bond is not part of sureties' contract (Code Civ. Proc. § 259).

Examination of sureties on bail bond and formal approval of bond by judge or court commissioner, under Code Civ. Proc. § 259, is not a part of the contract entered into by the sureties.

3. Bail ⚡74(2)—Sureties held not released from liability on bail bond by continuance without their knowledge or consent.

Continuance of trial of case in which bond was given without knowledge or consent of sureties held not to release them from their obligation on bail bond.

4. Appeal and error ⚡731(2)—Findings attacked as too general held not reviewable, where particular issues not covered were not pointed out.

Alleged insufficiency of findings to sustain judgment because of generality held not reviewable on appeal, where particular issues not covered by findings were not specifically pointed out.

Appeal from Superior Court, Los Angeles County; Ralph H. Clock, Judge.

Action by the County of Los Angeles against E. W. Grannis and another. From a judgment for plaintiff, defendants appeal. Judgment and order denying new trial affirmed.

Stanley Visel, of Los Angeles, for appellants.

Edward T. Bishop, Co. Counsel, Arthur T. George, Mortimer A. Kline, and W. Sumner Holbrook, Deputies Co. Counsel, all of Los Angeles, for respondent.

HAHN, Justice pro tem. This is an appeal by defendants in an action against them as sureties on a bail bond and from the order of court refusing a new trial. The case comes here upon the judgment roll alone.

Three points are urged by appellants: First, that the bail bond in question was void because approved by a court commissioner and not by a judge of the superior court; second, that the sureties were relieved from their obligation on the bond in question because the trial of the case in which the bond was given was continued several times without the knowledge or the consent of the sureties; and, third, that the findings are "insufficient because of the generalness to sustain a judgment."

[1, 2] There is no merit in any of the points urged. Section 259, Code of Civil Procedure, specifically provides for the examination of sureties and the approval of bonds by a court commissioner. Moreover, the examination of sureties or formal approval of a bond is not a part of the contract entered into by the sureties. 3 Cal. Jur. 1059; *Carpenter v. Furrey*, 128 Cal. 666, 61 P. 369.

[3] There is no provision in the statute that entitles the sureties on a bond to notice of a continuation of the case. No cases are cited by appellant in support of this contention, and we know of no statute or rule of court procedure that sustains this point.

[4] As to the third point, inasmuch as appellants do not specifically point out the issue which the findings do not cover, this court will not give consideration to the point.

The judgment and order denying a new trial are affirmed. It appearing to the court that this appeal, being devoid of any merit, was taken for the purposes of delay, it is further ordered that the appellants pay to respondent as damages the sum of \$100, which amount shall be included in the costs to be allowed respondent on this appeal.

We concur: HOUSER, Acting P. J.; YORK, J.

88 Cal. App. 502

PEOPLE v. RUIZ. (Cr. 1445.)

District Court of Appeal, First District, Division 1, California. Jan. 21, 1928.

1. Weapons $\S$ 8—Evidence of carrying concealed bayonet, part of which was filed off, held to support conviction for carrying "dagger" or "dirk."

Evidence that defendant carried concealed bayonet, part of which was filed off, held to support conviction for carrying "dagger" or "dirk," which are synonymous terms, meaning straight knife primarily fitted for stabbing.

[Ed. Note.—For other definitions, see Words and Phrases, Dagger.]

2. Indictment and Information $\S$ 128—First count of information for carrying concealed "dirk" and second count for carrying concealed "dagger" held to describe same offense.

First count of information for carrying concealed "dirk" described same offense as sec-

ond count for carrying concealed "dagger," since such terms are synonymous, and mean straight knife, primarily fitted for stabbing.

3. Criminal law $\S$ 1173(1)—Where first count charged carrying concealed "dirk" and second count carrying concealed "dagger," constituting same offense, refusal to submit instructions under both counts and to supply verdicts for each was not prejudicial.

In prosecution under information charging carrying concealed "dirk" and carrying concealed "dagger," since only one offense was alleged, refusal to submit instructions under both counts, and failing to supply verdicts for each count, was not prejudicial, especially in view of fact that, after defendant was convicted under second count, first count was dismissed.

4. Criminal law $\S$ 829(3)—Refusal of instruction to acquit, if concealed weapon was not "dirk" or "dagger," as alleged, held proper, in view of giving similar instruction.

In prosecution for carrying concealed "dirk" or "dagger," refusal of instruction that, if jury found weapon taken from defendant was one other than dirk or dagger, to acquit, was not error, in view of fact that court in effect gave such instruction.

5. Criminal law $\S$ 829(3)—Refusal to instruct that, if defendant was carrying weapon outside clothing, to acquit, held not error, in view of instruction given.

In prosecution for carrying concealed "dirk" or "dagger," refusal to instruct that, if defendant carried weapon outside his clothing, it was not concealed on his person, and to acquit, was not error, in view of instruction that one of material elements of offense was whether weapon carried by defendant was concealed on his person.

6. Criminal law $\S$ 829(1)—Refusal of instruction is not error, if court's instruction given fully covers point.

In criminal prosecution, refusal of requested instruction is not error, if instruction given fully embraces point involved in court's own language.

7. Weapons $\S$ 17(6)—In prosecution for carrying concealed dirk or dagger, instruction that statute did not use "dagger" in narrow or technical sense held proper.

In prosecution for carrying concealed "dirk" or "dagger," instruction that word "dagger" was not used in statute in narrow or technical sense held proper.

Appeal from Superior Court, Alameda County; Fred V. Wood, Judge.

Louis Ruiz was convicted of carrying a concealed weapon, and he appeals. Affirmed.

Willard W. Shea, Public Defender of Alameda County, of Oakland, for appellant.

U. S. Webb, Atty. Gen., and Emery F. Mitchell, Deputy Atty. Gen., for the People.

TYLER, P. J. [1] Defendant was prosecuted by information for the crime of fel-

ony. It contained two counts. The first charged him with unlawfully carrying upon his person a dirk or dagger, in that at the time and place stated he carried concealed upon his person a dirk. The second count charged that he was carrying concealed upon his person at the same time and place a dagger. It is alleged that the second count is a different statement of the offense described in the first count. It was further alleged that, prior to the commission of the offense, defendant had suffered two prior convictions; one for the crime of forgery, the other for petit larceny. Defendant was convicted upon the second count, and sentenced to the State Prison. A motion for a new trial was made and denied. This appeal is from the order and judgment. As grounds for reversal, it is claimed that the verdict is unsupported by the evidence, and that the court erred in the giving, and refusing to give, certain instructions to the jury. The evidence shows that defendant was placed in custody on the morning of September 2, 1927, by a police officer employed by the Southern Pacific Company as he was carrying a large bundle wrapped in paper. The bundle contained copper wire, which defendant claimed was taken from the dumps at Niles, but which the prosecution contended was obtained from the railroad yards. On the way to police headquarters defendant stopped and removed the bundle of wire from his shoulder, at which time the weapon in question, inclosed in a metal sheath, was found in his possession. Defendant testified that it was wrapped in the bundle with the wire; the arresting officer testifying that it was drawn from underneath defendant's trousers. It appeared in evidence that the weapon in question was a bayonet with part of it filed off, which could be worn on the body; that it resembled a British bayonet; that there was no such thing as a British dirk; that the weapon resembled a dagger in every particular, except that a dagger is more pointed, and not quite so heavy. Under the first point raised, namely, that the verdict is unsupported by the evidence, it is claimed that it was not shown just what the real character of the weapon was. The objection is without merit. As above indicated, there was evidence to show that it resembled a dagger.

[2, 3] The information charged under the first count that defendant was unlawfully carrying a dirk and in the second the weapon was described as a dagger. It was one and the same offense. A dagger has been defined as any straight knife to be worn on

the person which is capable of inflicting death, except what is commonly known as a "pocket knife." "Dirk" and "dagger," are used synonymously and consist of any straight stabbing weapon, as a dirk, stiletto, etc. Century Dictionary. They may consist of any weapon fitted primarily for stabbing. The word dagger is a generic term covering the dirk, stiletto, poniard, etc. Standard Dictionary. Each of the names given to the weapon properly described it. The weapon itself was in evidence, and the jury was in a position to judge its character. Appellant complains that the trial court erred in failing to submit instructions under both counts, and that it likewise erred in failing to supply verdicts for each count. What we have already said disposes of this objection. Moreover, after the jury rendered the verdict finding the defendant guilty as charged in count 2, the first count was dismissed. Defendant therefore suffered no prejudice.

[4-7] Error is claimed for failure on the part of the trial court to give an instruction to the effect that, if the jury found that the weapon taken from the defendant by the arresting officer was one other than a dirk, or dagger, it was their duty to acquit. The court did in effect give this very instruction. Further error is claimed in the refusal of the court to instruct the jury that, if it found that defendant was at the time of his arrest carrying the weapon taken from him outside his clothing, it was not "concealed upon his person" and it was its duty to acquit. The court instructed the jury that one of the material elements of the crime charged was whether the weapon carried by the defendant at the time mentioned was concealed upon his person. The duty of a court in this respect is fully discharged, if the instruction given fully embraces the point involved in the court's own language. The practice of repeating instructions in a different way and thus loading the case with innumerable forms of instructions upon a particular subject is not to be commended. The instruction as given was full and fair, and covered the subject. And, finally, it is urged that the trial court erred in defining the word "dagger." The court instructed the jury that the word was not used in the statute in a narrow or technical sense. The instruction was a proper one. As above stated, the term is generic. There is no merit in the appeal.

The order and judgment are affirmed.

We concur: CASHIN, J.; PARKER, Justice pro tem.

88 Cal. App. 469

SMELSER v. DEUTSCHE EVANGELISCHE LUTHERISCHE GEMEINDE DER ST. MARKUS KIRCHE. (Civ. 6035.)

District Court of Appeal, First District, Division 1, California. Jan. 20, 1928.

1. Landlord and tenant ⇨164(1)—In absence of fraud, concealment, or covenant, landlord is not liable for injuries to tenant from defective premises (Civ. Code, § 1941).

In absence of fraud, concealment, or covenant in lease, landlord is not liable to tenant for injury due to defective condition or faulty construction of demised premises, this rule not having been changed by Civ. Code, § 1941.

2. Pleading ⇨34(4)—In construing pleading before judgment, pleader is presumed to have stated case in manner most favorable to himself.

In construing pleadings before judgment, it must be presumed that pleader stated his case in most favorable manner to himself.

3. Landlord and tenant ⇨169(3)—Complaint in action by roomer against landlord for injuries from defective ladder held not to show that provisions of State Housing Act were applicable (St. 1923, p. 813, § 48).

Complaint in action by roomer and boarder against landlord for injuries from alleged defective ladder, alleging that ladder was built in court or light well and was accessible to tenants of top story, held to fail to show that such ladder came within provisions of State Housing Act (St. 1923, p. 813, § 48), relating to ladders leading to penthouse or scuttle and accessible to all tenants of building.

4. Landlord and tenant ⇨124(1)—In absence of agreement or license, tenants have no easement over roof as appurtenant to tenancy other than for purpose of shelter.

The primary purpose of a roof of a building is to shelter it and its occupants, and other than for purpose of shelter tenants are given no easement thereover as appurtenant to their tenancies, unless their rights are extended by agreement with or license from owner.

5. Landlord and tenant ⇨164(1)—Roomer and boarder voluntarily climbing ladder to roof to gratify his curiosity held not entitled to recover against owner for injuries from defect in ladder.

A roomer and boarder, who voluntarily climbed ladder extending to roof for purpose of gratifying his curiosity in ascertaining who was on roof, is not entitled to recover against owner for injuries from defect in ladder; any license to use such ladder, under State Housing Act (St. 1923, p. 813, § 48), arising only in case of an emergency such as imminent peril from fire.

6. Negligence ⇨2—To maintain action for negligence, existence of obligation left unfulfilled must be shown.

To maintain an action for personal injuries caused by negligence or want of due care, there must be shown to exist some obligation or duty toward plaintiff which has been left undischarged or unfulfilled.

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Action by Charles E. Smelser, by George F. Snyder, his guardian ad litem, against the Deutsche Evangelische Lutherische Gemeinde Der St. Markus Kirche. Judgment for defendant, and plaintiff appeals. Affirmed.

George F. Snyder, of San Francisco, for appellant.

Henry Eickhoff, of San Francisco, for respondent.

KNIGHT, J. This is an action to recover damages for personal injuries alleged to have been caused by the defendant's negligence. An order was made sustaining defendant's demurrer to the amended complaint without leave to amend, and from the judgment entered thereon plaintiff appeals. The single question presented is whether the amended complaint states facts sufficient to constitute a cause of action.

The allegations of said complaint are to the following effect: Defendant owned a three-story frame apartment house in San Francisco which contained one apartment on each story. The building was designed, built, and occupied as a home or residence for three families living independently of each other, and was provided with a stationary wooden ladder, constructed in a court or light well extending from a point near a window in the top apartment to the roof. The ladder, as the complaint alleges, "was accessible to the occupants or tenants of the third or top story and top apartment of said apartment house," and "was the only means of access to said roof." One Sophie Strasser was the lessee of the top floor, and plaintiff occupied one of her rooms as her boarder or tenant. The complaint further alleges that on the day plaintiff was injured he "heard certain sounds or noises coming from the roof of said building indicating that persons were on the roof, * * * and that when after said sounds or noises had continued for a considerable length of time plaintiff climbed to the roof of said building by means of said ladder and ascertained that said sounds or noises were being made by certain boys not living in said building who were erecting radio aerials on said building;" that thereupon he started to descend from the roof by means of the ladder when the rung he was grasping loosened and gave way, precipitating him to the pavement at the bottom of said court or light well, a distance of approximately 60 feet, as a result of which fall he was severely injured. Allegations follow showing the extent of the injuries and the damage sustained by plaintiff by reason of them. The negligent act charged against defendant was that said ladder had been attached to the building for

many years, and that "the nails holding the rungs * * * had become and were rusted and rotten with age, and that the defendant negligently failed to keep said ladder in repair."

[1] Plaintiff contends that defendant's liability attaches under the rule that, where a portion of demised premises is reserved for the common use of the owner and tenants, or of different tenants, the owner is charged with the implied duty to use reasonable care to keep the reserved portions in a reasonably safe condition, and that for a failure to perform such duty he is liable for any injuries sustained by persons rightfully using the same. 36 Corp. Jur. 213. There is no disputing the existence of the foregoing rule, but in the present case it is nowhere alleged, either expressly or by implication, that at the time plaintiff was injured the defective premises were under reservation for common use of the owner and tenants, or of different tenants, the allegations being merely that said ladder extended from a point near a window in the top story to the roof, and "was accessible to the occupants or tenants of the third or top story and top apartment of said apartment house." If, therefore, the foregoing allegations be construed to mean that said ladder was a part of or appurtenant to the third or top story of the building, and as such was included in the premises leased to Sophie Strasser, defendant, as owner, was not liable, the rule in such cases being that in the absence of fraud, concealment, or covenant in the lease the landlord is not liable to a tenant for the injury due to the defective condition or faulty construction of the demised premises. This is the rule at common law, and it has not been changed by section 1941 of the Civil Code. *De Motte v. Arkell*, 77 Cal. App. 610, 247 P. 254; *Daley v. Quick*, 99 Cal. 179, 33 P. 859; 15 Cal. Jur. 704.

[2, 3] But in furtherance of his theory that the ladder in question was subject to the common use of all the tenants in the building, plaintiff claims that certain provisions of the State Housing Act (Stats. 1923, p. 813) should be imported into the transaction and considered a part thereof. Those provisions read:

"Every now existing apartment house or hotel of more than two stories in height, that is not provided with a stairway to the roof as hereinbefore prescribed shall have in the roof a penthouse or a scuttle, * * * located in the ceiling of a public hallway, and there shall be provided a stairway or a stationary ladder, leading from the top floor of such apartment house or hotel to the roof thereof. Such stairway or stationary ladder shall be made readily accessible to all the tenants of the building. No scuttle or penthouse door shall at any time be locked with a key, but may be fastened on the inside by a movable bolt or lock." Section 48.

The complaint utterly fails to show, however, even inferentially, that said ladder, ei-

ther with respect to its location or type of construction, was built with the intention that it should or that in fact it did conform to the requirements of said State Housing Act, there being no allegations whatever to show that, as the statute requires, it led to "a penthouse or a scuttle, * * * located in the ceiling of a public hallway," or was "readily accessible to all the tenants of the building." On the contrary, as pointed out, it affirmatively appears from the facts alleged that the ladder was built in a court or light well and was "accessible to the occupants or tenants of the third or top story. * * *" In construing pleadings before judgment, it must be presumed that the pleader stated his case in the most favorable manner to himself (*Burrowes v. Bosworth*, 68 Cal. App. 117, 228 P. 667; *Smith v. Buttner*, 90 Cal. 95, 27 P. 29), and consequently, if said ladder had been in fact accessible to or reserved for the common use of all tenants in the building, it is fair to assume that plaintiff would have so alleged. It may be that defendant has failed to provide a common stairway or ladder in compliance with the terms of the State Housing Act, but that is a question with which we are not here concerned for the reason that plaintiff does not claim that the accident was proximately caused by such failure or neglect.

[4, 5] Furthermore, and in any event, the mandatory requirements of section 48 of the State Housing Act were obviously enacted pursuant to the state's police power as a regulation for protection in cases of emergency of the human beings residing in apartment houses, hotels, and group buildings, to provide them with safe means of access to the roof in cases of imminent peril such as fire or other disaster, and do not have the legal effect plaintiff claims of conferring upon all the tenants in the building an additional unrestricted right to go upon the roof and to use the same for any and all purposes. The primary purpose of the roof of a building is to shelter it and all of its occupants, and consequently, other than for purposes of shelter the tenants are given no easement thereover as appurtenant to their tenancies, unless their rights be extended by agreement with or license from the owner. *O. J. Gude Co. v. Farley*, 28 Misc. Rep. 184, 58 N. Y. S. 1036; *Leuch v. Dessert*, 137 Wash. 293, 242 P. 14; *Keesey v. O'Reilly*, 181 App. Div. 665, 168 N. Y. S. 844.

The complaint before us does not show that either plaintiff, who was merely "a tenant of a room and a boarder on the third or top floor," or any of the other tenants acquired from defendant any right, either in common or otherwise, to use the roof, and consequently they had no right, leave, or license to use the same or the ladder leading thereto except as the act contemplates in cases of perilous exigency. That such exigency did not arise is manifest from the allegations of the com-

plaint, for it would appear therefrom that, without being requested or importuned by his landlady or any other tenant of the building so to do, plaintiff climbed out of the window of the third floor into the court or light well and ascended the ladder to the roof in order to investigate certain noises which were not alleged to be alarming, but which indicated merely, as the complaint avers, "that persons were on the roof." Clearly, the limited right conferred upon plaintiff by the State Housing Act to use the ladder if and when an emergency arose did not carry with it a license to use the same for the purpose of gratifying his curiosity; and, having thus voluntarily exposed himself to danger which resulted in his injury, there is no rule of law authorizing a recovery of damages against the owner. *Kneiser v. Belasco-Blackwood Co.*, 22 Cal. App. 205, 133 P. 989; *Lindholm v. Northwestern Pacific R. Co.* (Cal. App.) 248 P. 1033; *McAlpin v. Powell*, 70 N. Y. 126, 26 Am. Rep. 555.

[6] As said in *Landers v. Brooks et al.* (Mass.) 154 N. E. 266, 49 A. L. R. 562, wherein the injuries suffered by a tenant were caused by an unauthorized use of a fire escape:

"The fire escape was intended for use in case of danger from fire. It was not to be used for other purposes. No duty was imposed on the defendant to keep it in proper repair except in case of fire. It was not designed for entrance or exit to the apartments, and it was not contemplated that it should be kept in a safe condition for all purposes and every kind of service. We decided in *Eisenhauer v. Ceppi*, 238 Mass. 458, 131 N. E. 184, that if the landlord agreed with his tenant to keep the place safe at all times, the promise of safety did not extend to a piazza roof or to every part of the demised premises which could be reached by going through a window; that it was not intended that all parts of the premises were to be kept in a condition

of safety under the agreement, when it was apparent that the piazza was not expected to be used by the tenant in the course of his tenancy."

In other words, under the general rule, in order to maintain an action for damages on account of personal injuries caused by negligence or want of due care, there must be shown to exist some obligation or duty towards the plaintiff which the other has left undischarged or unfulfilled (*Schmidt v. Bauer*, 80 Cal. 565, 22 P. 256, 5 L. R. A. 580), and when, as here, it appears that plaintiff was where he had no right to be or was a mere licensee whose presence at the place where he was injured was brought about through motives affecting his private convenience or curiosity, the owner owes him no legal duty other than not to willfully injure him (*Lindholm v. Northwestern Pac. R. Co.*, supra; *Whitner v. Southern R. Co.*, 101 S. O. 441, 85 S. E. 1064; *McAlpin v. Powell*, supra).

Assuming, therefore, that, contrary to the fact and in the absence of appropriate allegations, the ladder in question might be deemed accessible to all the tenants in said building for the purposes designed by the State Housing Act, and that therefore defendant was charged with responsibility for its safe condition, it affirmatively appears from the complaint that plaintiff's injuries were received while he was using the ladder for purposes not contemplated by said act, and under such circumstances the owner cannot be held liable for damages resulting from such unauthorized use.

For the reasons stated, we are of the opinion that the demurrer was properly sustained without leave to amend, and the judgment is therefore affirmed.

We concur: TYLER, P. J.; CASHIN, J.

88 Cal. App. 415

PEOPLE v. McCLELLAN. (Cr. 1567.)★

District Court of Appeal, Second District, Division 2, California. Jan. 19, 1928.

Hearing Denied by Supreme Court March 19, 1928.

1. Criminal law ☞1087(1/2)—Statutes in force on January 1, 1927, relative to time and manner of making up record on appeal, remain effective until promulgation of rules under subsequent repealing statute (Pen. Code, § 1246, as amended by St. 1927, p. 1047, § 1).

Pen. Code, § 1246, as amended by St. 1927, p. 1047, § 1, providing that, until rules are promulgated by judicial council, time and manner of making up and filing record on appeal in effect January 1, 1927, should govern, operated to render all statutes relating to time and manner of making record on appeal, which were in force at that time, still operative irrespective of repeal, where no rules had been promulgated by judicial council.

2. Criminal law ☞1071—Statute, requiring filing of application with trial court, stating grounds of appeal, held effective, notwithstanding repeal (Pen. Code, § 1247, and § 1246, as amended by St. 1927, p. 1047, § 1).

Pen. Code, § 1247, requiring presentation of application to trial court stating grounds of appeal and designation of portions of reporter's notes which must be transcribed, held effective, notwithstanding repeal (St. 1927, p. 1048), since amendment of section 1246 (St. 1927, p. 1047, § 1), subsequently enacted, continues in force statutes relative to time and manner of making up and filing record on appeal.

3. Criminal law ☞1071—Defendant's failure to present application to trial court stating grounds of appeal held to require dismissal of appeal (Pen. Code, § 1247, and § 1246, as amended by St. 1927, p. 1047, § 1).

Failure of defendant, on appeal to comply with Pen. Code, § 1247, by failure to present application to trial court stating grounds of appeal and points relied on, held to require dismissal of appeal, since statute, though repealed (St. 1927, p. 1048), is still effective as to time and manner of making and filing record on appeal under Pen. Code, § 1246, as amended by St. 1927, p. 1047, § 1.

Appeal from Superior Court, Orange County; H. G. Ames, Judge.

Edward McClellan was convicted of simple assault, and he appeals. Appeal dismissed.

Nelson & Burns, of Santa Ana, for appellant.

U. S. Webb, Atty. Gen., and James S. Howie, Deputy Atty. Gen., for the People.

THOMPSON, J. [1, 2] This is an appeal from a judgment of conviction of simple assault and from an order denying appellant's motion for a new trial. The respondent has made a motion to dismiss the appeal on the ground that appellant altogether failed to "present an application to the trial court, stating in general terms the grounds of the ap-

peal and the points upon which the appellant relies," as was required by section 1247 of the Penal Code on January 1, 1927, and thereafter until repealed (St. 1927, p. 1048), and which respondent claims is still required thereby by virtue of the saving clause which was made a part of section 1246 of the Penal Code, adopted at the same time that section 1247 was repealed. The appeal was taken subsequent to the repeal of section 1247. Section 1246 (St. 1927, p. 1047, § 1) now reads as follows:

"The record on appeal shall be made up and filed in such time and manner as shall be prescribed in rules to be promulgated by the judicial council. Until such rules are promulgated, the time and manner provided by statutes in force on January 1, 1927, shall govern."

No rules have been promulgated by the judicial council. The only fair construction of the concluding clause of section 1246 is that all those statutes which were in force on January 1, 1927, relating to the time and manner in which the record on appeal shall be made up and filed, are still in force and effect. The question then is: Does section 1247, as it existed on that date, relate to the time or manner of making up or filing the record on appeal? Like section 1246, as it formerly existed, which has been stated to have no concern with the taking of appeals, but rather with methods whereby the appeals may be heard (*Garrett v. Superior Court* [Cal. App.] 249 P. 871), section 1247 opens with the words "upon an appeal being taken," indicating clearly that it related not to the taking of appeals. It is there said that the appellant shall file and present the application already mentioned, which, in addition to containing a general statement of the grounds of appeal, shall "designate what portions of the phonographic reporter's notes it will be necessary to have transcribed to fairly present the points relied upon." Undoubtedly this language relates to the time and manner of making up the record on appeal. This view is reinforced by the authority of *Rhodes v. Sargent*, 17 Cal. App. 54, 118 P. 727, where the court refused by writ of mandate to compel the trial judge to certify the transcript, where, as here, the appellant had failed to file and present the application and designation required by the section.

[3] Having concluded that section 1247 relates to the time and manner of making up and filing the record on appeal, we are compelled by a uniform line of authorities, including *People v. Flaherty*, 61 Cal. App. 775, 215 P. 699; *People v. Hill* (Cal. App.) 248 P. 714; *People v. Shaw* (Cal. App.) 253 P. 747; *People v. May* (Cal. App.) 253 P. 961; and *People v. Johnson* (Cal. App.) 254 P. 1118, to dismiss the appeal.

Appeal dismissed.

We concur: WORKS, P. J.; CRAIG, J.

88 Cal. App. 523

**WILLIS FINANCE & CONSTRUCTION CO.
v. PORTER. (Civ. 5035.)**

District Court of Appeal, Second District, Division 1, California. Jan. 23, 1928.

1. Arbitration and award ⚡50—Parties to arbitration agreement are bound by terms thereof, including provision limiting time beyond which arbitrators cannot act.

Parties to an agreement of arbitration are bound by its terms, including that fixing a time limit beyond which arbitrators cannot act.

2. Arbitration and award ⚡50—Award of arbitrators made after date named in agreement beyond which arbitrators could not act was nullity (Code Civ. Proc. § 1283).

Where agreement of submission to arbitrators provided it should be entered as order of superior court, in accordance with Code Civ. Proc. § 1283, and powers of arbitrators thereunder ceased on May 31st, award made by arbitrators on June 4th was a nullity.

3. Arbitration and award ⚡16(2)—Plaintiff was within rights in terminating agreement of submission, where powers of arbitrators ceased before award was made (Code Civ. Proc. § 1283).

Where powers of arbitrators under agreement of submission providing that it should be entered as order of superior court, under Code Civ. Proc. § 1283, ceased on May 31st, plaintiff was within rights in terminating agreement of submission on June 2d before award was made or submission was filed in court on June 4th.

4. Arbitration and award ⚡50—Filing of submission agreement subsequent to plaintiff's revocation after last day for making award could not validate award or give court jurisdiction (Code Civ. Proc. §§ 1281—1290).

Where agreement of submission provided it should be entered as superior court order, in accordance with Code Civ. Proc. § 1283, and powers of arbitrators under sections 1281—1290 ceased thereunder on May 31st, and June 2d plaintiff notified defendants that agreement was terminated, the filing of agreement of submission subsequent to plaintiff's revocation and subsequent to last day set in agreement for making award could not validate award or give court jurisdiction.

5. Judgment ⚡577(2)—Since court had no jurisdiction, its denial of motion to vacate award was not bar to later motion to set judgment aside (Code Civ. Proc. § 1283).

Where filing of an arbitration award after plaintiff rightly notified defendants that agreement of submission was terminated did not give court jurisdiction of subject-matter or of parties, denial of motion to vacate order did not operate as bar to presentation of later motion to set aside judgment entered on award filed with the clerk, under Code Civ. Proc. § 1283.

6. Appeal and error ⚡1074(1)—Where award was not binding, error, if any, in ordering that it and entry thereof as judgment be set aside, was harmless.

On motion to set aside a judgment entered on an award under Code Civ. Proc. § 1283, be-

cause court was without jurisdiction and judgment was void, since award was not binding on parties either as statutory or common-law award and was erroneously entered, error, if any, in judgment ordering that award and entry thereof as a judgment be set aside and proceedings perpetually stayed, was harmless.

Appeal from Superior Court, Los Angeles County; Hartley Shaw, Judge.

Action by the Willis Finance & Construction Company against A. D. Porter. From a judgment setting aside a judgment based on an award of arbitrators, plaintiff appeals. Affirmed.

Newlin & Ashburn, R. L. Haight, Otto & Linn, and James H. Mitchell, all of Los Angeles, for appellants.

Thomas C. Ridgway and Richard F. Bailey, both of Los Angeles, for respondent.

WOOD, Justice pro tem. Appellant and respondent entered into an agreement in writing on April 30, 1924, submitting to arbitrators certain controversies then existing between them. The agreement of submission provided that it should be entered as an order of the superior court in accordance with section 1283 of the Code of Civil Procedure, and that it should be filed before the arbitrators entered upon the performance of their duties. The agreement contained the following provision:

"It is hereby mutually agreed that the award hereunder shall be made by said arbitrators at any time on or before the 15th day of May, 1924, or on or before any other day to which the parties hereto shall, by writing, indorse on this submission, from time to time enlarge the time for making the award, and it is hereby agreed that, in the event said award is not made within the time that may be agreed upon, it shall be deemed that this submission shall have failed, and the same shall be at an end, and the second party may proceed, as hereinafter specified, with the prosecution of such actions as have already been started, or such action as may hereafter be started in connection with said controversies."

The time limit was later extended to May 31, 1924, by indorsement in writing.

Respondent notified appellant in writing on June 2, 1924, that the agreement of submission was terminated on the ground that no award had been made within the time limit fixed in the submission or within the extended time. On June 4, 1924, the arbitrators made an award, which was filed on June 12, 1924. Appellant caused the agreement of submission to be filed on June 10, 1924, in the office of the county clerk. At the time the agreement of submission was filed the clerk entered in the register of actions the names of the parties, the fact that it was an

arbitration matter, and the date of the filing of the submission. This constituted the entire record of the entry of submission and this record was not at any time amended. There was no entry by the clerk of the names of the arbitrators or the time limited by the submission within which the award must be made, in accordance with the requirements of section 1283, Code of Civil Procedure, as it was in force at the time of these proceedings. Respondent on June 17, 1924, served notice of motion to vacate the arbitrators' award. This motion was denied by the court on July 25, 1924, and notice of the ruling of the court was served on August 8, 1924. Appellant filed an affidavit on November 5, 1924, setting forth certain matters mentioned in section 1286, Code of Civil Procedure, and on November 7, 1924, the award was set out in full by the clerk in the judgment book as a judgment of the court. Thereafter the respondent moved to set aside the judgment entered by the clerk on the ground that the court was without jurisdiction and that the judgment was void. On November 25, 1924, the court granted respondent's motion by minute order and filed a written order and judgment, in which it was found:

"That the submission to arbitration filed herein on June 10, 1924, was filed subsequent to the time limited by the said submission and after the award had been made, and that the clerk of the court did not enter in his register of actions the names of the arbitrators, the date of the submission, and the time limited by the submission within which the award must be made, and that the above court had no jurisdiction of the above-entitled matter or of the parties, and that the award entered by the clerk as a judgment herein is void and is a nullity."

Appellant now seeks to reverse the judgment setting aside "the said award and the entry thereof as a judgment."

By the terms of the agreement of submission it was expressly agreed that the submission should "be at an end" in the event the award should not be made within the time extended, May 31, 1924. The record clearly shows that the award was dated June 4, 1924, and filed June 12, 1924.

[1, 2] Parties to an agreement of arbitration are bound by all of its terms, including that fixing a time limit beyond which the arbitrators cannot act. The powers of the arbitrators ceased on May 31st. It does not appear that respondent ever consented to the making of an award after that date, but, on the contrary, he promptly notified all concerned of the termination of the submission. It follows that the award made on June 4th is a nullity. *Ryan v. Dougherty*, 30 Cal. 218; *In re Abrams*, 2 Cal. App. 237, 84 P. 363.

[3, 4] A statutory arbitration such as the one under discussion is governed by sections 1281-1290 of the Code of Civil Procedure. As stated in *Fairchild v. Doten*, 42 Cal. 125:

"The proceeding is a special one, and the statutory provisions must be substantially complied with or the judgment will not be valid."

Section 1283, Code of Civil Procedure, before the amendment of 1927 (St. 1927, p. 405), provided that the submission must be filed with the clerk in order to be made an order of the court. After specifying certain steps to be taken by the clerk in making the proper entry, the section provided:

"When so entered the submission cannot be revoked without the consent of both parties. * * * If the submission is not made an order of the court, it may be revoked at any time before the award is made."

In the instant case respondent was within his legal rights in terminating the agreement of submission before the award was made or the submission filed. The filing of the agreement of submission subsequent to the revocation by respondent, subsequent to the last day set in the agreement for the making of the award, and subsequent to the actual making of the award, could not validate the award or give the court jurisdiction of the subject-matter or the parties. *Kreiss v. Hotaling*, 96 Cal. 617, 31 P. 740.

[5] Appellant contends that the denial of the motion to vacate the award on July 25, 1924, operates as a bar to the presentation of a later motion to set aside the judgment entered by the clerk on November 7, 1924. The court at no time had jurisdiction of the parties or the subject-matter and at no time had authority to adjudge the matters in controversy. The judgment being void upon its face, the rule of *res adjudicata* does not apply. In *Forbes v. Hyde*, 31 Cal. 342, 348, it is said:

"A judgment absolutely void upon its face may be attacked anywhere, directly or collaterally, whenever it presents itself, either by parties or strangers. It is simply a nullity, and can be neither the basis nor evidence of any right whatever."

See, also, *Pioneer Land Co. v. Maddux*, 109 Cal. 633, 42 P. 295, 50 Am. St. Rep. 67; *Estate of Pusey*, 180 Cal. 368, 181 P. 648.

[6] In its judgment the lower court used this language:

"It is ordered, adjudged, and decreed that the said award and the entry thereof as a judgment in Judgment Book 572, at page 12, records of the above court, be set aside, held for naught, and expunged from the records in the above-entitled matter, and that all proceedings thereon be perpetually stayed."

Appellant contends that in any event the award should not be set aside, but only its entry and the judgment based thereon. Since the award is not binding upon the parties either as a statutory or common-law award, the error, if any, is harmless.

The judgment is affirmed.

We concur: HOUSER, Acting P. J.; YORK, J.

88 Cal. App. 554

DALTON et al. v. GORE et al. (Civ. 4871.)★

District Court of Appeal, Second District, Division 2. California. Jan. 24, 1928.

Hearing Denied by Supreme Court March 22, 1928.

1. Appeal and error §907(3)—In appeal on judgment roll alone, court will assume evidence was sufficient to sustain findings.

In appeal on the judgment roll alone without any bill of exceptions, the reviewing court will assume that the evidence was sufficient to sustain the findings.

2. Appeal and error §544(1)—That there was error in admission of parol testimony could not be considered on review, in absence of bill of exceptions.

Where an appeal was upon the judgment roll without any bill of exceptions, contention that the trial court committed error by the admission of parol testimony could not be considered; such appeal being equivalent to an admission that there was no error in admitting evidence.

3. Appeal and error §761—Mere statement of abstract proposition without attempt by specification, argument, or authority to justify its application could not be relied on as ground for reversal.

In appeal from judgment on a contract, an abstract proposition relative to construing the intent of the parties to the contract could not be relied on for reversal, where appellant made no attempt by specification, argument, or authority to justify its application.

4. Appeal and error §900—Error is never presumed, and all intendments are in favor of judgment.

Error is never presumed, and all intendments are in favor of the judgment.

5. Appeal and error §204(1)—Errors of law in admission of evidence are not available on appeal if no objection was made to reception of such evidence.

Errors of law in admission of evidence are not available on appeal, if no objection was made to the reception of the evidence.

6. Appeal and error §169—Point raised for first time on appeal will not be considered.

A point raised for the first time on appeal will not be considered.

7. Appeal and error §901—A judgment will not be reversed unless error is shown.

A judgment will not be reversed unless error is shown.

8. Appeal and error §901—Burden is upon appellant to show error.

The burden is upon appellant to show error relied upon for reversal of the judgment.

9. Appeal and error §197(1)—Question of variance between pleadings and proof not raised in trial court will, upon appeal, be presumed waived.

Question of variance between pleadings and proof, which was not raised in the trial court,

is presumed by the reviewing court to have been waived so as to preclude its consideration.

10. Appeal and error §907(3)—Where it affirmatively appears that evidence was introduced below, reviewing court will conclusively presume, in absence of bill of exceptions, that evidence supports finding and that all objections to evidence were waived.

Where it affirmatively appears that evidence was introduced in the court below, and there is no bill of exceptions before the reviewing court, it will be conclusively presumed that the evidence supports the findings and that all objections to the introduction of evidence were and are waived.

Appeal from Superior Court, Los Angeles County; C. P. Vicini, Judge.

Action by F. O. Dalton and another, copartners doing business under the firm name and style of Dalton Bros., against M. Gore and another, copartners doing business under the firm name and style of Gore Bros. From the judgment, defendants appeal. Affirmed.

Schweitzer & Hutton, of Los Angeles, for appellants.

Hewitt, Ford & Crump, of Los Angeles, for respondents.

VALENTINE, Justice pro tem. This was an action brought by plaintiffs and respondents against defendants and appellants for money due under contract. The case was tried on the amended and supplemental complaint of plaintiffs, upon an amendment thereto, and upon the original answer of defendants stipulated to stand as answering plaintiffs' amended complaint.

The amended and supplemental complaint of plaintiffs contained four separate counts or causes of action, the first being on the contract as plaintiffs claimed it was entered into and agreed upon while the second, third, and fourth causes of action were for revision on the grounds, respectively, of fraud, mutual mistake, and mistake of plaintiffs known or suspected by the defendants.

The trial court found for plaintiffs on the first cause of action and found against the allegations of fraud and mistake pleaded in the second, third, and fourth causes of action.

The nature of the contract as found by the court is as follows:

"That heretofore, to wit, on or about April 6, 1921, plaintiffs and defendants entered into a contract for the operation of a certain theater in the city of Los Angeles known as the Burbank Theater for a period of 52 consecutive weeks, beginning May 15, 1921, under which contract plaintiffs agreed to furnish a full acting musical comedy company consisting of not less than 28 people, an assistant manager, one door man and one stage man, and the defendants agreed to furnish the building then being operated by defendants as the Burbank Thea-

ter, located on Main street in the city of Los Angeles, and agreed to provide all necessary ice, heat, light, water, janitor service, cashiers, insurance, ushers, film service, and pay all licenses—city, county, state, and federal.

"That plaintiffs and defendants contracted and agreed that the gross receipts coming from the operation of said theater as such for said period of 52 weeks should, after the deduction of the United States amusement or admission tax from said receipts, be divided equally between said plaintiffs and said defendants, with the proviso and condition, however, that the portion of the total gross receipts to go to defendants should amount to at least the sum of \$130,000 for said period of 52 weeks, and said plaintiffs agreed to and did deposit with the Los Angeles Trust & Savings Bank of Los Angeles the sum of \$15,000 in cash as a sum from which said guaranty of a minimum of \$130,000 as defendants' portion for said period of 52 weeks should to that extent be made good."

The trial court further found that:

"There is now due, owing, and unpaid from defendants to plaintiffs said sum of \$4,372.85, together with interest thereon from the times and in the amounts the various sums were due to plaintiffs on weekly settlements as hereinabove shown."

The conclusions of law were of the conventional type, following and based upon the findings, to the effect that plaintiffs were entitled to a money judgment, stating the amount, and the judgment likewise was in the usual form based on the conclusions of law.

The appellants contend: (1) That the judgment is against the law, in that (a), in the absence of mutual mistake, fraud, mistake of the plaintiffs which the defendants at that time knew or suspected, ambiguity, fiduciary relationship, or subsequently executed oral agreement, the court must not admit parol testimony for the purpose of construing the agreement. In other words, that the court is confined to the four corners of the instrument. And (2) that in so construing the intent of the parties as there expressed, the court must not insert or add anything which is not necessarily and reasonably implied from the terms contained therein.

[1, 2] The appeal is taken from the judgment upon the judgment roll, without any bill of exceptions. It is therefore necessarily admitted by appellants that no errors were committed in the admission or rejection of evidence, and that the evidence sustains and justifies the findings. *Mock v. City of Santa Rosa*, 126 Cal. 330, 340, 58 P. 826. There is therefore no merit in appellants' first contention that the trial court committed error by the admission of parol testimony.

[3] Nor do we see that there is any force

in appellants' second contention, that in so construing the intent of the parties the court must not insert or add anything which is not necessarily and reasonably implied from the terms contained therein. As a mere statement of an abstract proposition it may be true, but appellants make no attempt by specification, argument, nor authority to justify its application here. *Hastaran v. Marchand*, 23 Cal. App. 126, 137 P. 297.

[4-8] We adopt the following from respondents' brief as a correct and concise statement of the law applicable on this appeal:

"There is no bill of exceptions showing the evidence, and we must upon this appeal take the findings of fact as absolutely true, and presume that the evidence necessary to sustain them was presented to the court below. *Estate of Brown*, 143 Cal. 450, 454, 77 P. 160, 162. Also, *Los Angeles, etc., Land Co. v. Marr*, 187 Cal. 126, 200 P. 1051; *Robben v. Benson*, 43 Cal. App. 204, 213, 185 P. 200; *Hastaran v. Marchand*, 23 Cal. App. 126, 137 P. 297.

"Error is never presumed. All intendment is in favor of the judgment. *Estate of Autfret*, 187 Cal. 34, 200 P. 946; *Estate of Gamble*, 166 Cal. 253, 135 P. 970; *Hastaran v. Marchand*, 23 Cal. App. 126, 137 P. 297.

"Errors of law in the admission of evidence are not available on appeal, if no objection was made to the reception of the evidence.

"A point raised for the first time on appeal will not be considered. *Morrison v. Land*, 169 Cal. 580, 147 P. 259; *Blanc v. Connor*, 167 Cal. 719, 141 P. 217.

"A judgment will not be reversed unless error is shown and the burden is upon appellant to show the error. *Kellogg v. Kellogg*, 170 Cal. 84, 148 P. 518.

"It can avail nothing to argue that Exhibit A to plaintiffs' amended and supplemental complaint is contrary to the court's finding. If this court should so conclude, it would then simply presume there was other evidence that did support the finding.

"Appellants are precluded from claiming any alleged variance between the allegations of the pleadings and the proof to support the findings. This court will presume sufficient evidence was before the lower court to support the findings, whether a variance or not, and if deemed variance, it will be presumed no objection thereto was made and that such variance was waived. *Calif. Portland Cement Co. v. Wentworth Hotel Co.*, 16 Cal. App. 692, 699, 118 P. 103, 113."

[9, 10] Therefore, it affirmatively appearing that evidence was introduced in the court below and there being no bill of exceptions before this court, it will be conclusively presumed that the evidence supports the findings and that all objections to the introduction of evidence were and are waived.

Judgment affirmed.

We concur: WORKS, P. J.; CRAIG, J.

88 Cal. App. 430

COHN v. VALENTINE et al. (Civ. 3381.)★

District Court of Appeal, Third District, California. Jan. 19, 1928.

Hearing Denied by Supreme Court March 19, 1928.

1. Evidence ⇨598(1)—Trial court is not bound to decide according to greater number of witnesses.

Trial court is not bound to decide in conformity to declarations of greater number of witnesses.

2. Auctions and auctioneers ⇨8—On purchasers depositing price with auctioneers, money became vendor's property less auctioneers' charges and commissions.

When vendor delivered deed to purchasers' escrow holder conveying good title and had complied with terms of sale, money deposited by purchasers with auctioneers selling property became vendor's property less auctioneers' charges and commissions.

3. Interpleader ⇨35—Auctioneers asserting right to retain deposit as against vendor held not mere stakeholders, and vendor entitled to costs of suit to recover purchase money against auctioneers (Code Civ. Proc. § 1022).

Where money deposited by purchasers with auctioneers selling property had become vendor's property less auctioneers' charges and commissions, and auctioneers alleged that purchasers had demanded return of money, and court was asked to determine to which claimant it belonged, auctioneers were not mere stakeholders, where they asserted as against vendor right to retain greater part of the money in their custody, and hence vendor suing to recover money was entitled to costs against auctioneers under Code Civ. Proc. § 1022.

4. Auctions and auctioneers ⇨9—Where part of money deposited with auctioneers to which vendor was entitled was readily ascertainable, auctioneers refusing to pay it over held chargeable with interest.

Where part of deposit money paid by purchasers to auctioneers to which vendor was entitled was readily ascertainable by computation, and auctioneers refused to pay it over on ground that vendor had not paid them for services, on finding against auctioneers as to amount due for their services, interest was properly allowed against auctioneers.

5. Vendor and purchaser ⇨274(1)—Vendor delivering deeds to escrow holder could enforce vendor's lien despite defense that no title passed.

Where vendor, pursuant to contract of sale, delivered to escrow holder deed conveying property to vendor and his own deed conveying to purchasers, he was entitled to enforce vendor's lien as against objection that no title had passed to purchasers or was ever delivered or tendered to them, especially where purchasers refused to complete transaction because mortgage did not contain release clause, which was not required by agreement.

6. Vendor and purchaser ⇨75—Where no time for conveyance was mentioned in agreement or announcement by auctioneers, vendor had reasonable time to convey.

Where parties' written agreement or announcement by auctioneers of terms of sale fixed no time for conveyance of title, vendor had reasonable time within which to convey.

7. Vendor and purchaser ⇨148—Trial court held warranted in finding conveyance offered January 8 following sale December 6 was within reasonable time.

In action to foreclose vendor's lien, trial court held warranted in finding that conveyance offered January 8, following sale December 6 was within reasonable time, in view of fact that parties' agreement or auctioneers' announcement of terms did not specify time for conveyance.

8. Vendor and purchaser ⇨107—Vendor's requiring escrow holder to obtain receipt for purchasers' payment to auctioneers held not to warrant cancellation of agreement by purchasers not performing or offering to perform.

Vendor's instructing escrow holder to obtain receipt for money paid by purchaser to auctioneers, not expressly made condition precedent to delivery of deed to purchasers, did not warrant cancellation of agreement by purchasers not having performed or offering to perform agreement.

9. Vendor and purchaser ⇨270—Vendor held entitled to foreclose lien for purchase money on purchasers' refusal to perform by seeking to incorporate in escrow instructions unauthorized agreement.

Vendor held entitled to foreclose lien for purchase price in accordance with agreement, where purchasers in effect refused to perform by requiring in their escrow instruction that mortgage should contain a release agreement where agreement between parties did not provide for such release clause nor provide for deliveries in escrow by either party.

10. Vendor and purchaser ⇨285(5)—Money judgment against purchasers not performing, requiring in effect purchasers to pay vendor's debt to auctioneers, held excessive by such amount.

In action to foreclose vendor's lien, in which auctioneers selling property were made parties, and judgment as against them was reduced by amount which plaintiff owed them, judgment against purchasers for price of property less amount of mortgage assumed and judgment against auctioneers was excessive, since it in effect required purchasers to pay plaintiff's debt to auctioneers.

11. Vendor and purchaser ⇨172—Vendor suing to foreclose lien held entitled to interest from date when he was ready, able, and willing to convey.

In vendor's action to foreclose lien, vendor was entitled to interest on purchase price from date when court found he was ready, able, and willing to convey title to purchasers.

Appeal from Superior Court, Los Angeles County; William C. Doran, Judge.

Action by M. B. Cohn against George H. Valentine and others, a partnership doing business under the firm name and style of Charles H. O'Connor & Son, and another, to foreclose a vendor's lien and for other relief. From a judgment for plaintiff, defendants, members of named partnership, appeal. Modified and affirmed.

Phillip Cohen, J. B. Irsfeld, and Douglas Fawcett, all of Los Angeles, for appellants.

Newby & Palmer, of Los Angeles (Dee Holder, of Los Angeles, of counsel), for respondent.

FINCH, P. J. In November, 1923, the plaintiff was in possession, under an agreement of purchase, of certain lots in the city of Los Angeles, together with the dwelling house thereon and its "furniture and furnishings." The agreement provided for the payment of \$1,000 on the purchase price at the time of the execution of the contract, \$19,000 on or before January 10, 1924, and the execution by the plaintiff of his promissory note for \$60,000, payable on or before three years after November 15, 1923, secured by a mortgage on said real property. The pleadings, which cover nearly a hundred pages of the typewritten transcript, are too lengthy to be given even in substance, but the findings of the court sufficiently indicate the issues in controversy. The court found:

That "the defendants Charles H. O'Connor and William C. O'Connor were copartners, * * * and at all times herein mentioned * * * were duly and regularly licensed auctioneers"; that the plaintiff employed them to sell said property at public auction, they to pay half the cost of advertising the sale and to receive as compensation for their services "one-half of all money derived from the sale of the furniture and furnishings in excess of \$10,000, and * * * one-half of all money derived from the sale" of the real estate "in excess of \$90,000"; that at the auction sale, held December 6, 1923, the furniture and furnishings were sold for the total sum of \$10,332.35; that the real estate was sold to defendants Valentine and Kane for \$90,000; that "Mrs. Marie Hummel was the duly appointed and acting clerk of said auction sale, and as such clerk * * * she then and there duly and regularly entered a memorandum of said sale in the said auctioneers' books of sales * * * and the said memorandum * * * specified as the name of the person for whom said auctioneers sold the said real estate, the name of M. B. Cohn, the plaintiff herein, and described said real estate * * * and the price at which the same was sold, * * * and the terms of the sale upon which said real estate was sold, and the name of the buyers of said real es-

tate, to wit, the defendants George H. Valentine and William Kane; that, at the time said real estate was so offered for sale, by said auctioneers, the terms of the sale were duly and regularly announced by said auctioneers; it being announced that 15 per cent. of the purchase price thereof should be paid by the purchaser immediately upon the closing of said sale * * * and that said property should be taken by the purchaser, subject to a mortgage of \$60,000, which the purchaser should assume and agree to pay, and that the balance of the purchase price of \$16,500 was to be paid within thirty days from the date of the sale, and it was announced at said time that a party in the crowd was willing to take a second trust deed for \$10,000 on the * * * property as part of the purchase price thereof"; that the plaintiff was present and was aware of the facts in connection with the sale and made no objection thereto; that, "immediately after said real estate was knocked down and sold to the defendants Valentine and Kane, the said Valentine and Kane signed and executed a certain deposit receipt * * * wherein the terms of the sale of said real estate as above set out, and announced by the auctioneer were duly entered and written, and at said time and place they paid to the said auctioneers * * * as a part of the purchase price of said real estate * * * the sum of \$13,500"; that "on the 8th day of December, 1923, the defendants Valentine and Kane deposited with the defendant Guaranty Building & Loan Association the sum of \$6,500 as an additional payment on the purchase price of said real estate, and stated in writing that they would execute a note and trust deed for \$10,000 upon said real estate as and for the balance of the purchase price of the same; that on the 9th day of January, 1924, and within a reasonable time after the said auction sale of said real estate, the plaintiff M. B. Cohn was ready, able, and willing to execute a deed, conveying the said real estate to the defendants Valentine and Kane, and to furnish a certificate of title therefor showing the title to be merchantable and to fully carry out the terms of the sale of said real estate as above set forth; that on said 9th day of January, 1924, the said Valentine and Kane undertook to cancel the said sale, and refused to execute the said note and trust deed, and refused to proceed with said transaction and * * * thereafter demanded the repayment to them of the \$6,500, paid by them to the defendant Guaranty Building & Loan Association upon the purchase price of said land and the \$13,500 paid by them to the defendants O'Connor as a part payment of the purchase price of said land, and said defendants Valentine and Kane have refused and now refuse to proceed to close the said sale and pay the moneys for said land, although the same has been de-

manded of them by plaintiff; that the plaintiff made and executed a deed conveying the said real estate to the defendants within a reasonable time after the said real estate had been sold to the said defendants Valentine and Kane and delivered the same to the said defendants' agent, the Guaranty Building & Loan Association, on the 8th day of January, 1924, for the said defendants Valentine and Kane; * * * that the defendants O'Connor have retained, and now have in their possession and control, the said sum of \$13,500 that was paid to them by the said defendants Valentine and Kane as a part of the purchase price of said real estate; that the defendant Guaranty Building & Loan Association received on the 8th day of December, 1923, from the defendants Valentine and Kane the sum of \$6,500 as a payment for the plaintiff upon the purchase price of said real estate, which sum was to be held for the plaintiff, and the said defendant loan association has ever since kept and retained said money."

Judgment was entered in favor of the plaintiff against Valentine and Kane for \$30,000, with interest thereon at the rate of 7 per cent. per annum from December 6, 1923; against Charles H. O'Connor and William C. O'Connor for \$13,500, less \$722.08 as commissions and expenses, with interest for the same period and at the same rate as in the judgment against Valentine and Kane; and against the Guaranty Building & Loan Association for \$6,500. The judgment provides that the said amounts for which judgment is rendered against Charles H. and William C. O'Connor and the Guaranty Building & Loan Association "be credited upon the judgment against the said defendants Valentine and Kane, and that the balance of said amount adjudged to be due from the said defendants Valentine and Kane to the said plaintiff, to wit, * * * the sum of \$11,876.89 * * * be, and the same is hereby declared to be, a vendor's lien upon the property, * * * and that the said vendor's lien be, and the same is hereby, foreclosed, and the said property be sold as other lands are sold under execution, subject to the \$60,000 mortgage upon said property which the said defendants Valentine and Kane assumed and agreed to pay." The usual provision is made for entry of a deficiency judgment against Valentine and Kane in the event of the proceeds of the sale proving insufficient to satisfy the judgment for \$11,876.89, with interest and costs and the expense of making the sale. The O'Connors and Valentine and Kane filed separate notices of appeal.

[1] In the O'Connor appeal it is said in appellants' opening brief:

"The plaintiff testified that the contract between him and the auctioneers was that the auctioneers were to receive one-half of all the real property brought at auction over and above \$90,000. * * * On the other hand, C. H.

O'Connor, W. C. O'Connor, and Mrs. Hummel * * * each gave evidence that the contract * * * was that the auctioneers should receive one-half of what the real property brought at auction over and above what the same had cost the seller."

It is then argued that it is improbable that the O'Connors would have entered into a contract on the terms stated by the plaintiff. This is an argument upon the weight of the evidence rather than its insufficiency to support the findings. The conflict in the evidence is substantial, and it is elementary that a trial court is not bound to decide in conformity with the declarations of the greater number of witnesses.

[2, 3] It is urged that the judgment against the O'Connors for interest and costs is erroneous. "The authorities are practically uniform in holding that an auctioneer receives a deposit of earnest money in the capacity of a stakeholder." 2 R. C. L. 1153; *Montgomery v. Pac. C. L. Bureau*, 94 Cal. 284, 290, 29 P. 640, 28 Am. St. Rep. 122. When the plaintiff delivered his deed to Valentine and Kane's escrow holder, conveying a good title to them, and had complied with the terms of the sale on his part to be performed, the deposit money became a portion of the cash payment and the property of the plaintiff, less the charges and commissions of the auctioneers. *Montgomery v. Pac. C. L. Bureau*, supra. The complaint alleges that the plaintiff demanded payment to him of the deposit money and that the O'Connors refused to pay any part thereof. The only defense set up in their answer reads as follows:

"Admit that they have refused to pay the plaintiff the said sum of \$13,500, for the reason that said plaintiff has refused to pay these defendants the amount due by plaintiff to them for services rendered, as will be more specifically set forth hereafter."

Nothing further is set forth except by way of counterclaim, in which it is alleged that the plaintiff agreed to pay the auctioneers one-half of the proceeds of the sale over and above \$80,000; that, in accordance with the terms of that agreement, the plaintiff was indebted to the O'Connors in the sum of \$10,231.42, for which sum judgment was demanded. It was further alleged in the counterclaim that Valentine and Kane had demanded the return of the deposit money, and that the O'Connors had not sufficient information to enable them to determine to whom such money belonged, and the court was asked to determine to which claimant it belonged. "Where both vendor and vendee are adverse claimants to the deposit money, the auctioneer may file a bill of interpleader, except where he himself claims an interest therein." 2 R. C. L. 1154. "The plaintiff in interpleader must be a disinterested stakeholder." *Conner v. Bank of Bakersfield*, 183 Cal. 199, 203, 190 P. 801, 802. The O'Connors were not

mere stakeholders, but, as against the plaintiff, they asserted the right to retain the greater part of the money in their custody. The award of interest is based on their own allegation that they refused to pay over the deposit "for the reason that said plaintiff has refused to pay these defendants the amount due" them for their services. The court found against the O'Connors as to the amount due them from the plaintiff. The portion of the deposit money to which the plaintiff was entitled was readily ascertainable by mere computation and, therefore, under the circumstances stated, interest was properly allowed thereon. The plaintiff was clearly entitled to his costs of suit against the O'Connors. Code Civ. Proc. § 1022.

[4, 5] Appellants Valentine and Kane make the following contentions:

"That no title passed to the purchasers at the auction sale or by the contract entered into directly after the sale.

"That no title was ever delivered or tendered to the purchaser by the seller or by any person for him.

"That the seller defaulted in not obtaining a guaranty of title vesting the property in the purchasers and in requiring delivery to him of the purchaser's copy of the contract showing payment of \$13,500 to the auctioneers.

"That the seller had no title within 30 days after the auction sale to convey to the purchasers.

"That the seller, not having performed or tendered performance, cannot maintain this action.

"That, no title having passed to the purchasers and the record before the court showing title to the property in the plaintiff, the plaintiff cannot foreclose a vendor's lien on the premises."

In their closing brief it is said:

"The contention of the purchasers is that the parties made and entered into a written agreement immediately after the fall of the hammer, * * * and this agreement measures the rights and duties of the parties."

The court found that such agreement was so entered into, "wherein the terms of the sale of said real estate * * * were duly entered and written." In so far as material to the questions raised by the appellants, the agreement reads as follows:

"Received from George H. Valentine and W. L. Kane the sum of \$13,500 as a deposit on account of the purchase price of the following described property (describing it), for the purchase price of \$90,000. The balance of the purchase price is to be paid within thirty days from date hereof, as follows, to wit: \$16,500, assume \$6,000 mtge, due 3 yrs, interest 7% per annum, payable quarterly. It is understood that seller will place a second trust deed for \$10,000 on above property, int. 7% per annum, payable quarterly, 2½ yrs. * * * In the event said purchaser shall fail to pay the balance of said purchase price or complete said purchase as herein provided, the amounts paid herein shall, at the option of the seller, be retained as

liquidated and agreed damages. * * * In the event the title to said property shall not prove merchantable and said seller shall not perfect, or be able to perfect, the same within a reasonable time from this date, the purchaser shall have the option of demanding and receiving back said deposit and shall be released from all obligation hereunder. * * * The evidence of title is to be in the form of a continuation of present title, issued by a responsible title company and to be furnished and paid for by the seller. * * * Time is of the essence of this contract."

The receipt was signed, "C. H. O'Connor & Son by W. C. O'Connor, Real Estate Agent." Following this signature there is indorsed:

"I agree to purchase the above-described property on the terms and conditions herein stated. George H. Valentine and W. L. Kane, purchaser."

In a case involving a similar state of facts it was said:

"The vendors have retained the legal title, and evidently as security for the purchase money. Their position is, in some respects, similar to what it would have been had they executed a conveyance to the vendee and taken from him a mortgage upon the property. * * * A vendor retaining the title may * * * sue at law for the balance of the purchase money, or file his bill in equity for the specific performance of the contract, and take an alternative decree that if the purchaser will not accept the conveyance and pay the purchase money, the premises be sold to raise such money, and that the vendee pay any deficiency remaining after the application of the proceeds arising upon such sale. * * * The plaintiffs tendered their deed under the contract, and as its acceptance was declined, they pray a sale of the premises, and such sale was decreed. * * * The decree is not, as it should be, in the alternative. We do not, however, deem it necessary to direct a modification of the decree, as the defendants can still, at any time, arrest a sale and take a conveyance, upon payment of the amount adjudged due of the purchase money, interest thereon and the costs of this suit." Sparks v. Hess, 15 Cal. 186, 194.

See, also, Gessner v. Palmateer, 89 Cal. 89, 92, 24 P. 608, 26 P. 789, 13 L. R. A. 187; Amaranth Land Co. v. Corey, 182 Cal. 66, 67, 186 P. 765; Maltby v. Conklin, 50 Cal. App. 201, 205, 195 P. 280. The foregoing cases furnish a sufficient answer to the first two and the last of appellants' contentions.

The escrow clerk of the Guaranty Building & Loan Association testified that on January 8, 1924, he had a report on the state of the title, signed by one of the officers of the Title Insurance & Trust Company; that Valentine and Kane made no objection that the title was not good, but refused to complete the transaction because "the mortgage did not contain a release clause." The agreement contained no provision for such a release clause. The witness further testified that on

January 8, 1924, he "could have furnished them (Valentine and Kane) at that time a guaranty of title, or a continuation of a guarantee of title, * * * showing the title vested in them, or vested in any one whom they might order," that the practice in such cases is to order the "Title Insurance & Trust Company to bring down the title" after both parties have made the necessary deliveries in escrow, and that disbursements are made and the transaction closed when a proper certificate of title is received. This is in harmony with the holding in *Neher v. Kauffman*, 197 Cal. 674, 682, 242 P. 713. The plaintiff had performed his part of the contract up to the time the purchasers refused to proceed further. He had delivered to the escrow holder a deed conveying the property to the plaintiff and the plaintiff's deed conveying it to Valentine and Kane. The latter refused to execute the necessary instruments to complete the transaction and attempted to rescind without any just cause therefor.

[6-9] The plaintiff was not required by the terms of the sale or of the said agreement to convey title within thirty days. No time for such conveyance was mentioned in such agreement or in the announcement by the auctioneers of the terms of the sale. The plaintiff therefore had a reasonable time within which to convey title, and the court was warranted in finding that he had performed the agreement on his part within a reasonable time. In his letter of instructions to the escrow holder, the plaintiff directed the former to "obtain receipt for \$13,500, signed by C. H. O'Connor & Son in favor of George H. Valentine and William L. Kane, assigned to M. B. Cohn." This direction was not expressly made a condition precedent to the delivery of the deed to the purchasers, and it is not clear whether it was so intended. It need not be determined whether the plaintiff was justified in demanding the assignment to him of this so-called receipt, which constituted the agreement between the parties hereinbefore mentioned. The condition, if such it was, did not warrant the cancellation of the agreement by the purchasers; they not having performed or offered to perform the agreement on their part. In their escrow instructions they stated, "Mortgage to contain release clauses of \$333.33 a front foot on Argyle." The agreement between the parties did not provide for such a release clause, nor did it provide for deliveries in escrow by either party. The escrow instructions of the purchasers were such as to prevent the delivery of the deposit of \$6,500 to the plaintiff without violation of such instructions. Under such circumstances, the purchasers having refused to perform, the rights of the parties must be determined in accordance with the terms of the agreement. Under the authorities cited the judgment entered in favor

of plaintiff against Valentine and Kane is proper except in the amount thereof.

[10, 11] The judgment against those defendants is for \$30,000, less the amount of the judgments against the other defendants, and interest. Since the judgment against the O'Connors was reduced by the sum of \$772.08, which the plaintiff owed them, the net sum for which judgment was given against Valentine and Kane was increased in a like amount, thus in effect giving the plaintiff judgment against them for the amount of his indebtedness to the O'Connors. The plaintiff is entitled to interest only from the 9th day of January, 1924, when, as the court found, he was ready, able, and willing to convey title to the purchasers. In his complaint he prays for interest at 7 per cent. per annum from January 8, 1924. He was given judgment for interest against the O'Connors on the deposit of \$13,500. This leaves only \$16,500 on which the purchasers were liable for interest. Judgment was rendered November 19, 1924. Interest on the \$16,500 up to that time amounted to \$994.58. This sum added to the remaining \$10,000, which the purchasers owed the plaintiff on the principal, makes a total of \$10,994.58, for which sum the plaintiff was entitled to judgment, instead of \$11,876.89, for which net sum the court entered judgment.

The judgment is modified by striking therefrom "\$11,876.89" wherever the same appears in the judgment and substituting in place thereof "\$10,994.58." As so modified the judgment is affirmed, the respondent to recover costs of appeal incurred by him in the appeal of the O'Connors, and the appellants Valentine and Kane to recover their costs of appeal against the respondent.

We concur: PLUMMER, J.; HART, J.

88 Cal. App. 549

WESTERN LITHOGRAPH CO. v. VANOMAR PRODUCERS et al. (Civ. 6135.)

District Court of Appeal, First District, Division 2, California. Jan. 24, 1928.

I. Attachment —337—Amended complaint alleging sale and promise to pay for merchandise, for which original complaint alleged defendant's indebtedness, held not to exonerate sureties on undertaking to release attachment (Civ. Code, §§ 2819, 2840, 2844).

Amended complaint, alleging that plaintiff sold and delivered certain merchandise to defendant on latter's order, instance and request, that defendant promised and agreed to pay stated sum therefor, with interest, and that certain amount remained due, held not to exonerate sureties on undertaking to release attachment, under Civ. Code, §§ 2819, 2840, 2844, where original complaint alleged that defendant became indebted to plaintiff in certain sum for merchandise sold and delivered to defend-

ant at latter's special instance and request, and that defendant promised and agreed to pay therefor; amended complaint not changing or adding any new parties, stating new cause of action or different facts, altering or impairing debtor's original obligation, nor prejudicing any rights of sureties.

2. Attachment ⚡336—Sureties may stand strictly on express terms of undertaking to release attachment.

Sureties on undertaking given to release attachment may stand strictly on the express terms of their contract.

3. Attachment ⚡345—Undertaking to release attachment held enforceable, though sureties qualified as freeholders instead of holders of real estate; "holder of a freeholder estate" (Code Civ. Proc. § 1057).

Undertaking given to release attachment held not unenforceable as not in proper form because sureties, in their affidavits, qualified as "residents and holders of real estate," instead of "residents and freeholders," as prescribed by Code Civ. Proc. § 1057, holder of real estate or real property being "holder of a freeholder estate."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Freeholder.]

4. Attachment ⚡337—Sureties on undertaking, given to release attachment before sheriff filed writ, held not exonerated, though certificate of proceedings was dated earlier (Code Civ. Proc. §§ 540, 554, 555).

Sureties on undertaking to release attachment held not exonerated on ground that sheriff took undertaking after making return on writ of attachment without court order required by Code Civ. Proc. §§ 554, 555, where sheriff filed writ, with certificate of his proceedings on attachment, on day after undertaking was given him and property released, as authorized by section 540, though such certificate was dated on day writ was placed in his hands; date of certificate not controlling fact of return as found by court.

Appeal from Superior Court, Los Angeles County; R. L. Thompson, Judge.

Action by the Western Lithograph Company against the Vanomar Producers, a corporation, Harry Chandler, and M. H. Sherman. Judgment for plaintiff, and defendant individuals appeal. Affirmed.

Frank Bryant, of Los Angeles, for appellants.

E. A. Lane, of Los Angeles, for respondent.

WELCH, Justice pro tem. Action on an undertaking given to release an attachment on personal property.

On the 7th day of May, 1919, respondent commenced an action in the superior court in Los Angeles county to recover against the defendant the sum of \$9,525.70 for labels, stationery, and merchandise sold and delivered by respondent to the defendant. On the

same day a writ of attachment was issued out of said court and action. The sheriff of the county, pursuant to said writ, levied on the property of the defendant on said May 7th. On the next day the undertaking herein involved was given for the release of the property. The sheriff thereupon, on May 8th, released the property from attachment. On the next day, May 9th, he filed with the county clerk the writ with a certificate of his proceedings on attachment. No other proceedings were filed in the original suit until August 11, 1919, when the plaintiff therein, respondent herein, filed an amended complaint, without the knowledge or consent of the defendant or of the appellants. After various proceedings had, which are unnecessary to be recited here, a judgment was obtained on June 13, 1922, in favor of the respondent and against the defendant for the sum of \$9,335 and costs.

A writ of execution was issued upon said judgment and placed in the hands of the sheriff for levy. Said execution was returned by the sheriff wholly unsatisfied. Demand for payment of said judgment was thereupon duly made upon the judgment debtor and also upon the sureties on the undertaking, which demand in each case was refused.

This action upon the undertaking resulted in a judgment against the principal and sureties from which the sureties appealed on the judgment roll and on a stipulation of facts of the parties.

In the court below and here appellants made and make three defenses to the cause of action against them on the undertaking: (1) That by amending its complaint without the knowledge or consent of the sureties the plaintiff and respondent thereupon altered the obligation of the sureties in such respect as to release them from obligation on their undertaking; (2) that the undertaking so given was not in form a compliance with statutory requirements; (3) that the sheriff had no authority to accept the undertaking and release the property without an order of the court.

These contentions will be taken up in the order made.

[1, 2] 1. What was appellants' contract of surety? They recited in their undertaking that plaintiff had begun an action against the defendant Vanomar Producers, claiming that there was due plaintiff the sum of \$9,525.70 or thereabouts; that an attachment had been issued against the property of the defendant as security for the satisfaction of any judgment which might be recovered therein; that certain property and effects of the defendant had been attached by the sheriff under and by virtue of said writ, and that the defendant was desirous of having said property released from attachment.

The obligation of the bond is to the effect

that appellants, "in consideration of the premises, and also in consideration of the release from attachment of the property so attached, * * * do hereby jointly and severally undertake in the sum of eleven thousand five hundred and no/100 (\$11,500.00) dollars, and promise that, in case the plaintiff recover judgment in the action, we will on demand pay to plaintiff the amount of whatever judgment may be recovered in said action, together with percentages, interest, and costs."

The original complaint in the action in which the undertaking was given alleges that, within the two years last past, the defendant became indebted to plaintiff in the sum of \$9,525.70 for labels, stationery, and merchandise sold and delivered to the defendant, at their special instance and request, and that the defendant promised and agreed to pay for the same.

Under sections 2819, 2840, and 2844, Civil Code, did plaintiff's amended complaint exonerate the bondsmen? A comparison of the allegations of the amended complaint with those of the original complaint answers the question in the negative. The amended complaint alleges that within the two years last past the plaintiff sold and delivered to the defendant certain labels, stationery, and merchandise on the order, instance, and request of said defendant; that the defendant contracted, promised, and agreed to pay for said labels, stationery, and merchandise so sold and delivered, the sum of \$10,897.14, with interest amounting to \$558.83; that nothing has been paid on account thereof except \$2,000; and that there now remains due, owing, and unpaid principal and interest in the sum of \$9,445.97.

The amended complaint did not change or add any new parties to the action. The cause of action set forth in the amended complaint is based upon the same cause of action set forth in the original complaint. The two causes of action in the two pleadings are based on the same facts. Each cause of action is for the recovery of money alleged to be due and unpaid for the sale of the same identical "goods, stationery, and merchandise." The slight difference of phraseology in the wording of the two pleadings does not alter the obligation of either the principal or the sureties in the slightest respect.

After affirming the principle that a surety may stand upon the strict terms of his contract, the Supreme Court of this state in the case of *Turner v. Fidelity & Deposit Co.*, 187 Cal. 76, 200 P. 959, says:

"The weight of authority, however, seems to sustain the rule that unless the amendments are such as to substitute new or different parties, or to state a new and independent cause of action, the sureties or guarantors are bound by the judgment."

We hold on this branch of the case that the amended complaint in the original action did

not alter or impair in any respect the original obligation of the debtor, nor did it prejudice any rights of the sureties. The sureties may stand strictly on the express terms of their contract, as they have a right to do, and yet they are liable. They undertook and promised to pay "the amount of whatever judgment may be recovered in said action," not exceeding \$11,500. The amount of the judgment was \$11,490.

[3] 2. The contention that this undertaking is nonenforceable because it is not in proper form is not well taken. Instead of the sureties in their affidavits to the undertaking qualifying as "residents and freeholders," as the law prescribes, they qualified as "residents and holders of real estate." The undertaking itself recites: "We, the undersigned, residents and freeholders in the county of Los Angeles." A holder of real estate or real property is a holder of a freeholder estate. Section 1057, Code of Civil Procedure, has been substantially complied with. The court finds it unnecessary to consider or decide whether or not the undertaking may be enforced as a common-law bond.

[4] 3. The third point made by appellants to exonerate them from the obligation of their undertaking is that the sheriff took the undertaking after he had made his return on the writ of attachment without an order of the court, as required by sections 554 and 555, Code of Civil Procedure. Here are all the dates and facts: On May 7, 1919, the writ of attachment was issued and placed in the hands of the sheriff for levy, on the same day levy was made, and, in accordance with the custom and routine business of his office, the sheriff immediately made a certificate of his proceedings on attachment, dating the same May 7, 1919, but did not at that time return the writ and certificate to the court or file the same with the clerk. On May 8th the undertaking herein sued upon was given to the sheriff whereupon the sheriff, as he had a right to do under section 540, Code of Civil Procedure, released the attached property, and noted the fact on his certificate of his proceedings on attachment, which was still in his possession and under his control. On May 9, 1919, the sheriff filed with the clerk the writ of attachment, indorsed thereon or attached thereto his certificate of his proceedings on attachment. His return then was not made before May 9th, and therefore the sheriff had the authority under section 540 of the Code of Civil Procedure to receive and accept the undertaking on May 8th, without order of the court. The court below found that the return of the writ was made on May 9th, and not on May 7th, as contended by appellants. The date of the certificate cannot control the fact of the return.

Judgment affirmed.

We concur: KOFORD, P. J.; STURTEVANT, J.

88 Cal. App. 535

(263 P.)

HOOPER v. WICKES et al., Glenn County High School District Trustees. (Civ. 3156.)★

District Court of Appeal, Third District, California. Jan. 23, 1928.

Hearing Denied by Supreme Court March 22, 1928.

1. Schools and school districts $\S$ 142—Charges against school principal relating to period not included in employment contract held properly excluded, in action for damages for dismissal.

In action by school principal for damages for dismissal, contract charges filed against plaintiff relating to period not included within contract held properly excluded.

2. Schools and school districts $\S$ 142—Mere showing of charges against school principal and action thereon held insufficient defense in principal's action for damages for dismissal (Pol. Code, $\S$ 1609, subd. [j]).

In action by school principal against board of trustees for damages for dismissal on plaintiff establishing a prima facie case, held that mere offer by defendants of charges preferred against plaintiff, notice of time of hearing, and fact of hearing, and conclusion of defendants, was insufficient defense, in view of Pol. Code, $\S$ 1609, subd. (j); it being incumbent on defendants to introduce testimony showing truth of charges upon which they acted.

Appeal from Superior Court, Glenn County; Claude F. Purkitt, Judge.

Action by W. H. Hooper against C. R. Wickes and others, Trustees of the Glenn County High School District. Judgment for plaintiff, and defendants appeal. Affirmed.

H. W. McGowan, of Willows, for appellants.

W. T. Belieu, of Willows, for respondent.

PLUMMER, J. On the 2d day of June, 1923, the plaintiff was employed by the defendants, acting as trustees of the Glenn County high school district, to serve as principal in the schools of said high school district. The written instrument evidencing such employment and the acceptance by the plaintiff thereof is in the words and figures following, to wit:

"Notice of Employment.

"To the Superintendent of Schools: You are hereby notified that the board of trustees or city board of education of Glenn County high school district, in the county of Glenn and state of California, held a regular meeting on June 2, 1923, and employed W. H. Hooper, who holds a certificate of the secondary grade, which is on file in our office, to serve as principal in the schools of this high school district. The board agrees to pay him a salary of three thousand dollars (\$3,000.00) per year, payable as follows: In ten equal payments of \$300.00, each payable at the end of each school month. The term of service agreed upon is ten months, and the time set for the opening of school is August 20th, 1923. The board reserves the

right to change the date of opening school. J. W. Birch, Trustee or Member City Board of Education. Lulu West, Trustee or Member City Board of Education. S. W. Chaney, Clerk or Secretary.

"Dated June 2, 1923.

"I hereby accept the conditions stated above and agree to serve as principal for the term specified above, unless released under the provisions of subdivision 2 of section 1609 of the Political Code. [Signed] W. H. Hooper, Principal or Teacher. Witness, signature of principal or teacher: Lola Wolcott."

Thereafter, and on the 3d day of December, 1923, said defendants, as the board of trustees of said high school district, entered an order dismissing the plaintiff from his employment and position as such principal. This action is for the recovery of the unpaid portion of the salary agreed to be paid the plaintiff as damages suffered by him on account of such dismissal.

After setting forth a number of preliminary matters, the plaintiff in this action alleges his employment as principal of the Glenn County high school district for the school year mentioned in the instrument in writing hereinbefore set forth; that pursuant to said contract and agreement plaintiff accepted and entered upon this employment as principal of said school and proceeded to discharge the duties incumbent upon him as principal thereof until dismissed by the defendants as herein stated. It is then further alleged that the defendants, acting as the board of trustees of said high school district, wrongfully and unlawfully breached said contract of employment, and without reason or cause, dismissed plaintiff as principal of said school, and thereafter refused to permit the plaintiff to resume the discharge of his duties under said contract as principal of said high school. The complaint then asks for damages in the sum of \$2,100, being the unpaid portion of the salary mentioned in the contract or agreement of employment.

As a defense to this action the defendants, after admitting all the preliminary matters set out in the plaintiff's complaint, deny the employment of the plaintiff for the school year embraced within the notice of agreement herein set forth, and further deny that the defendants, as trustees of said high school district, or otherwise, unlawfully breached the contract of employment with the plaintiff, or without reason or cause dismissed the plaintiff as principal of said high school district, and by amended answer the defendants set forth that there was no lawful contract of employment between the plaintiff and the defendants, and, further, that on the 21st day of November, 1923, written charges were filed with said defendants as the board of trustees of said high school district charging the plaintiff with unprofessional conduct, incompetence, evident unfitness to teach, and per-

sistent violation and refusal to obey the school laws of the state of California and the reasonable rules prescribed for the government of public schools; that notice of the filing of said charges was served upon the plaintiff according to the law, and that thereafter a hearing was held upon said charges at which hearing plaintiff was represented by counsel, witnesses were sworn and examined, and at the conclusion of such hearing the defendants, as trustees of said district, found the plaintiff guilty on all of said charges and dismissed him as principal of the said Glenn County high school district, and duly notified him thereof.

Upon the hearing of this cause before the trial court the plaintiff introduced testimony showing his employment as principal of said high school beginning with May or June, 1920, and that he had continued as such principal until the time of his dismissal as hereinbefore stated. Considerable testimony was introduced as to the number of teachers employed in said schools which is not material to be considered herein. The testimony further shows that the plaintiff assumed his duties as principal under the contract of employment hereinbefore mentioned, during the latter part of August, 1923. The contract or notice of employment was introduced in evidence. The amount of money which had been paid the plaintiff on account of his salary of \$3,000 per year, and the amount still remaining unpaid thereon was likewise proven. It was further shown by the testimony that the plaintiff was at all times ready and willing to resume his duties as principal of said school during the time covered by the notice or agreement of employment. Upon cross-examination it was shown that the plaintiff, during the school year covered by the notice of employment, had earned a sufficient sum of money by reason of other employment to reduce his damages to the sum of \$1,398.75 on account of the unpaid portion of the salary agreed to be paid to him in the event the court held plaintiff was entitled to recover. Judgment was entered in plaintiff's favor for said sum. Upon cross-examination and also as a part of the defendants' defense, the defendants introduced in testimony the following charges against the plaintiff filed with the defendants as the trustees of Glenn County high school district, to wit:

"Board of Trustees of Glenn County High School District, Willows, California—Gentlemen: The undersigned hereby charges W. H. Hooper, the principal of the Glenn County high school at Willows, Cal., with unprofessional conduct, incompetence, evident unfitness for teaching, and persistent violation of the reasonable rules prescribed for the government of the schools by the state board of education and by the board of trustees of the Glenn County high school. That said unprofessional conduct consists in the following acts on the part of the said W. H. Hooper: * * * in making erroneous statements in his report to the superintendent

of public instruction and to the county superintendent of schools, during the month of October, 1923, and also in making the statement to the board of school trustees of Glenn County high school district that the accounts of the student body had been audited by Mr. E. O. Talbott and himself, and that no indebtedness, except for a moving picture machine, existed, when as a matter of fact the accounts had not been so audited and numerous other debts are charged to said student body. That the persistent violation of the reasonable rules prescribed for the government of the schools by the state board of education and the board of trustees of the Glenn County high school consists in his failure and refusal to be at the schoolhouse of said Glenn County high school district at the times specified and provided for in the rules of the state board of education, and the rules and instructions of the board of trustees. That the commission of the acts as charged above on the part of the said W. H. Hooper render him unworthy, incompetent, and unfit to hold the principalship of the school."

[1] These charges were filed against the plaintiff with said board of trustees by C. R. Wickes, one of the members of said board of trustees, and one of the defendants herein. Other charges were filed against the plaintiff relating to acts of the plaintiff during a previous year, but neither such charges nor the action of the board of trustees taken thereon were admitted in evidence. As the charges just referred to and the action of the defendants as the board of trustees of said high school district related to a period not included within the contract of employment involved in this action, we think that there was no error on the part of the court in excluding the same. The defendants also introduced in evidence the minutes of themselves while acting as a board of trustees passing upon the charges set forth herein, finding the plaintiff guilty.

No evidence whatever was introduced or offer made to introduce any evidence showing the truth of the charges preferred against the plaintiff, nor was any testimony whatever introduced to show that the defendants, as the trustees of said high school district, had just, or any, cause to dismiss the plaintiff from his position and employment as principal of the high school of said district. The cause was submitted to the court simply upon the record showing the filing of charges and the verdict or conclusion of the defendants as the board of trustees of said school district acting thereon. Upon this state of the record the trial court entered judgment for the plaintiff as stated, and the defendants appeal.

[2] The employment of plaintiff having been shown, his readiness to fulfill his part of the contract, and the breach of the defendants having been established by their dismissal of the plaintiff during the school year, does the simple offering in testimony of the charges preferred against the plaintiff, notice

of the time of hearing, the fact of hearing, and the conclusion of the defendants acting as the board of trustees of said district constitute any defense to the action? Subdivision (j) of section 1609 of the Political Code empowers the trustees of a school district to dismiss a principal for one or more of the following causes, after a fair and impartial hearing, to wit: Immoral or unprofessional conduct; incompetence; evident unfitness for teaching; persistent violation of, or refusal to obey the school laws of California or reasonable rules prescribed for the government of public schools. This subdivision of the section is followed by others relating to procedure not material here for the reason that no question is raised as to the procedure in this cause. We come then to the subdivision pertaining to this action, which reads:

"Nothing in this act shall be construed in such manner as to deprive any teacher of his rights and remedies in a court of competent jurisdiction on a question of fact and law."

This subdivision of section 1609 of the Political Code was under consideration by this court in the case of *Alexander v. Manton Joint Union School District*, 73 Cal. App. 252, 238 P. 742, and this court, speaking through Mr. Presiding Justice Finch, said:

"It would be difficult to give the provision quoted any meaning other than that, upon the discharge of a teacher for any alleged cause, he is entitled to maintain an action in court to determine the truth or falsity of the charges preferred against him. The reasons which may have actuated the Legislature in giving a teacher such right are well illustrated by the facts in this case. The trustees, as the representatives of one party to the contract, preferred the charges against plaintiff."

In this particular the circumstances of the case at bar are exactly parallel with the circumstances presented in the *Alexander Case*. One of the trustees preferred the charges, and also acted in the capacity of a trustee to determine their truth or falsity. Further considering the circumstances in the *Alexander Case*, it appears that the respondent, the Manton school district, after offering the charges in evidence, offered to prove the truth of the charges preferred against the plaintiff by independent testimony without reference to the decision of the school board. To this offer the plaintiff objected. While the form of the offer in that case was not as clear and definite as might have been made, this court held that the trial court was in error in refusing to admit testimony to show the truth of the charges preferred against the plaintiff, and that the trial court committed reversible error in excluding such testimony. The trial in the *Alexander Case* proceeded upon the theory that the decision of the board of trustees upon the charges preferred was final and conclusive. The substance of the

holding in the case of *Alexander v. Manton*, supra, is that upon an action such as is being presented to us upon this appeal, the trial court is vested with authority to hear all pertinent testimony relative to the support of the charges preferred against the plaintiff as principal of the high school district, to show the propriety, correctness and justness of the action of the board of trustees in ordering his dismissal. The holding in the *Alexander Case*, as we read it, is also further to the effect that subdivision 5 of section 1609 of the Political Code lays the whole matter open before the trial court for inquiry and investigation as to the truthfulness of the charges, as though no testimony had been taken before the board of trustees and no action had thereon. The very wording of the subdivision seems to necessitate such holding in providing that "nothing in this act shall be construed in such manner as to deprive any teacher of his rights and remedies in a court of competent jurisdiction on a question of fact and law." That is equivalent to saying that none of the provisions contained in section 1609 of the Political Code shall be so construed as to prevent a teacher from bringing an action for a violation of a contract held by him with a board of school trustees which necessitates the further holding, as would be the case in any ordinary action, that all that is necessary for a plaintiff to do is to prove the contract of employment, his readiness to perform and the breach by the opposite party. That is one of the rights included and referred to in subdivision 5 of said section 1609, because it is one of the rights given to a teacher just the same as to any other party to maintain an action for a violation of contract. The language of said subdivision of said section is also equivalent to saying that in such an action it is incumbent upon the party disavowing the contract to show that he is justified in such disavowal, as the rights guaranteed by said subdivision give to the teacher the same rights that are vouchsafed to other parties occupying contractual relations.

The form of the action does not appear to us to be at all decisive of the rights of the parties or as to proofs sustaining the action of either of the parties to the contract. That is to say, in any case a party breaching a contract must show good cause therefor. This is further illustrated in the case of *Goldsmith v. Board of Education*, 66 Cal. App. 157, 225 P. 783, where the subject-matter of the dismissal of a school teacher was elaborately considered by this court in an opinion written by Mr. Justice Hart. A consideration of that opinion shows that while the action was one praying for a writ of mandate, the trial court had before it not only the charge preferred against the teacher, but also all the evidence upon which the decision of the board of education was based, and it was upon this evi-

dence that the trial court held that the action of the board of education was amply supported, and upon appeal to this court it was held that such evidence supported the charge filed against the teacher, and the acts referred to in the testimony constituted acts condemned by the statute and affirmed the judgment of the trial court. While in form an action for a writ of mandate, all the testimony bearing upon the truthfulness of the charges preferred against the teacher was placed before the trial court just as we hold it should have been done in this case. It is not incumbent upon the plaintiff to prove a negative. As we have stated, occupying a contractual relation, all he was called upon to do in the first instance was to introduce proof showing employment, the term of the employment, his readiness to perform, and the breach on the part of the defendants, or their refusal to permit performance, and the burden of showing justification or excuse for such refusal was then cast upon the defendants. In other words, it was their duty to introduce testimony showing the truth of the charges upon which they had acted. The simple introduction of the charges and of their action thereon did not, under the subdivision of the section of the Political Code which we have referred to, tend to establish any defense, as the charges in and of themselves and the action of the defendants thereon prove nothing. It may be that the very fact that boards of school trustees frequently act in the capacity of complaining witnesses, prosecutors and judges induced the legislature to write into section 1609 of the Political Code the subdivision which gives a teacher a right to prosecute his action for the violation of contract where the justification of the action of the board in dismissing a teacher and disavowing its contract must be established.

By reason of the fact that the two cases from the District Court of Appeal which we have cited refer to practically all of the California cases relating to the dismissal of teachers, further citations are not herein given. It is sufficient to say that in whatever form the question has arisen, the facts appear to have been inquired into by the trial court, and we think such would have been the proper procedure in this case. We do not think that the appellants' contention that no contract of employment existed by reason of the action of the board of trustees on June 2, 1923, and the acceptance thereof by the plaintiff, is tenable, and therefore will not be discussed herein.

No attempt having been made to introduce any testimony showing that the defendants, as the board of trustees of said high school district, were justified in their disavowal of their contract with the plaintiff and ordering his dismissal, it follows that the judgment of

the trial court awarding damages suffered by the plaintiff must be and the same is affirmed.

We concur: FINCH, P. J.; HART, J.

88 Cal. App. 505

PEOPLE v. WESTWOOD. (Cr. 1434.)

District Court of Appeal, First District, Division 2, California. Jan. 21, 1928.

1. Burglary $\S$ 41(1)—Evidence held sufficient to sustain conviction for burglary.

In prosecution for burglary of wholesale drug house by one entering through rear and taking articles not paid for, evidence held sufficient to sustain conviction as against claim that defendant had no intent to commit larceny at time of entry.

2. Criminal law $\S$ 115(2)—Conviction supported by some evidence is not disturbed on appeal.

Where there is some evidence from which jury could find crime was committed, conviction will not be disturbed on appeal.

Appeal from Superior Court, City and County of San Francisco; James G. Conlan, Judge.

Charles Westwood was convicted of burglary, and he appeals. Affirmed.

Milton T. U'Ren, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Emery F. Mitchell, Deputy Atty. Gen., for the People.

STURTEVANT, J. The district attorney filed an information against the defendant charging him with the commission of the crime of burglary. The defendant pleaded not guilty, and a trial was had before the trial court sitting with a jury. The jury returned a verdict of guilty. The defendant made a motion for a new trial, also a motion in arrest of judgment. The motions were denied, and the defendant has appealed from the judgment and from the order denying him a new trial.

[1, 2] The defendant presents the point that the prosecution absolutely failed in its endeavor to prove that the defendant entered the premises with the intent to commit larceny. A consideration of the point involves at least the following facts:

Coffin-Redington Company conduct a wholesale and retail drug business, at 401 Mission street, in the city and county of San Francisco. Between the hours of 12 and 1 o'clock the employees of this company go to lunch, and a sign "Closed between 12 and 1" is hung on the front door, and the shades are drawn. There is a back door which, at the time the defendant entered the premises, was closed but unlocked. During the lunch hour on July

13, 1927, William Mahoney, a salesman in the employ of the company, was in the store and seated at a place in the salesroom at a spot from which he could not readily be seen. While seated there he heard a person coming down the floor from the shipping room, which is in the back part of the premises. Later he saw the defendant put a comb and brush into his pocket. The defendant commenced going through more goods. When the defendant saw Mahoney seated in the room near by, defendant asked him if he had awakened him. The defendant then stated that he had come into the store to buy some adrenalin. He was told that he could make no purchases during the noon hour. He said that he would come back at 1 o'clock and started out. At first he turned toward the back door and then turned toward the front door. At the front door he was arrested by Mahoney. Later the police officer came and upon taking the defendant into custody he was searched and the comb and brush, the property of the company, were taken from the defendant's inside pocket. The police officer testified that the defendant asked him what he was going to charge him with, and, upon being informed that the charge would be burglary, the defendant said, "Charge me with petit larceny." At the same time the defendant gave him the name of Charles Wilson. He admitted that he had not bought the articles taken from his pocket.

The defendant contends that in the charge of burglary intent is a necessary element. Thereupon he argues that the record contains no evidence to the effect that the defendant entered the premises 401 Mission street with intent to steal, but that the evidence is such that the intent to steal may have been formed after the entry, and that the offense, if anything, was petit larceny and not burglary. The defendant cites *State v. Carroll*, 13 Mont. 246, 33 P. 688; *State v. Moore*, 12 N. H. 42, 48, 49; *People v. Barry*, 94 Cal. 481, 484, 29 P. 1026; *People v. Lowen*, 109 Cal. 381, 42 P. 32. Conceding the rule of law is as contended by the defendant, we think that the facts do not support the defendant's contention. True it is that no witnesses saw the defendant enter the back door. Nevertheless, he was heard to come from that direction, and the record does not disclose how he could have entered any other door. The fact that at the time of his arrest he made a false statement as to his name was at least some evidence of guilt. The fact that he inquired as to what charge would be placed against him would seem to imply that he was conscious of having committed at least two offenses, burglary and petit larceny. In other words, the record presents some evidence showing the intent with which the defendant entered the premises, and the implied finding of the jury was that he had entered the building with an unlawful intention. Under these circumstances,

this court may not disturb the judgment based on that verdict. We think the conclusion which we have reached is supported by, rather than questioned by, the authorities cited by the defendant, and that it is further supported by *People v. Brittain*, 142 Cal. 8, 75 P. 314, 100 Am. St. Rep. 95, and *People v. King*, 4 Cal. App. 213, 87 P. 400.

We find no error in the record. The judgment and order are affirmed.

We concur: BURROUGHS, Presiding Justice pro tem. NOURSE, J.

88 Cal. App. 558

PEOPLE v. EDENBURG. (Cr. 1557.)

District Court of Appeal, Second District, Division 2, California. Jan. 24, 1928.

1. Criminal law ☞1166½(6)—Collective examination of jury by judge, with denial of right to ask questions covered by him, held not prejudicial error (Pen. Code, § 1078, as amended by St. 1927, p. 1039).

Collective examination of jurors by trial judge under Pen. Code, § 1078, as amended by St. 1927, p. 1039, with denial to counsel of right to ask questions covered by judge, held not prejudicial error, where it did not affirmatively appear that counsel was precluded from asking questions not theretofore covered, or that any juror who served was prejudiced, and defendant did not exhaust his peremptory challenges.

2. Constitutional law ☞197—Question in determining whether law is *ex post facto* is whether accused was deprived of substantial right.

Real question in determining whether a law is *ex post facto* is whether accused was deprived of substantial right.

3. Constitutional law ☞197—Law is "*ex post facto*" as to acts already committed, where it makes innocent act criminal, or aggravates crime, or inflicts greater punishment, or authorizes different or less testimony.

Law is "*ex post facto*" where (1) it makes act criminal which was done before passing of law and was innocent when done, (2) it aggravates crime or makes it greater than when committed, (3) it inflicts greater punishment than was annexed to crime when committed, or (4) it authorizes less or different testimony than was required when offense was committed.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, *Ex Post Facto*.]

4. Constitutional law ☞199—Statute changing criminal procedure to require court to examine jurors in first instance to determine qualifications, rather than parties, is not "*ex post facto*" as concerns offenses committed before it took effect (Pen. Code, § 1078, as amended by St. 1927, p. 1039).

Pen. Code, § 1078, as amended by St. 1927, p. 1039, providing that it shall be duty of trial

court to examine prospective jurors, thus casting duty of examination on court in first instance, instead of parties, as theretofore under said section, *held* not *ex post facto* as to offenses committed before it took effect, in view of sections 1081, 1082, since change does not deprive defendant of any substantial right.

5. Kidnapping ☞1—Statute denouncing child stealing protects all minor children (Pen. Code, § 278, and § 784, subd. 2).

Pen. Code, § 278, providing that every person maliciously, forcibly, or fraudulently taking or enticing away "any minor child," with intent to detain and conceal it from person having lawful charge of it, shall be punished, protects all minor children, and is not limited to children under 12 years of age by section 784, providing in subdivision 2 for venue of offense of decoying, taking, or enticing away "child under the age of 12 years," with intent to detain and conceal it from person having lawful charge of it, in view of section 777.

6. Kidnapping ☞1—Instruction that, to convict of child stealing, it was unnecessary to prove that defendants actually concealed or detained children from parents, held not error (Pen. Code, § 278).

Instruction that, to convict defendants of child stealing, it was not required that prosecution should prove that defendants actually concealed or detained children from parents, *held* not error under Pen. Code, § 278.

7. Criminal law ☞829(3)—Refusing instruction on intent in child stealing held not error, where covered by given instructions.

Refusing instruction, in prosecution for child stealing, that, when specific intent is element of offense, no presumption of law can arise to decide it, *held* not error, where covered by given instructions.

8. Criminal law ☞829(9, 13)—Refusing instruction on presumption of innocence and reasonable doubt held not error, where covered by given instructions.

Refusing instruction that presumption of innocence is not only sufficient on which to base acquittal, but is of such importance that jury must acquit, unless convinced beyond reasonable doubt of guilt, *held* not error, where covered by given instructions.

9. Criminal law ☞369(1)—Generally, testimony of separate offense is inadmissible.

It is general rule that testimony of separate and distinct offense is not admissible.

10. Criminal law ☞371(1)—Testimony of separate offense is admissible, where having direct tendency to prove intent in committing act involved in instant case.

Testimony of separate and distinct offense is admissible, where it has a direct tendency to prove intent in committing act for which defendant is on trial.

11. Kidnapping ☞5—Evidence of sexual intercourse between defendant and girl held admissible to show intent in prosecution for child stealing (Pen. Code, § 278).

Evidence to show that defendant had sexual intercourse with girl *held* admissible to show

intent with which girl was enticed from parents, in prosecution for child stealing under Pen. Code, § 278.

Appeal from Superior Court, Kings County; K. Van Zante, Judge.

Oscar Edenburg was convicted of child stealing, and he appeals. Affirmed.

John G. Covert, of Hanford, for appellant.
U. S. Webb, Atty. Gen., and James S. Howie and Warner I. Praul, Deputy Attys. Gen., for the People.

THOMPSON, J. The defendants Oscar Edenburg and Guy Watley were jointly charged and convicted of the offense of child stealing, a crime denounced by section 278 of the Penal Code. The appellant, Oscar Edenburg, prosecutes this appeal from the judgment of conviction.

It appears from the testimony that Mr. and Mrs. Lockhard, the parents of Ruby and Leona, 14 and 15 years of age, respectively, were operating a restaurant at Corcoran, Cal., and required the help of their daughters in its operation very early in the morning and late into the evening. For some little time prior to June 28, 1927, the daughter of Mr. Lockhard's first cousin, by name Ida May Wilson, apparently in years of about the same age as Ruby and Leona, had been visiting at Corcoran, and was anxious that the two girls should return with her to Los Angeles. A few days prior to June 28th the appellant suggested to the girls that he was going to Los Angeles, and that they should come with him and the defendant Guy Watley. He promised them a good time, no work, and the privilege of going to dances and other places of amusement. He promised Ruby that they would get married, go to Phoenix, Ariz., then to some little town where they could stay until everything was over with, when they could return to Los Angeles, and make their home. He arranged to get the girls after everybody was asleep, and accordingly, at about 3 o'clock in the morning, he helped them to escape out of the window of their room, from which the screen had been cut for the purpose, and the four of them started. On arriving in Los Angeles Wednesday afternoon Ruby was sent to the door of the home of Ida May Wilson, with oral instructions from the appellant not to let them know who she was. Ida May was not at home, and the girls were taken to a place designated as "Mother Houston's" on Forty-Seventh street. Later in the day they succeeded in getting into communication with Ida May, and the two defendants and the three girls attended a dance that evening. The four of them stayed at "Mother Houston's" that night. On the following day the two men and the girls went to Watts for the purpose of enabling the appellant to borrow money to continue their trip to Phoenix. On

the way they stopped some distance from the home of Ida May while the defendant Guy Watley went to the house and got Ida May to accompany them to Watts. The girls were told by the appellant not to go to the house with Watley. They did not secure the needed funds at Watts, and on the return to Los Angeles appellant, according to the testimony of the Lockhard girls, threatened "to beat hell out of" them if they went to the home of Ida May Wilson. However, Leona did go, and stayed there that night, while the appellant and Guy Watley, together with Ruby, stopped overnight at a place designated as "Bessie's," where the three of them slept in the same bed, and where the appellant had sexual intercourse with Ruby. The next day the appellant was arrested in the back yard of this same house behind a chicken coop; he and Ruby having gone out the back door when the father and officers approached the front door. There was also testimony tending to show that the two places mentioned where the appellant and defendant stopped in Los Angeles did not bear good reputations.

[1] In the selection of the jury to try the cause the prospective jurors were examined by the trial judge, and he refused to permit counsel to ask any questions which had been covered by him in his examination. The trial judge, after cautioning each of them to answer candidly, asked the prospective jurors collectively concerning whether they had any prejudice against the defendants because of the nature of the charge, or of their arrest, also concerning their relationship with the attorneys, and acquaintance with either of the defendants, whether they had heard anything concerning the case, whether they were biased or prejudiced by any fact, if there was any reason they could not give the defendants a fair trial, concerning their sympathy, with the usual instruction that the jurors are the sole judges of the facts, and the one concerning the presumption of innocence and the requirement that the state must prove its case beyond a reasonable doubt, and whether they would follow all of the instructions of the court. In each instance the question was so worded that it might be answered by raising, or failing to raise, the hand, and, if no hand were raised, the judge announced "no hand is raised," or some equivalent statement. After this examination, the judge remarked to counsel, "The attorneys for the defendant may ask the jurors, or any one of them, any questions that are not covered by the court," which ruling was consistently followed to the extent that the trial judge sustained an objection to a question propounded by counsel for the defense asking the prospective jurors if they understood that "it requires the joint operation" of "the intent and the act" to constitute a crime, on the theory that this question was covered by the question concerning whether they would abide by all of the in-

structions of the court. This sufficiently states the manner of selecting the jurors to understand the objections of appellant thereto, which are that "he was deprived of the right to question the prospective jurors for the purpose of determining whether or not they were unbiased and properly qualified to give him a fair and impartial trial," and that the amendment of section 1078 of the Penal Code, providing for the examination of prospective jurors by the judge, violates the constitutional inhibition against *ex post facto* laws in its application to trials for offenses committed prior to the time it took effect.

Undoubtedly, appellant was entitled, as he avers, to a fair and impartial trial by jury, and, if this was denied him, it would constitute reversible error. It does not appear from the record, however, that he was deprived of this right. We said recently in the case of *People v. Riordan* (Cal. App.) 250 P. 190:

"It has repeatedly been decided that, in jurisdictions where no statutory limitation or restriction of such examination to individual jurors exists, a judgment will not be reversed unless it shall affirmatively appear that the defendant was precluded from interrogating the jurors upon matters not theretofore covered, or that any juror who served was prejudiced or not qualified. *Nichols v. State*, 97 Tex. Cr. R. 174, 260 S. W. 1050; *Murphy v. U. S. (C. C. A.)* 7 F.(2d) 85; *State v. Munch*, 57 Mo. App. 207; *Johnson v. State*, 29 Wyo. 121, 211 P. 484."

In addition to the fact that it does not appear that counsel was precluded from asking questions "not theretofore covered," or that "any juror who served was prejudiced," we are confronted by the situation that the defense did not exhaust its peremptory challenges, and therefore it rather appears from the record that those who did serve were neither prejudiced nor lacked the necessary qualifications. Somewhat pertinent to the instant case is the statement in *People v. Craig*, 196 Cal. 19-26, 235 P. 721, 723:

"By all of the authorities of this state touching like situations the rule is that an erroneous disallowance of a challenge for cause is not prejudicial even though the defendant finally exhaust his peremptory challenges if it does not appear that he had occasion to or desired to use an additional peremptory challenge or that the jurors finally accepted were not entirely satisfactory to him."

While we do not care to affix the stamp of approval to the method of collectively examining prospective jurors, on account of the dangers which beset its course, nevertheless the examination in this instance seems to have been quite comprehensive, and we are satisfied no prejudicial error is made to appear, and that defendant was not deprived of a fair and impartial trial by jury.

[2] We now turn to the claim of appellant that the amendment of section 1078 of the Penal Code violates the constitutional inhi-

bition against *ex post facto* laws in its application to trials for offenses committed prior to the time it took effect. As amended (St. 1927, p. 1039), it reads as follows:

"It shall be the duty of the trial court to examine the prospective jurors to select a fair and impartial jury. He shall permit reasonable examination of prospective jurors by counsel for the people and for the defendant."

Prior to the amendment the section read:

"Trial of challenge. If the facts are denied, the challenge must be tried by the court."

By this section and sections 1081 and 1082 of the Penal Code it would seem that the Legislature assumed that the challenge for cause and the denial of the fact asserted as the foundation thereof should precede the examination of a juror. It is stated in *People v. Edwards*, 163 Cal. 752, 754, 127 P. 58, 59, that:

"In practice, however, it usually saves time and promotes justice to allow the party to first elicit the facts by questioning the juror, and this course is generally followed. *People v. Reynolds*, 16 Cal. 131. There is no other provision for the examination of jurors either to prepare for or to prove the basis for a challenge to an individual juror."

It will be seen, therefore, that the change consists in casting the duty upon the court of examining the jurors in the first instance to determine whether or not there exists a reason for a challenge for cause. The respondent asserts that the change relates to a procedural change, and therefore is not *ex post facto* in an objectionable sense. It is an insufficient answer to appellant's contention to say that the amendment involves a procedural change. Not all procedural changes are outside the inhibition. The real question to be framed is whether the person accused has been deprived of a substantial right by reason of the change. Illustrative of this we quote from the case of *Kring v. Missouri*, 107 U. S. 221, 2 S. Ct. 443, 27 L. Ed. 506:

"Can the law with regard to bail, to indictments, to grand juries, to the trial jury, all be changed by state legislation, after the offense committed, to the *disadvantage* of the prisoner, and not held to be *ex post facto*, because it relates to procedure, as it does according to Mr. Bishop?"

"And can any *substantial right* which the law gave the defendant at the time to which his guilt relates be taken away from him by *ex post facto* legislation, because, in the use of a modern phrase, it is called a law of procedure? We think it cannot." (Italics ours.)

[3] And from the same case, quoting from *Calder v. Bull*, 3 Dall. 386, 1 L. Ed. 648, we find a statement of four distinct classes of laws which violate the constitutional guaranty, two of which may involve changes in procedure. They are as follows:

"1. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal, and punishes such

action. 2. Every law that aggravates the crime or makes it greater than it was when committed. 3. Every law that changes the punishment, and inflicts a greater punishment than was annexed to the crime when committed. 4. Every law that alters the legal rules of evidence, and receives less or different testimony than the law required at the time of the commission of the offense * * * to convict the offender."

[4] Viewing the complaint of appellant in the light of these enunciations from the United States Supreme Court, we conclude that the amendment relates to a procedural change of such a character as not to deprive him of any substantial right, and does not fall within any of the four classes enumerated. Nor was he deprived of a fair and impartial trial by a jury of twelve men, nor was less or different testimony sufficient to convict. The change falls within the same bounds as those found not to violate the constitutional provision in *People v. Mortimer*, 46 Cal. 114; *People v. Campbell*, 59 Cal. 243, 43 Am. Rep. 257; *People v. Schmidt*, 33 Cal. App. 426, 165 P. 555; *People v. Gibson*, 39 Cal. App. 202, 178 P. 338; and *People v. O'Bryan*, 165 Cal. 55, 130 P. 1042.

[5] The appellant next assails the judgment for errors which he claims the trial judge committed in refusing and giving instructions. First he asserts that the court erred in refusing to give a requested instruction as follows:

"You are instructed that the offense charged in the information pertains to and is restricted to children under the age of twelve years; and if you find that the children, alleged to have been taken or enticed away from their parents, were over the age of twelve years, then you are instructed to acquit the defendants."

Section 278 of the Penal Code reads as follows:

"Every person who maliciously, forcibly, or fraudulently takes or entices away any minor child with intent to detain and conceal such child from its parent, guardian, or other person having the lawful charge of such child, is punishable by imprisonment in the state prison not exceeding twenty years."

Counsel bases his argument upon the fact that section 784 of the Penal Code, which states that the jurisdiction of certain criminal actions shall be in the county in which the offense is committed, etc., provides in subdivision 2 thereof as follows:

"2. For decoying, taking, or enticing away a child under the age of twelve years, with intent to detain and conceal it from its parent, guardian, or other person having the lawful charge of the child."

He argues that the offense mentioned in this section is the same as that denounced by section 278 and hence must be construed as a limitation upon it. It will be noted that section 784 merely fixes the jurisdiction for certain offenses, and that by section 777 of

the Penal Code, where the jurisdiction is not otherwise provided, "the jurisdiction * * * is in the county wherein it is committed." We see nothing necessarily inconsistent in sections 278 and 784, and, in accordance with the well-recognized rule of statutory construction that all parts and phrases shall be construed so as to give each and every part thereof a meaning, we can arrive at no conclusion other than that section 278 was intended to guard all minor children against those who would entice them away from their natural guardians, their parents, or from their legal guardians. As a possible aid to this construction, it should be noted that in the next case to which reference is made, *People v. Black*, *infra*, the child there was of the age of 16 years.

[6] The next instruction complained of was one given by the court as follows:

"You are instructed that in order to convict the defendants it is not required that the prosecution prove that the defendants actually concealed or detained Ruby Lockhard or Leona Lockhard from their parents."

[7] Appellant relies upon the authority of *People v. Black*, 147 Cal. 426, 81 P. 1099, which holds "that the gist of the offense consists of the taking and enticing away of a minor child 'with intent to detain and conceal such child' from its parent, guardian, or other person having lawful charge of it. In a prosecution under this section it is not enough to show that there was an intent to conceal the minor, but the intent must be accompanied with an intent to detain, and both must exist and be found by the jury in order to constitute an offense under the statute." We garner from counsel's argument and his objection to the instruction that his construction upon the language just quoted is that there must be an actual concealment and detention, but we do not so understand that case. It simply means, and the instructions are in accord, that the intent to conceal and the intent to detain must be proven as a fact in the case. It does not say that the intent needs necessarily to be accompanied by an actual concealment and actual detention. We do not repeat the instructions of the court upon the subject of intent for the reason that the next objection of counsel is to the refusal of the court to give the following instruction:

"When specific intent is (an) element of offense no presumption of law can arise that will decide this question of intent."

The jury were very fully instructed upon this phase of the trial in not less than five instructions, and it will be sufficient for the purposes of this opinion if we point out that the court elaborately conveyed to them the substance of the law announced in *People v. Black*, *supra*, and in addition stated that:

"* * * When a specific intent is an element of the offense it presents a question of fact which must be proved like any other fact in the case. All the circumstances surrounding the act furnish the evidence from which the presence or absence of the specific intent may be inferred by the jury; and no presumption of law can ever arise that will decide it."

It will therefore be apparent that the subject of the requested instruction was amply covered.

[8] Appellant also complains because the trial court refused to give an instruction requested by him to the effect that the presumption of innocence is not only sufficient upon which to base an acquittal, but is of such importance that the jury must acquit, unless, after hearing the evidence, the jury is convinced beyond a reasonable doubt of defendant's guilt. In other instructions the court fully covered the law on the subject of presumption of innocence and reasonable doubt, and the jury, as reasonable men, could not have failed to understand the law upon this phase of the case.

[9-11] The last assignment of error asserts that the court improperly received evidence showing that appellant had sexual intercourse with Ruby Lockhard during the night that she remained with him and the other defendant at the place designated as "Bessie's." Concededly it is the general rule, as counsel contends, that testimony of a separate and distinct offense may not be introduced. A well-recognized exception to this general rule, however, is where proof of the distinct offense has a direct tendency to prove the intent with which the act was done for which the defendant is on trial. *People v. Cook*, 148 Cal. 334, 83 P. 43; *People v. Ratledge*, 172 Cal. 401, 156 P. 455; *People v. Lopez*, 135 Cal. 23, 66 P. 965. It cannot be gainsaid that proof of intercourse with the girl by the appellant while they were in Los Angeles tended directly to show the intent with which she was enticed from her parents.

Judgment affirmed.

We concur: WORKS, P. J.; CRAIG, J.

88 Cal. App. 375

PEOPLE v. PLUM et al. (Cr. 1009.)*

District Court of Appeal, Third District, California. Jan. 24, 1928.

Rehearing Denied Feb. 21, 1928. Hearing Denied by Supreme Court March 22, 1928.

1. Indictment and information $\S$ 119—Words "steal and carry away" in information, otherwise in statutory form, for grand theft may be treated as surplusage, in absence of prejudice to defendants (Pen. Code, $\S$ 484, as amended by St. 1927, p. 1046, $\S$ 1, and $\S$ 952, as amended by St. 1927, p. 1043).

Words "steal and carry away" in information, otherwise in precise form prescribed by Pen. Code, $\S$ 952, as amended by St. 1927, p. 1043, for grand theft in violation of section 484, as amended by St. 1927, p. 1046, $\S$ 1, may be treated as surplusage, in absence of any possible prejudice to defendants.

2. Indictment and information $\S$ 110(18)—Statute merges crimes of larceny, embezzlement, and obtaining property by false pretenses into crime of theft, charge of which substantially in statutory form is sufficient (Pen. Code, $\S\S$ 870, 925, and $\S$ 484, as amended by St. 1927, p. 1046, $\S$ 1, and $\S$ 952, as amended by St. 1927, p. 1043).

Pen. Code, $\S$ 484, as amended by St. 1927, p. 1046, $\S$ 1, merges former crimes of larceny, embezzlement, and obtaining property by false pretenses into one crime of theft, charge of which substantially in form prescribed by section 952, as amended by St. 1927, p. 1043, is sufficient, especially in view of sections 870, 925, requiring that transcript of testimony at preliminary examination or before grand jury be furnished defendant in event of commitment for trial or indictment.

3. Larceny $\S$ 43—Defendant meat inspector's report for September held immaterial in trial for larceny of cattle inspected by him in August.

In trial of city meat inspector and slaughterhouse owner for grand theft of cattle by falsely representing that they were condemned as tubercular after their sale and delivery to latter defendant, former defendant's official report for September, showing condemnation of three of latter's cattle in that month, was immaterial, where witnesses for both prosecution and defendants testified that cattle sold were inspected in August.

4. Criminal law $\S$ 1120(3)—Supreme Court cannot determine whether excluded bill of sale, not made part of record, was material.

Where excluded bill of sale, offered in evidence by defendants, was not made part of record and it does not appear when or by whom it was executed or what were its contents, appellate court cannot determine whether it was material in trial for larceny of cattle.

5. Criminal law $\S$ 772(2)—Ordinarily, instruction should be given in language of statute defining crime.

Ordinarily, it is best to give an instruction in the language of the statute defining the crime charged.

6. Larceny $\S$ 68(1)—Whether cattle were taken by trespass from owner's possession, fraudulently converted while in wrongdoer's possession, or obtained by criminal false pretenses held for jury (Pen. Code, $\S$ 484, as amended by St. 1927, p. 1046, $\S$ 1).

In trial for grand theft of cattle, in violation of Pen. Code, $\S$ 484, as amended by St. 1927, p. 1046, $\S$ 1, it was for jury to determine from facts proved whether taking thereof was by trespass from possession of owner, fraudulent conversion while in wrongdoer's possession, or by criminal false pretenses.

7. Criminal law $\S$ 779—Instruction on conspiracy held unnecessary, in view of instructions at defendant's request not to consider codefendant's admissions and declarations as evidence against former defendant.

Where court repeatedly instructed jury at one defendant's request that admissions and declarations by codefendant could not be considered as evidence against former defendant, it was not necessary to instruct jury on subject of conspiracy.

8. Criminal law $\S$ 956(10)—Affidavit as to juror's statement before examination that she would hang defendant held not to warrant new trial, in absence of showing of diligence.

Affidavit that one summoned as juror told affiant before her examination that she would hang defendant because convinced that he was guilty held insufficient to warrant new trial, in absence of showing as to when defendants first discovered such juror's bias or whether testimony as to her qualifications showed bias or put defendants on further inquiry, or of any steps by defendants to make their affidavit that they had no knowledge of such facts a part of record.

Appeal from Superior Court, Yuba County; Eugene P. McDaniel, Judge.

Fred Plum and R. S. Christman were convicted of grand theft, and they appeal. Affirmed.

Ray Manwell and W. E. Davies, both of Marysville, for appellants.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

FINCH, P. J. The information charges the defendants with the crime of "grand theft, committed as follows: The said Fred Plum and R. S. Christman on or about the 29th day of August, A. D. 1927, at the county of Yuba, in the state of California, then and there being, did willfully and unlawfully take, steal, and carry away the property of one J. B. Dalby, consisting of 5 head of cattle, of the value of \$200." Neither defendant demurred to the information, and each of them entered a plea of not guilty. They were both convicted and sentenced to imprisonment in the state prison. This appeal is from the judgment and the order denying a new trial.

At the time of the alleged crime Christman, who is a veterinary surgeon, was meat in-

spector and health officer of the city of Marysville. Plum owned a meat market in Marysville and a slaughterhouse near Ostrom station, about midway between Marysville and the town of Sheridan. J. B. Dalby was a farmer, residing near Sheridan.

August 19, 1927, Dalby called Christman to the farm to treat a sick cow. Christman "looked at the cow" and "said it was a bad case of tuberculosis and there could be nothing done for her." Dalby then requested Christman to test the other cattle on the place, and on the following day Christman "injected the cattle with tuberculin, 11 head." He returned on August 23 and "said that out of the 11 there was 9 that reacted." Dalby testified:

"He advised us to sell the cattle and take a new start. I told him I would sell them to the Pleasant Grove butcher. * * * He said, 'If I was you, I would sell them to Fred Plum. I am inspector. I will do the inspecting and see you get a square deal. * * * If you sell the cattle anywhere else, there will be chances of loss.' I said, * * * 'I don't want anything to do with Fred Plum. * * * I sold him beef cattle and he owes me \$30 or \$40 that he has owed the last 6 or 8 years.' He says, 'There is plenty of money behind the business now, and you are safe in selling the cattle there.' * * * I says, 'All right. If that is the case, Fred Plum can have the cattle.'"

August 25 Christman again went to the farm and there branded the 9 head of cattle with the letter T on the left jaw. At that time he gave Dalby a written estimate of the weights of the condemned cattle and stated that they should bring 1 cent a pound below the San Francisco market. On August 27 Plum appeared at the farm and purchased 7 head of the cattle at the estimated weights and price suggested by Christman. He gave Dalby a check for \$50, on the back of which was indorsed, "Subject to inspection. Balance to be paid after cattle are inspected and passed." Later, on the same day, 6 of the cattle were taken to Plum's slaughterhouse. The seventh one was taken August 29, about the middle of the afternoon. Dalby testified that he saw the 6 head of cattle in Plum's corral at the slaughterhouse a "little after" noon on Monday, August 29; that on August 31 he saw Christman in Marysville, who stated that he had inspected 2 of the cattle, 2 calves; that they "passed all right," and that he "would go down that Wednesday evening and inspect the balance and notify us by mail on September 1st as to the result of the inspection"; and that on September 3 he received a letter from Christman reading as follows:

"Dr. R. S. Christman, D. V. M. Phone 334.
"Office of City Health Officer. City Hall.

"Marysville, California, September 2, 1927.

"Mr. J. B. Dalby, Sheridan, California—Dear Sir: The first of the month has kept me exceedingly busy, hence the delay in my promised note

to you, but will say I regret very much the fact that I had no alternative other than to condemn all of the cattle delivered by you to Mr. Plum's slaughterhouse, excepting the first two veal slaughtered.

"Out of my seven years' experience as a meat inspector I have never encountered such a virulent type of tuberculosis. They were lesionized throughout, which means generalization. Yours very truly, City of Marysville, R. S. Christman, Meat Inspector."

Clarence J. Dalby, a son of the witness last mentioned, gave testimony to the same effect as that stated.

Lester Mitchell testified that he had been "following the trade of butcher" for about 20 years; that he had worked for 2 years under federal inspection and 2 years under state inspection; that he had charge of Plum's slaughterhouse from August 10 to the latter part of September; that during that time he lived at the slaughterhouse with his family; that he butchered all of the Dalby cattle on August 30 and put the carcasses in the ice-box, hanging them separately in accordance with instructions given him by Plum; that he is "acquainted with the signs of tuberculosis in cattle, that is, butchered stuff"; that there were no signs of tuberculosis in the carcasses of the Dalby cattle; that he saw Plum in Marysville during the evening of the same day, at which time Plum "asked me how the cattle butchered out, the Dalby cattle. I said, 'All right.' He said they were reactors. I said, 'No; they were all right.' * * * He said, 'Don't you see what I mean? They are reactors. They are supposed to go down.' And I said, 'You can't get away with those calves,' and he says, 'Maybe I can't get away with the calves, but the other 5 are supposed to go down,'" that Plum there stated "that the cattle were to be sold and the Dalbys to be told they were destroyed;" that the witness sold the carcasses on Plum's instructions on September 1, some of them in Sacramento and some in Roseville; that in the evening of that day he delivered to Plum "the receipts, or tags, for the weight and price that I had sold to the different shops"; that Plum said, "It is too much to split with Dr. Christman;" that Plum then "deducted from \$8 to \$15 a head off of that" and said, "That looks better now, it is too much money for Mr. Christman to split;" that three or four days later "Plum came out with Dr. Christman" and "Plum called me off to one side and whispered to me that Dalby was making an investigation of his cattle, and if he came there and asked me if I tanked them to tell him yes;" that on August 31 Christman appeared at the slaughterhouse and stamped the carcasses of the Dalby cattle, "Marysville health department, inspected and passed," stamped them "with seven stamps on each side"; that at that time Christman "asked me, * * * 'Are these the Dalby cattle?' * * * I said, 'Yes;'" and that there were no "cattle tank-

ed or destroyed" during the time he was working for Plum.

The defendants and their witnesses gave testimony to the effect that the cattle in controversy were butchered by Mitchell on Sunday, August 28; that the carcasses were inspected and condemned by Christman on the following day, at which time he cut them down, "sliced them across" and poured coal oil over them to make them unfit for human food; and that they were then placed in the steam tank and cooked, the tallow then being drawn off and the meat fed to the hogs. There is other testimony corroborating or discrediting the testimony of one side or the other. Enough has been stated to show that the evidence is substantially conflicting on every contested issue.

[1] Appellants contend that under the provisions of section 484 of the Penal Code theft "may be committed in four different ways"; that the information charges "theft by asportation"; and that "the crime proved is that of obtaining property under false pretenses, which, under section 484, * * * is the third method, or mode * * * of committing theft." Section 484 was amended at the last session of the Legislature (St. 1927, p. 1046, § 1) for the purpose of avoiding such contentions as appellants make. In so far as applicable to the facts of this case it reads as follows:

"Every person who shall feloniously steal, take, carry, lead, or drive away the personal property of another, or who shall fraudulently appropriate property which has been intrusted to him, or who shall knowingly and designedly, by any false or fraudulent representation or pretense, defraud any other person of money, labor, or real or personal property, or who causes or procures others to report falsely of his wealth or mercantile character and by thus imposing upon any person, obtains credit and thereby fraudulently gets or obtains possession of money or property or obtains the labor or service of another, is guilty of theft."

At the same session section 952 was amended (St. 1927, p. 1043) to provide:

"In charging theft it shall be sufficient to allege that the defendant unlawfully took the property of another."

[2] If the words "steal and carry away" were omitted from the information, it would be in the precise form prescribed by the statute. It is not perceived that the defendants have suffered any possible prejudice from the use of those words in the charge, and they may be treated as surplusage. Under similar provisions of the statutes of Massachusetts it is said that:

The effect "is to put it beyond a doubt that the former crimes of larceny, embezzlement, and the obtaining of property by false pretenses, are now merged into the one crime of larceny. * * * This legislation was intended

to do away with the possibility of a criminal indicted for one of the three crimes mentioned escaping punishment by reason of its being afterwards found that his crime was technically one of the other two mentioned. A typical case of this kind is *Commonwealth v. O'Malley*, 97 Mass. 584. In that case the defendant had obtained by a trick possession of the money of an ignorant woman for a temporary purpose, and had fraudulently converted it to his own use. He had been prosecuted for larceny, but had obtained an acquittal because the judge before whom he was tried believed his crime to have been embezzlement. He was then indicted for embezzlement, and was convicted. But it was held by this court that his offense was really larceny and not embezzlement, and he was thus enabled wholly to escape punishment. It was the object of the Legislature to prevent for the future similar scandals in the administration of justice, by doing away with the merely technical difference between three cognate and similar offenses. The only way in which this reformatory intent can be effectuated is to allow the jury, upon the material facts which are the ground of a charge of larceny, to consider whether these facts show a taking of money or other property, by trespass from the possession of its owner, a fraudulent conversion of it while properly in the possession of the wrongdoer, or an obtaining of it by criminal false pretenses, * * * and in either of these cases to convict of the larceny." *Commonwealth v. King*, 202 Mass. 379, 388, 88 N. E. 454, 458.

Adapting the language of the *King Case*, the effect of section 484 of the Penal Code is that the former crimes of larceny, embezzlement, and obtaining property by false pretenses are merged into the one crime of theft. A statutory form of charging such crime of larceny, substantially as provided by section 952, was upheld in *Commonwealth v. Farmer*, 218 Mass. 507, 106 N. E. 150, and *Commonwealth v. Carver*, 224 Mass. 42, 112 N. E. 481. In the *Farmer Case*, where the defendants had obtained property by false representations, it is said:

"The indictments in all counts followed the short forms set forth in the criminal pleading act, R. L. c. 218. The constitutionality of the statute in this respect has been sustained in several decisions. It now is unnecessary to do more than summarize the conclusions reached. The word 'steal' used in the indictment for larceny has become a term of art and includes the criminal taking of personal property either by larceny, embezzlement or false pretenses. * * * The provisions of R. L. c. 218, par. 39, require a bill of particulars setting out adequate details where the indictment alone does not sufficiently inform the defendants, and this as matter of right."

In *People v. Hanaw*, 107 Mich. 337, 65 N. W. 231, it is said:

"We think that it is within the power of the Legislature to prescribe the form of indictments, keeping in view the constitutional right asserted in this case; and where, as in embezzlement, a defendant has a right to have the charge made certain by examination or by bill of

particulars, it cannot be said that he is not informed of the nature of the charge."

See, also, *Commonwealth v. Bennett*, 118 Mass. 443, 452; *Commonwealth v. Wakelin*, 230 Mass. 567, 120 N. E. 209, and *State v. Hodgson*, 66 Vt. 134, 28 A. 1089. Sections 870 and 925 of the Penal Code require that the testimony in a criminal case taken at a preliminary examination or given before a grand jury be taken down by a stenographic reporter and, in the event of the commitment of the defendant for trial or his indictment, that he be furnished with a transcript thereof. Such transcript, together with the indictment or information, certainly informs the defendant of the nature of the charge against him as fully as would a bill of particulars.

[3] The defendants introduced in evidence Christman's official report as meat inspector for the month of August, showing that on August 29 he condemned as tubercular 5 beeves belonging to Plum. They also introduced, over the objection of the district attorney, a similar report for September, which showed that 3 of Plum's cattle were condemned September 14, but none on any other day during that month. In admitting the latter report in evidence the court said, "I don't think it is material." The statement of the court is correct. The witnesses for the defendants testified that the cattle in question were inspected by Christman on August 29, and those for the prosecution testified that they were inspected on August 31. In either case the results of the inspection would naturally be contained in the August report and the report for September therefore was immaterial.

[4] Plum testified that on August 30 he purchased a bull calf. It may be conceded that this testimony was material. The defendants then offered in evidence a bill of sale of the calf to Plum, but objection thereto was sustained. The alleged bill of sale was not made a part of the record. It does not appear when or by whom it was executed or what were the contents thereof. It cannot be determined on this appeal, therefore, whether the instrument was material.

[5, 6] The court instructed the jury in the language of section 484 of the Penal Code, defining the crime with which the defendants are charged. "Ordinarily it is best to give an instruction in the language of the statute defining the crime." 8 Cal. Jur. 326. It was for the jury to determine from the facts proved whether the taking of the property was "by trespass from the possession of its owner, a fraudulent conversion of it while * * * in the possession of the wrongdoer, or an obtaining of it by criminal false pretenses." *Commonwealth v. King*, supra.

[7] The appellants complain of the court's refusal to give four of their proposed instructions on the subject of conspiracy. Three of these proposed instructions are indorsed as refused because first proposed during or aft-

er the argument, a court rule requiring that proposed instructions must be in the judge's hands prior to the argument. The instructions are framed on the erroneous theory that proof of a conspiracy was necessary to warrant a conviction of either defendant, and one of them expressly so states. The defendants were not on trial for conspiracy. Certain admissions and declarations made by Plum were proved as evidence of his guilt, but the court repeatedly instructed the jury, at Christman's request, that such admissions and declarations could not be considered as evidence against Christman. Under such circumstances it was not necessary to instruct the jury on the subject of conspiracy. The case is unlike that of *People v. Geiger*, 49 Cal. 643, 649, where it is said:

"We think there was sufficient evidence of the conspiracy between Alexander and the defendant to justify the court in admitting in evidence the declarations of the former, made previous to the alleged killing. The question of conspiracy was then submitted to the jury, with instruction to disregard the declarations of Alexander, unless the conspiracy was satisfactorily proved. This was the proper practice."

See, also, *People v. Fehrenbach*, 102 Cal. 394, 398, 36 P. 678, and *People v. Dixon*, 94 Cal. 255, 257, 29 P. 504. The court instructed the jury fully, and as favorably to the defendants as the law warrants, on the law applicable to every element of the crime charged, including an instruction that:

"Every single fact which is necessary for drawing the deduction of guilt must be proved by evidence which satisfies the mind and consciences of the jury to a moral certainty and beyond a reasonable doubt."

The usual contention is made that the district attorney was guilty of prejudicial misconduct in his argument to the jury. The remarks of which complaint is made are so clearly within the bounds of legitimate argument that it is deemed sufficient to so state.

[8] At the hearing of their motion for a new trial the defendants read into the record and offered in evidence an affidavit in which the affiant stated:

"That Viola M. Downing was one of the jurors who sat as a trial juror in the above-entitled case; that on the 15th day of October, 1927, and after the said Viola M. Downing had been summoned as one of the jurors in the above-entitled case, but before her examination, the said Viola M. Downing was present at her place of business, 402½ D street, Marysville, and in the presence of affiant said Viola M. Downing stated that if she was summoned to appear on said jury and if she was called, she would hang Fred Plum, one of the defendants herein, because her mind was made up that Plum was guilty."

The record does not show when the defendants first discovered the alleged bias of the juror, or whether testimony as to her quali-

fications was such as to show bias or to put the defendants upon further inquiry. The minutes of the trial show that the defendants did not exercise all of their peremptory challenges. Counsel for defendants stated that their own affidavit shows that they "had no knowledge of such a state of facts," but they did not take any steps to make such affidavit a part of the record, and it is not contained in the transcript on appeal. Under the circumstances stated, the affidavit quoted is wholly insufficient to show that the court erred in denying a new trial.

The judgment and the order are affirmed.

We concur: HART, J.; PLUMMER, J.

88 Cal. App. 568

PEOPLE v. O'CONNOR. (Cr. 1003.)

District Court of Appeal, Third District, California. Jan. 24, 1928.

1. Criminal law $\S$ 576(3)—Refusal to dismiss for delay in second trial, based on ground that there was "good cause," held not error, where second trial was had 66 days after remittitur (Const. art. 1, $\S$ 13; Pen. Code, $\S$ 1382).

Refusal to dismiss prosecution for delay in second trial, based on ground that there was "good cause" for such delay, held not abuse of discretion, under Const. art. 1, $\S$ 13, and Pen. Code, $\S$ 1382, where defendant was brought to trial 66 days after filing of remittitur certifying reversal of conviction had on first trial, and there was change of district attorneys, and judge was engaged in another part of state.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Good Cause.]

2. Courts $\S$ 90(1)—Decision that refusal to dismiss prosecution for delay was not abuse of discretion held conclusive in case with like facts (Const. art. 1, $\S$ 13; Pen. Code, $\S$ 1382).

Decision of Court of Appeal that refusal of trial court to dismiss prosecution for delay in second trial was not abuse of discretion, under Const. art. 1, $\S$ 13, and Pen. Code, $\S$ 1382; where second trial was had 64 days after filing of remittitur, held conclusive on Court of Appeal in subsequent case as to whether refusal to dismiss prosecution for delay in second trial was abuse of discretion, where defendant was brought to trial 66 days after filing of remittitur and other facts were same.

3. Criminal law $\S$ 576(1)—Trial court has discretion as to dismissing prosecution for delay, but discretion must be based on facts (Const. art. 1, $\S$ 13; Pen. Code, $\S$ 1382).

Trial court has some discretion as to whether it should dismiss prosecution for delay in bringing defendant to trial, under Const. art. 1, $\S$ 13, and Pen. Code, $\S$ 1382, but this discretion cannot be exercised arbitrarily, and must be based on all circumstances and facts presented to account for delay.

Appeal from Superior Court, Yolo County: W. A. Anderson, Judge.

James O'Connor was convicted of burglary and of robbery, and he appeals. Affirmed.

J. G. Bruton and J. H. Laugenour, both of Woodland, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

HART, J. The defendant was convicted in the superior court of Yolo county of two offenses set forth in two separate counts in the information, to wit: The crime of burglary, and the crime of robbery. He appeals from the judgment and the order denying his motion for a new trial. The present appeals are the outgrowth of a second trial of the defendant for the two distinct charges set forth as stated.

At the first trial of the case the defendant was jointly charged with one Fitzgibbons for the crimes named and the two were jointly tried with certain other parties charged in a different information with participation in the commission of the same crimes; all the accused, except one, who pleaded guilty, being found guilty. Each of the convicted defendants appealed to this court from the judgment of conviction and the order denying a new trial to each. This court in an opinion by Justice Plummer, reversed the judgment and the order entered in the case of O'Connor (the appellant here) and Fitzgibbons, and remanded the cause for a trial de novo. *People v. O'Connor et al.* (Cal. App.) 254 P. 630.

[1] The single point submitted here for determination involves the proposition, advanced by defendant, that the trial court committed error in its refusal to grant the motion of defendant to dismiss the prosecution on the ground that the defendant was not brought to trial within 60 days after the remittitur from this court, certifying to the reversal by this court of the judgment and the order, was filed with the clerk of the court below. The motion was founded on section 1382 of the Penal Code. Said section provides:

"The court, unless good cause to the contrary is shown, must order the prosecution to be dismissed in the following cases:

"1. When a person has been held to answer for a public offense, if an indictment is not found or an information filed against him, within thirty days thereafter.

"2. If a defendant, whose trial has not been postponed upon his application, is not brought to trial within sixty days after the finding of the indictment, or filing of the information."

A motion similar to the one with which we are here concerned was made in behalf of Edward Brock, who, though not proceeded against in the same information in which

the defendant herein was informed against, was nevertheless charged with precisely the same offenses—that is to say, that the two defendants named were accused of having committed, jointly with certain other parties, the two offenses above mentioned—but by two different and distinct informations. The appeals growing out of the second trials of both Brock and O'Connor were submitted to this court for decision at its December, 1927 term. In the Brock Case an opinion by Justice Plummer, affirming the judgment and the order, was handed down by and filed in this court on December 15, 1927. *People v. Brock* (Cal. App.) 262 P. 369. The papers, files, affidavits, and other documentary evidence introduced and used at the hearing of the motion to dismiss the prosecution against the defendant here and upon which the court below predicated its order denying the motion to dismiss as to said defendant were exactly the same as those introduced and used in the case of Brock and upon which the refusal to dismiss the prosecution as to him was based. In the case of Brock, it may be stated, there were questions involved and passed upon by this court in the opinion by Justice Plummer besides the single question presented here, viz. whether the court below erred in making the order refusing to dismiss the prosecution on the ground heretofore stated. In the opinion by this court in the case of Brock, on his second or last appeal, the facts alleged in the affidavits and disclosed by other documentary evidence thus presented by the people to show "good cause" for the delay in bringing said defendant to trial, and which affidavits and other documentary evidence were used at the hearing of the said motion in both cases, are comprehensively set forth. It is, therefore, not necessary to repeat in detail herein the facts which were brought out at the hearing of said motion on behalf of O'Connor for the purpose of the showing of "good cause" for the delay in bringing him to trial within the time which it is claimed section 1382 of the Penal Code contemplates in such a situation as is presented here. A mere skeleton statement of the facts, however, as they are fully stated in the Brock opinion may well be given herein.

The remittitur from this court certifying to the reversal of the judgment on the first appeal of the cases of the defendants was filed in the office of the clerk of the trial court on the 2d day of May, 1927. Brock was not brought to trial until the 6th day of July, 1927, or 4 days beyond the 60 days after the filing of the remittitur in the office of the clerk of the court below. The defendant here was not brought to trial until the 8th day of July, 1927, or 6 days beyond the 60 days after the date of the filing of the remittitur below. So far as the facts are concerned, the only difference between the two cases is in the fact that Brock was

brought to trial 2 days earlier than was O'Connor. This circumstance, it may be explained, was due to the fact that, as seen, the two defendants, although charged with the commission of the same two offenses of which they were adjudged guilty by the jury, were, for some reason, proceeded against by two separate and distinct informations and were separately tried, and necessarily so under our law. *People v. O'Connor et al.* (Cal. App.) 254 P. 630. Referring now in somewhat of a general way to some of the facts developed at the hearing of the motion, it appears that Neal Chalmers, Esq., a practicing lawyer at Woodland, the county seat of Yolo county, was one of the lawyers who defended in court the defendants at the first trial of their case; that, subsequently to said trial, said Chalmers was elected to and inducted into the office of district attorney of the county of Yolo; that he was the incumbent district attorney when the defendants were brought to trial for the second time or after the conviction of the accused at the first trial was reversed by this court. Under those circumstances, Mr. Chalmers conceived, and, of course properly so, that he was, by reason of his official position, disqualified from either defending or prosecuting the defendants.

The situation thus arising naturally called for the interposition of the Attorney General of the state, he having been informed thereof, to the end that he might make preparation or arrangements for the trial of the cases on behalf of the people. Upon being apprised of the disqualification of the district attorney to prosecute the cases against the defendants, the Attorney General immediately took steps looking to the employment of a member of the Yolo county bar to act in the place and stead of the district attorney and take charge of the prosecution of the cases on behalf of the people. After considerable correspondence between the Attorney General and Mr. Chalmers, and also between the Attorney General and Arthur B. Eddy, Esq., an attorney and a resident of Woodland, Yolo county, the services of the latter as the prosecutor of the cases were obtained. The correspondence referred to and the negotiations between the Attorney General and Mr. Eddy for the retention of the latter to act as the legal representative of the people in the trial of the cases required considerable time and necessarily contributed materially to the delay in bringing the cases to trial. Mr. Eddy, upon accepting the appointment by the Attorney General to appear and prosecute the cases for the people, not being familiar with the facts of the cases, was required to look into and examine the evidence introduced in the former trial of the cases, and this required time.

It further appears that, beginning in the month of May, 1927, and continuing through the month of June of that year, the regular-

ly elected judge of the superior court in and for the county of Yolo, Hon. W. A. Anderson, was, by order of the Chief Justice of the Supreme Court and chairman of the state judicial council, exercising the power conferred by law on that judicial officer, under assignment to preside and hear and try cases in certain departments of the superior courts in and for the counties of San Diego, Los Angeles, and Sacramento; that during that period of time Judge Ernest Weyand of the superior court of Colusa county and Judge Malcolm C. Glenn of the superior court of Sacramento county were assigned to the Yolo county court at different times, the record disclosing that a large volume of legal matters came before and were disposed of by them. The opinion of Justice Plummer, in disposing of the second appeal in the case of Brock, sets forth the various proceedings coming before and heard by Judges Weyand and Glenn during the period mentioned, and the approximate time required and consumed in disposing thereof with sufficient fullness to show that the time of the Yolo court was then occupied with a large volume of important work, and also that said judges were required in the intervals of time between the dates on which they presided therein to attend to certain like duties in the courts of their own respective jurisdictions. For more specific details regarding those matters, we refer to the said opinion.

In view of the full examination of the record in the opinion in the Brock Case disclosing the showing of "good cause" for the delay in bringing the two defendants to trial within the 60-day period mentioned, we have now proceeded herein in that particular as far as it is deemed necessary for the purposes of the decision herein.

[2, 3] Undoubtedly, the showing of "good cause" for the delay in bringing the defendant O'Connor to trial within the 60-day period beginning with the filing with the clerk of the court below of the remittitur certifying to the reversal on the first appeal of the judgment and order is such as to require this court, as in the Brock Case, to leave the decision below on the motion to the discretion of the trial court. Indeed, we may rest the decision here on the decision in the Brock Case, since upon the same record or the same facts the motion in each case was heard and determined. In the Brock Case it is pertinently said:

"Under these circumstances, as stated in the case of *People v. Farrington*, 140 Cal. 656, 74 P. 288, the trial court was called upon to exercise its discretion as to whether good cause had or had not been shown for the delay of 5 days after the 60-day period had expired, in bringing the defendant to trial, and, as stated in the case just cited, some discretion must be given to the trial court in its decision relative to the motion to dismiss. This discretion, how-

ever, cannot be exercised arbitrarily, but is to be based upon all the circumstances and facts presented to the court to account for the few days' delay."

The opinion cites a number of cases in which it is held, upon a showing of good cause for the delay no stronger than that presented herein and in the Brock Case, that the trial court's denial of the motion represented a proper exercise of its discretion in such matters.

What has been said herein is not to be taken to imply an expression of an opinion by us upon the question whether the provision of section 1382 of the Penal Code prescribing the period of time within which a defendant in a criminal case must be brought to trial after the date of the finding of an indictment or of the filing of an information against him is to be accepted as fixing the period of time within which the defendant, having been once convicted and the conviction set aside on appeal, must be brought to trial after the remittitur from a reviewing court, certifying to the reversal, is filed with the clerk of the trial court. This statement is made because the Attorney General, claiming that under our decisions there is much uncertainty as to what the correct rule is in a situation such as is presented here, has asked for a consideration of the proposition here, and advances what we regard as a very forceful argument that, in such a case as this, the time limit should not, by analogy to the provision of section 1382, be definitely fixed at 60 days after the remittitur has been filed with the clerk of the court below; that in such case the decision of the question whether the delay in bringing the defendant to trial after the remittitur has been filed with the clerk of the trial court is such as to offend the mandate of the Constitution (article 1, § 13) that "in criminal prosecutions, in any court whatever, the party accused shall have the right to a speedy and public trial," should rest in the sound legal discretion of the trial court upon the facts and circumstances of each case. There are decisions upon the proposition both ways. In *People v. Giesea*, 63 Cal. 345, and *People v. Lundin*, 120 Cal. 308, 311, 52 P. 807, it was held that the provision of section 1382 of the Penal Code requiring an accused to be brought to trial within 60 days after the finding of an indictment or the filing of an information against him "does not apply to cases where a defendant has appealed to this court and had his case sent back for a second trial." See, also, *Ex parte Newell*, 188 Cal. 508, 206 P. 61, which, while not directly passing upon the question, discusses the principle involved therein. The latest case in which the question was considered and a conclusion reached that section 1382 in so far as it relates to the time within which an accused must be brought to trial,

applied to such a situation as is presented here, is *In re Begerow*, 133 Cal. 349, 65 P. 828, 56 L. R. A. 513, 85 Am. St. Rep. 178. In that case Justices McFarland and Garoutte dissented from the conclusion arrived at by the majority of the court, while Justice Harrison did not participate in the decision. So, as is said in *People v. Walker*, 76 Cal. App. 192, 244 P. 94, by Presiding Justice Finlayson:

"Whether section 1382 can have any possible application after there has been a judgment of reversal and a second trial has been ordered is a question respecting which there possibly may be some room for doubt under the language of some of the decisions of our Supreme Court."

The question should, of course, be definitely and definitively settled, in a proper case, but, as shown above, it is not necessary to pass definitely upon the proposition in this case; hence we do not undertake so to decide it here or intend the remarks made in this opinion respecting the question to be construed as reflecting the views of this court thereon.

For the reasons first hereinabove given, the judgment and the order appealed from are affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

83 Cal. App. 513

PACIFIC GAS & ELECTRIC CO. v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al. (Civ. 6094.)

District Court of Appeal, First District, Division 1, California. Jan. 23, 1928.

1. Master and servant §419—Evidence of recurrence of disability held to authorize award increasing compensation (Workmen's Compensation Act, § 20, subd. [d]).

Evidence held to authorize award made by Compensation Commissioner of increase in compensation on ground of recurrence of disability on petition made under Workmen's Compensation Act, § 20, subd. (d) (*Deering's Gen. Laws 1923, Act 4749*).

2. Master and servant §417(7)—Court cannot weigh evidence on certiorari to review compensation award.

In certiorari to review increase in award made by Compensation Commissioner, appellate court has nothing to do with weight of evidence, which is matter solely within jurisdiction of commissioner.

Proceeding under Workmen's Compensation Act by John Mulhern by his guardian, Mary Casey, opposed by the Pacific Gas & Electric Company, employer. Claimant procured an award, which was paid. Subsequently petition was made for an increased award and order was made granting claimant temporary total disability. Rehearing

was granted and further hearings had, and from last order granting award, employer petitions for certiorari to review proceedings. Award affirmed.

John J. Briare and L. H. Susman, both of San Francisco, for petitioner.

G. C. Faulkner, of San Francisco, for respondents.

TYLER, P. J. Certiorari to review an award of the Industrial Accident Commission. The petition discloses the following facts: Respondent John Mulhern, while employed by petitioner Pacific Gas & Electric Company, sustained an injury to his foot which necessitated the amputation of one of his toes. The accident happened August 18, 1925, and it is admitted that it occurred in the course of and arose out of his employment. Mental illness followed in consequence of the injury, and Mulhern was on December 1, 1925, committed to the Napa State Hospital for the Insane. On January 8, 1926, an application was filed with the respondent Industrial Accident Commission by Mulhern through his guardian, Mary Casey. On March 15th Mulhern was paroled from the State Hospital. Proceedings were had before the respondent commission, culminating in findings and award, whereby it was definitely found that Mulhern's left great toe was fractured by a blow from a machine falling over, requiring amputation; the shock of the accident and loss of the member caused the development of a mental illness, and also that "said injury caused temporary total disability, continuing from August 18, 1925, to June 15, 1926," entitling the employee to the sum of \$700.14. This finding of causal relation between injury and disability and the award made thereon were accepted by petitioner and the award was paid, and no question in regard thereto is here involved. On December 21, 1926, a petition for the payment of further compensation was filed by the employee through his guardian on the grounds that there had been an increase or recurrence of his disability. The petition was made under section 20 (d) of the Workmen's Compensation Act (*Deering's Gen. Laws 1923, Act 4749*).

In the petition it was alleged "that since the findings and award of July 22, 1926, the mental illness found in findings of fact No. 1, of said findings and award, has increased and recurred and has caused the increase in disability, with the result that the injured man has not worked for more than a few days since the date of said award." Hearings were held upon this application and an order made on March 21, 1927, annulling findings and award and granting to the employee temporary total disability from June 29, 1926, to February 22, 1927. A petition for rehear-

ing was filed by petitioner herein, and upon a showing that the employee had worked part of the time during the period of this last found disability, the order of March 21, 1927, was set aside and a rehearing granted. Further hearings were then had, and on August 26, 1927, the order, now sought to be reviewed, was made. In the last order the commission found that partial disability recurred October 29, 1926, and lasted until the employee returned to work for petitioner on February 23, 1927, entitling the employee to the sum of \$138.04.

[1, 2] The contention is made that there is no evidence whatsoever to establish the fact that disability had increased or recurred, for which reason the commission had no power to amend the original findings. We cannot agree with petitioner in this contention. There is evidence to show that from the time he was paroled from the State Hospital in March, 1926, the employee was mentally unbalanced and remained so up to February 23d, when he returned to work for petitioner. His brother-in-law, John Casey, testified that during that period Mulhern, due to his condition, was unable to secure or retain employment; that he, the witness, had endeavored to have him returned to the asylum, as he feared injury from his hands; and that he no longer wanted him to reside in his home as his condition was becoming worse all the time. His sister, Mary Casey, testified that he was unable to retain employment as he was incapable on account of his condition to do work. There was also medical testimony to the effect that during the period in question Mulhern was still insane, in consequence of which he was unable to procure or perform labor. Counsel for petitioner claims that the testimony of John Casey and his wife is unreliable as evidenced by their cross-examination. With the weight of the evidence we have nothing to do, as that is a matter solely within the jurisdiction of the commission.

There being evidence to sustain the finding, it follows that the award must be and it is hereby affirmed.

We concur: KNIGHT, J.; CASHIN, J.

88 Cal. App. 441

WOOD et al. v. HENLEY et al. (Civ. 3359.)★

District Court of Appeal, Third District, California. Jan. 19, 1928.

Rehearing Denied Feb. 18, 1928.

1. Taxation ⚡734(9)—Where sale to state was void for want of notice by tax collector, sales by state and state's grantee were also void.

Where sale of interest in land to state was void because notice of proposed sale by tax collector was not given as required by law, pur-

ported resales of same interest by state to abstract company and by company to defendant were also void.

2. Tenancy in common ⚡13—Tenants in common hold land by unity of possession, and no one of them can claim determinate portion of common land (Civ. Code, §§ 685, 686).

Under Civ. Code, §§ 685, 686, dominant attribute of tenancy in common is that cotenants hold land by unity of possession, for which reason there can be no specific or determinate portion of common land which any one of such tenants can claim as his in severalty.

3. Tenancy in common ⚡13—Tenant in common is entitled to possession of entire common property against all persons except cotenants; possession by one cotenant being possession for all.

Tenant in common of undivided interest in common property is entitled to possession of whole thereof as against all persons, except his cotenants; each tenant having right to enter on and occupy entire part of common lands, so that possession of one cotenant is possession for all.

4. Tenancy in common ⚡13—Acts of ownership by tenant in common in possession is evidence of possession of other tenants, each tenant having right to assume possession of cotenant is own possession, till informed to contrary.

Where one of several tenants in common remains in possession, his acts of ownership are construed as evidence of possession by both tenants in common, since tenant in possession is presumed to hold for himself, and cotenants and each cotenant has right to assume that possession of cotenant is his own possession, until informed to contrary by actual notice, or acts and declarations equivalent to notice.

5. Tenancy in common ⚡15(10)—Possession by cotenant is presumed amicable until contrary is shown.

Presumption is that possession of one cotenant is amicable until contrary is shown.

6. Tenancy in common ⚡15(2)—One cotenant may acquire adverse claim against other cotenants, but there must be ouster or repudiation of relation.

Relationship of cotenants in not necessarily so intimate as to preclude one cotenant from asserting and acquiring an adverse claim against other cotenant to common property, but, to acquire adverse title, there must be an ouster of cotenant, or repudiation of relation.

7. Tenancy in common ⚡15(6)—Exclusive possession of common lands by cotenant and payment of taxes for five years will not alone establish title by adverse possession (Code Civ. Proc. §§ 323, 325).

Fact of exclusive possession of common lands by cotenant, claiming adverse title or payment by cotenant of taxes on common property, or both acts taken together for period of five years, will not of themselves be sufficient to establish a several title in such cotenant to common property by adverse possession, under Code Civ. Proc. §§ 323, 325, since such acts are consistent with rule that possession of one cotenant is possession of all cotenants, and payment of taxes is presumptively for benefit of all.

8. Tenancy in common ⚡15(2)—Cotenant, claiming title to common property by adverse possession, must bring positive acts, indicating intention to oust cotenants, to cotenants' notice.

For cotenant to acquire title to common property by adverse possession, there must be some positive acts by cotenant claiming title which are brought to notice of other cotenant, either actually or constructively, clearly and unequivocally indicating intention by cotenant to oust other cotenants from possession.

9. Tenancy in common ⚡15(10)—Evidence held insufficient to show cotenant acquired title by adverse possession against other cotenant (Code Civ. Proc. §§ 323, 325).

In action to quiet title to land to which defendants in position of cotenant with plaintiff claimed title by adverse possession under Code Civ. Proc. §§ 323, 325, evidence that defendants were never at any time in exclusive possession of common property or any part thereof, that defendants' possession was not necessarily hostile to rights of cotenant in common land, or so intended, and that quitclaim deed acquired by defendant from state was void, was insufficient to establish title in defendant by adverse possession.

10. Tenancy in common ⚡15(1)—Cotenant could not segregate portion of land, and by possession, improvements, and payment of taxes acquire title by adverse possession against other cotenant (Code Civ. Proc. § 325).

In action to quiet title to land to which defendant claimed title by adverse possession, defendant, as cotenant, could not segregate from common lands particular portion thereof, and, by occupying and improving same and paying taxes thereon for five years, claim title to such portion by adverse possession under Code Civ. Proc. § 325.

11. Tenancy in common ⚡15(10)—Improvements by husband of cotenant claiming title by adverse possession could be presumed for benefit of common property and all cotenants.

In action to quiet title to land to which defendant claimed title by adverse possession, where husband of plaintiff's cotenant had no interest in land, other cotenants had right to assume that any improvements which cotenant's husband put on common property were intended to be for benefit of common property and all cotenants, and not adverse to them.

12. Tenancy in common ⚡15(10)—Improvements by cotenant's husband are presumed to have been consented to by other cotenants, and did not raise presumption of adverse possession (Code Civ. Proc. § 325).

In action to quiet title to land to which defendant as cotenant claimed title by adverse possession, acts of cotenant's husband in erecting improvements on land for accommodation of tourists are presumed to have been done with consent, actual or constructive, of cotenants, in absence of proof to contrary, and were not in themselves sufficient to raise presumption of ouster or adverse possession as to other cotenants, under Code Civ. Proc. § 325.

13. Tenancy in common ⚡15(10)—Evidence held not to show continuous possession of property for five years by adverse claimant (Code Civ. Proc. § 325).

In action to quiet title to property to which defendant claimed title by adverse possession, testimony that defendant stayed on property occasionally on Saturday nights, when campers would be coming in, and worked there during spare time, was sufficient to support implied finding that defendant did not actually occupy premises or any part thereof for period of five years, under Code Civ. Proc. § 325, continuously and uninterruptedly.

14. Tenancy in common ⚡15(10)—That house erected by defendant cotenant was on land which he supposed to be his own held evidence that he did not intend hostile act to other cotenant.

In action to quiet title to property to which defendants, in position of cotenants, claimed title by adverse possession, evidence that defendant, in constructing house on property, supposed he was constructing house on tract belonging to himself, was evidence that he did not intend erection of house to constitute act of hostility to rights of plaintiff.

15. Adverse possession ⚡3—Statute providing for acquiring title by adverse possession must be strictly followed (Code Civ. Proc. § 325).

In action to quiet title to land to which defendants claimed title by adverse possession, under Code Civ. Proc. § 325, providing for acquiring of title by adverse possession, where land is inclosed or improved, provisions of statute must be strictly followed.

16. Limitation of actions ⚡165—Rule that acquisition of title by adverse possession presupposes grant does not apply to statute of limitations (Code Civ. Proc. §§ 318, 323, 325).

Doctrine that acquisition of title to real property by adverse possession, under Code Civ. Proc. §§ 323, 325, presupposes grant of such property, does not apply to statute of limitations under section 318, which has effect of cutting off owner's remedy for recovery of property or possession thereof.

17. Limitation of actions ⚡44(2)—To start running statute of limitations against owner, there must be avowed claim of ownership and substantially all elements necessary to establish title by adverse possession (Code Civ. Proc. § 318).

To start statute of limitations, contained in Code Civ. Proc. § 318, running against legal owner of land, there must be an avowed claim of ownership by party relying on statute, and substantially all elements essential to establishment of title by adverse possession.

18. Limitation of actions ⚡44(2)—Claim of title by running of statute of limitations held to necessarily fail, where testimony failed to support claim, of title by adverse possession (Code Civ. Proc. §§ 318, 323, 325).

In action to quiet title to land, defendants' claim of title by running of statute of limitations under Code Civ. Proc. § 318, necessarily failed with failure of testimony to support claim of title by adverse possession under sections 323 and 325.

19. Quieting title ☞23, 29—Action to quiet title may be maintained by party out of possession, who need not proceed until there has been asserted claim of title hostile to real owner (Code Civ. Proc. §§ 380, 738).

Party out of possession of land may maintain action to quiet title under Code Civ. Proc. § 738, and is not required to proceed in such action until there has been asserted by another claim of title thereto hostile to real owner, in view of section 380.

20. Adverse possession ☞41—Title by adverse possession could not be based on deed dated within five years of suit to quiet title, and presumed to have been delivered on its date (Code Civ. Proc. § 323; Civ. Code, § 1055).

In action to quiet title to property claimed by defendant under Code Civ. Proc. § 323, by adverse possession founded on deed received by defendant, which is presumed to have been delivered on its date under Civ. Code, § 1055, defendant's claim could not be maintained, where evidence showed plaintiff brought action within five years from date on which deed was executed and delivered to defendant.

21. Adverse possession ☞43(7)—Defective written instrument under which defendants claimed title by adverse possession could not relate back to date of original entry, where there was no sufficient prior possession (Code Civ. Proc. § 318).

In action to quiet title, defendants could not claim defective written instrument, under which title by adverse possession was claimed, related back to original entry so as to bring case within five-year period required by Code Civ. Proc. § 318, where there was no such possession and occupation as would constitute element in establishing adverse possession to which color of title under instrument could relate back to.

22. Quieting title ☞51—Recovery of improvements by adverse claimant requires demand for relief in pleadings and allegation of good faith.

In action to quiet title to property, title to which was claimed by defendant by adverse possession, defendants, to be entitled to compensation for improvements placed on property, are required to make demand for reimbursement in their pleadings, and to allege that improvements were made in good faith, and enhanced value of property sought to be recovered.

23. Quieting title ☞51—Adverse claimant could not recover value of improvements against plaintiff seeking only to quiet title (Code Civ. Proc. § 741).

In action to quiet title to property, title to which was claimed by defendants by adverse possession, defendants were not entitled to recover value of improvements placed on land, in view of Code Civ. Proc. § 741, providing that value of improvements must be set off against damages claimed for withholding property.

24. Improvements ☞4(1)—Value of improvements cannot be claimed in action to recover realty, except by way of set-off against damages claimed for withholding property (Code Civ. Proc. § 741).

Under Code Civ. Proc. § 741, defendants, in action to recover real property, whether reme-

dy be either legal or equitable, cannot be allowed reimbursement for improvements made by him on property, except by way of set-off against any damages which may be claimed by plaintiff for withholding property.

25. Quieting title ☞51—As affects good faith in making improvements, quitclaim deed to defendant claiming title by adverse possession held notice that title was of doubtful validity.

In action to quiet title to land, title to which was claimed by defendant by adverse possession, quitclaim deed to defendant from abstract company, conveying only such interest in dispute as abstract company acquired from state, was notice to defendant that title was of doubtful validity.

26. Quieting title ☞51—Evidence held to show bad faith by adverse claimant seeking to recover improvements (Code Civ. Proc. § 323).

In action to quiet title to property claimed by defendants by adverse possession under Code Civ. Proc. § 323, quitclaim deed, acquired by defendant from abstract company purchasing property from state, and letter by true owner, conveyed to defendant, stating that state's title was absolutely void, held to create more than suspicion of bad faith in defendant seeking recovery of improvements erected on property.

Appeal from Superior Court, Ventura County; Merle J. Rogers, Judge.

Action by Frances C. Wood and another against George J. Henley and another, in which defendants filed a cross-complaint. Judgment for plaintiffs, and defendants appeal. Affirmed.

Drapeau, Orr & Gardner, of Ventura, for appellants.

John F. Poole, of Los Angeles, for respondents.

HART, J. This action was brought by the plaintiffs to quiet their alleged title to an undivided one-half interest in a certain tract of land, consisting of 160 acres, situated in what is known as "Sespe Canyon," in the mountainous regions of Ventura county.

The complaint, which was filed on the 28th day of May, 1921, specifically describes the 160 acres, and alleges that the defendants claim and assert an interest in said property adverse to plaintiffs; that the claim so made by the defendants is "without any right whatever, and that said defendants have no estate, right, title, or interest in or to said real property above described, or any part thereof; that plaintiffs Frances C. Wood and Ira B. Wood are now and were at all times herein mentioned husband and wife; that defendants George J. Henley and Melita Henley have an undivided one-fourth interest in said real property, and hold the same jointly and as tenants in common with plaintiffs herein; that plaintiffs hereby tender all legal state and county taxes, penalties, and tax costs

that defendants may have paid on said undivided one-half interest in said real property belonging to plaintiffs."

The defendants answered, specifically denying the averments of the complaint, and also filed a cross-complaint, in which they allege that the defendants, at the time of the filing of the complaint herein, and for a long time prior thereto, were, "and they still are, the owners, in possession, and entitled to the possession, of that certain undivided one-half interest in the lands described in the complaint"; that plaintiffs wrongfully and without any right whatever claim an estate or interest therein adverse to the defendants. The prayer of the cross-complaint, as is that of the complaint with respect to the defendants, is the usual one in actions to quiet title to real property.

The plaintiffs, answering the cross-complaint, admit that they claim the ownership in fee of the undivided one-half interest in controversy, and specifically deny the other averments of said pleading.

Judgment passed for the plaintiff Frances C. Wood in accord with the prayer of the complaint.

The appeal, supported by a bill of exceptions, is by the defendants from said judgment.

The defendants claim title to the undivided one-half interest in dispute by adverse possession under the terms of both sections 323 and 325 of the Code of Civil Procedure. They further claim that the action by plaintiff is barred by the statute of limitations. Code Civ. Proc. § 318.

Section 323 of said Code provides:

"For the purpose of constituting an adverse possession by any person claiming a title founded upon a written instrument, or a judgment or decree, land is deemed to have been possessed and occupied in the following cases:

"1. Where it has been usually cultivated or improved;

"2. Where it has been protected by a substantial inclosure;

"3. Where, although not inclosed, it has been used for the supply of fuel, or of fencing-timber for the purposes of husbandry, or for pasturage or for the ordinary use of the occupant;

"4. Where a known farm or single lot has been partly improved, the portion of such farm or lot that may have been left not cleared, or not inclosed according to the usual course and custom of the adjoining country, shall be deemed to have been occupied for the same length of time as the part improved and cultivated."

Section 325 reads:

"For the purpose of constituting an adverse possession by a person claiming title, not founded upon a written instrument, judgment, or decree, land is deemed to have been possessed and occupied in the following cases only:

"1. Where it has been protected by a substantial inclosure.

"2. Where it has been usually cultivated or improved.

"Provided, however, that in no case shall ad-

verse possession be considered established under the provision of any section or sections of this code, unless it shall be shown that the land has been occupied and claimed for the period of five years continuously, and the party or persons, their predecessors and grantors, have paid all the taxes, state, county, or municipal, which have been levied and assessed upon such land."

It appears that the undivided one-fourth interest in the 160 acres not accounted for in the complaint or the cross-complaint was owned by one Mason Bradfield, so that, prior to the claim by defendants of ownership of the undivided one-half interest in dispute was asserted, the 160 acres were owned as follows: One-fourth by defendant Melita Henley, wife of defendant George J. Henley; one-fourth by said Mason Bradfield; and the remaining one-half (the interest in controversy) by the plaintiff Frances C. Wood.

The claim by defendants that they acquired title to the undivided one-half interest in controversy by adverse possession founded upon a written instrument grows out of the sale to the state of the said one-half interest in the year 1917 for delinquent taxes for certain years preceding that of the sale of said interest to the state.

As before stated, the land described in the complaint—the entire 160 acres—is situated in a canyon in the mountains of Ventura county. It is of rock formation, and wholly useless for the purposes of farming or husbandry. It possesses value, however, as a stone quarry, where stone for building purposes is to be obtained.

[1] The interest in dispute, for a long period of time prior to the purported sale thereof to the state for the nonpayment of taxes assessed thereon, was owned by the plaintiff Ira B. Wood. At some time after said Wood acquired title to said undivided interest, he conveyed the same to his wife, who is his coplaintiff. Ira B. Wood never at any time resided on the premises, but, after he acquired the interest in dispute, he visited and inspected the 160 acres on two different occasions. Mrs. Wood, down to the time of the trial of this action, had never been on, or seen, the property. No taxes assessed against said interest were paid by Mrs. Wood or by any other person for her for the year 1911, nor for the succeeding years of 1912 and 1913. George J. Henley testified that he knew of these delinquencies in the payment of the taxes on said interest, having obtained his information regarding the same by making inquiry of the assessor of Ventura county in each of the years named. On June 22, 1917, however, the said undivided one-half interest having been previously sold, or attempted to be sold, by the county tax collector to the state, the latter sold said undivided interest to the Ventura Abstract Company, a corporation, whose principal place of business was at the city of San

Buenaventura, in Ventura county. On July 6, 1917, said corporation quitclaimed said interest to the defendant George J. Henley. It was discovered at some time (the record does not show just when) that the sale of the said interest to the state was void because the notice of such proposed sale by the tax collector was not given as required by law. The sale to the state being, therefore, void, it follows, of course, that the purported sale of the interest to the abstract company and that of the latter to George J. Henley were also void and of no legal effect. It was at the trial, and it is here admitted by the defendants, that the sale to the state and the sale by the state, as explained, were and are void.

Ira B. Wood testified that, acting for his wife, he addressed a letter in the year 1916 to the tax collector of Ventura county, inquiring about the matter of the tax delinquencies on the interest in question, and asking for a statement of the taxes unpaid on the property; that he received a reply from the tax collector, informing him of the sale of the interest to the state in the year 1912, and suggesting that he communicate with the proper state department at Sacramento for further information; that, subsequently, his wife addressed a letter (witness could not remember whether to the tax collector of the county or to some state officer connected with delinquent tax matters) asking whether it would be sufficient if she would pay the taxes for the year 1916, the year in which she wrote and mailed said letter, and all back taxes. No reply was made to that letter, but later, and the day before the sale was to be made by the state, the witness received a phone message at his home (the witness said he thought it was from the tax collector) asking him (witness) if he was going "to take care of those taxes." The message was received late in the day, and the witness did not leave for San Buenaventura until the following morning, in ample time, though, to have reached that place before the hour at which the sale was noticed to take place. The train was for some reason delayed, with the result that the witness did not arrive at the county seat until some ten minutes after the sale had taken place. Wood, nevertheless, interviewed a Mr. Barnard through whom the abstract company purchased the undivided one-half interest in dispute. He testified that Barnard stated to him that it was the intention of the abstract company to sell the property to defendant George J. Henley; that he (witness) then warned Barnard that he had been given legal advice to the effect that the sale was invalid; and that a transfer of the interest by said company to said Henley would be void.

On July 2, 1917, acting for and in behalf of his wife, Wood addressed a letter to said Barnard, reading, in part, as follows:

"Your night letter of first Inst received. You doubtless have already received my telegram of 29th ultimo, and letter 30th ult.

"The people pestering you for an assignment of interest in the property of Frances C. Wood supposedly acquired by you at the delinquent tax sale held in Ventura, June 22nd, last, do not worry me.

"The fact is, you have no title to the property in question to convey, and whatever these people would pay you they would lose, for a contest of their claim would certainly ensue. For several reasons the sale referred to was invalid. * * * Any rights assumed from that sale would be promptly and successfully contested, and such contest would also establish the invalidity of all the other sales made on the same occasion. However, we are perfectly willing to deal equitably with you in remuneration for all money you may pay out in satisfaction of tax demands, for essential services in the matter, and in appreciation of the spirit of consideration shown when the writer saw you. We can get together and in a reasonable time as intimated in my previous letter. I think we both wish only what is about right."

As to his alleged possession and occupancy of the interest in controversy, the defendant testified:

"I first went up into the Sespe Canyon years ago. I went up there to go into the stone business. Between Christmas and New Year's in 1887 the first time. I went up in 1887, and came back in 1888. I had a claim up there in 1888. This claim was on this very land in question. It was up above the Devil's Gate. That was northwest of the land in question. With reference to making improvements and doing work upon this land I built a road. I broke through in 1900, that is, through the Devil's Gate, and through this land. This road was built through the Devil's Gate in 1900. * * *

"I first put a road across the property in question in 1898. This road went entirely across this property. Since that time I have kept the road up. I was living on the property north of this along in 1904 and 1905. I built the house which I have indicated on the map as soon as we broke through the Devil's Gate and got a wagon road in that country. This was prior to 1900. I am referring to my dwelling house. The Devil's Gate is on this property in question. We went around underneath the Devil's Gate. By 'Devil's Gate' I mean a tunnel and narrow gorge. The property is very mountainous, all cliffs. This house in which I was living in 1904 and 1905 was destroyed by fire. I first made improvements on the property in controversy, other than building the road, at the end of March or April, 1916."

The occupation and use by said Henley of the premises prior to and down to the year 1916 was, according to his own testimony, intermittent. He testified that, during that period, he was engaged, principally, in blasting rock, and taking out and selling stone to those desiring it for any purpose or use. "I am living on the property now," said Henley testified. "I first went on that property to live," he continued, "in 1916, right after the fire (referring to the destruction by fire of a house on the premises in

which he had lived). As I remember it, the fire occurred in the month of August. I paid taxes on this half interest at Ventura. By that, I mean I paid them at the tax collector's office. I bought (referring to the purchase at the tax sale) in 1917, and paid the taxes in 1918, 1919, 1920 and 1921. At the time I entered upon this property my claim of ownership thereof was based on my possession of said property * * * I actually began work in February (of 1916), worked in March and worked in April of that year, and there hadn't been any one that had done anything on it but me for years." Henley testified that he had been informed by the county assessor that there had been no taxes paid on the property for the years 1911, 1912, and 1913; that in each of those years he would ask the assessor if the taxes had been paid for the particular year so inquired about; that the assessor was the party who informed him that the property in dispute had been sold to the state for taxes. He further testified that he owned in his separate right 40 acres of land "below" and adjoining the 160 acres. This tract of land was known as the "McIntyre land," although he purchased it from a "Mr. Keyes."

In the year 1918, some time after the month of August, he (Henley) erected on, or on land adjoining, the premises, a stone house to be used by him for residential purposes. He testified that, when he was erecting the house, he supposed, and, in fact, believed, that he was building it on the "McIntyre land" which he had purchased from said Keyes, but that, after completing its construction, a man by the name of Owen made a survey of the premises with reference to the dividing line between the 40-acre tract and the 160-acre tract involved herein, and so discovered, or at least thought he discovered, that the house was within and on the 160-acre tract, about 12 feet from said line. He stated that he erected and maintained a fence around or about the house, and a gate to afford passage to and from the house.

It appears that running through the land is a stream of water in which fish abound, and that during the summer seasons of the years persons on "camping trips" for pleasure had frequently been permitted by the defendant George J. Henley to camp for a few days on the land and engage in the diversion of "catching fish"; said Henley, so he testified, charging such persons a small fee for the privilege so granted. In fact, said Henley testified that he erected on the land several cheaply built cabins to rent to such persons as were taking a brief "outing" and desired to remain on the land for a few days during summer seasons for the purpose of fishing.

It further appears that "above" and adjoining the 160 acres, and in the Sespe Can-

yon, a company, known as the "Sespe Light & Power Company," and another company, known as the "Sespe Oil Company," owned a body of land, the first company maintaining a light and power plant, and the last named being engaged, as may be assumed, although as to that the testimony is indefinite, in the development of oil. There was also another company, operating near the 160 acres, known as the "Sespe Land & Water Company." Henley testified that he improved and kept in repair a road running into and partly over the 160 acres, and connecting with a road maintained by the Sespe corporations. These roads led to the properties of said companies. There was no other possible way of passage to and from the properties of said corporations than by means of the roads mentioned. Henley himself so testified. In fact, he said, there was no way of entering upon the 160 acres or into the Sespe Canyon other than by the road he improved and kept in repair.

Over objection by counsel for the plaintiffs, said Henley was allowed to testify to the value of the stone house erected by him on the premises and the value of other improvements made by him thereon, by giving an estimate of the "reasonable cost" of their construction. Thus he placed the value of the house at \$6,000. On the other improvements—a barn, the "camping cabins" referred to, a house which he stated that he occupied during the interval of time between the date of the destruction by fire of the house in which he had previously lived on the premises, and the time at which the stone house was completed or ready for occupancy, and a pipe line 1,400 feet in length—he placed a value amounting in the aggregate to the sum of \$1,200.

The defendant Melita Henley testified that with her separate money she purchased her one-quarter interest in the 160 acres from a Mrs. Troy; that her husband and codefendant "had and was in possession" of the one-half interest in February and March, 1916, "and right on, of 1916." She further testified:

"He was working all the spare time he had and besides that he often had help. He was brushing out and blasting rock and cutting down brush and cleaning off the place in general. He started in February, 1916. That country up there is all rocks; of course he had to blast out a lot of the rocks. He was fixing it up for campers and to live on in general, and he blasted out those rocks and chopped the brush and cleaned it up, you know. The first habitation or dwelling house which was put on there, he put this cabin, this house we are living in now, that was put on there in April, 1916, that is the two rooms—we have added onto it since. He first commenced staying on the property sleeping there in the last of April, 1916. He did not stay there continuously after that, just stayed there once in a while Saturday nights when campers would be coming in there, he did not

sleep there continuously; no, he was working there whenever he had spare time."

The foregoing is a sufficient résumé of the testimony for all the purposes of the decision of this appeal.

The major question submitted here for decision is whether the findings upon which the validity of the judgment depends are afforded support by the evidence. The defendant and cross-complainant makes certain other points, the nature of which will be explained when we reach the consideration thereof.

[2-8] The dominant attribute of a tenancy in common is that the cotenants hold the common land by unity of possession, for which reason there can be no specific or determinate portion of the common land which any one of such tenants can claim as his in severalty. See Civ. Code, §§ 685 and 686. In other words, a tenant in common, by reason of the fact that he and his cotenants hold the common lands by unity of possession, cannot "know his own severalty, and, therefore, they all occupy promiscuously. * * * The only unity (in such a tenancy) is that of possession; and for this Littleton gives the true reason, because no man can certainly tell which part is his own; otherwise even this would soon be destroyed." 1 Blackstone's Comm. pp. 589, 590. It follows, therefore, that a tenant in common of an undivided interest in the common property is entitled to the possession of the whole thereof as against all persons except his cotenants. Each of such tenants has the right to enter upon and occupy the whole and every part of the common lands. This being so, such a tenant has no right to exclude his cotenant from any portion of the common lands. The logical consequence of the foregoing propositions is that the possession of one cotenant is possession for all. 7 Cal. Jur. § 13, p. 346, and cases named in the footnotes. "So long as one of several tenants in common remains in possession, as he is presumed to hold for himself and for his cotenants, his acts of ownership are naturally construed as evidence of the possession of both. *Packard v. Moss*, 68 Cal. 123, 8 P. 818. And each has a right to assume that the possession of his cotenant is his own possession, until informed to the contrary, either by actual notice or by acts and declarations which may be equivalent to notice. *Aguirre v. Alexander*, 58 Cal. 21; *Tabler v. Peverill*, 4 Cal. App. 671, 88 P. 994. The presumption is that the possession of one cotenant is amicable until the contrary is shown." 7 Cal. Jur. § 13, p. 346. As to the proposition last stated, see *Tully v. Tully*, 71 Cal. 338, 12 P. 246; *McNeil v. First Congregational Society*, 66 Cal. 105, 4 P. 1096; *Olney v. Sawyer*, 54 Cal. 379; *Carpentier v. Mendenhall*, 28 Cal. 484, 87 Am. Dec. 135. But it is undoubtedly true that "the relation of cotenants is not necessarily so intimate as to preclude one of them from asserting and acquiring an ad-

verse claim against the others to the common property. As between them, there may be a subsequent adverse possession. To acquire such a title, however, there must first be an ouster of the cotenant, or a repudiation of the relation." 1 Cal. Jur. § 34, p. 542, and cases therein referred to. The mere fact of the exclusive possession of the common lands by the cotenant claiming the adverse title, or the mere payment by him of the taxes on the common property, or both acts taken together, for the period of five years, will not of themselves be sufficient to establish a several title in such cotenant to the common property under the doctrine of adverse possession, since such acts alone would only be consistent with the rule that the possession of one cotenant of such property is the possession of all the cotenants, and that such payment of the taxes is an act presumptively for the benefit of all. In such a case, to constitute an adverse possession, there must be some positive act or acts upon the part of the cotenant claiming title to the whole or a specific portion of the property by adverse possession as against his cotenants, which acts are brought to the notice of the latter either actually or constructively, clearly and unequivocally indicating an intention by such cotenant to oust his cotenants from the possession of the property. Or, as the proposition is stated in 1 Cal. Juris. § 35, p. 544:

"When a tenant in common is in possession, and exercises acts of ownership of an unequivocal character, overt and notorious, and of such a nature as, by their own import, to impart information and give notice to the other cotenants that an adverse possession and a disseizin are intended to be asserted against them, then the possession of such tenant in common is adverse. And any act of the cotenant in the exclusive possession which manifests an intention on his part to hold exclusively for himself is equivalent in law to an actual ouster. It is the intent which determines the character of the possession; but it is essential that this intent be in some mode, either by actual or presumptive notice, directly or indirectly communicated to the other cotenant. This intent is not the secret purpose of the occupant, but is the purpose which the acts themselves manifest, and the acts done must be manifested to the person against whom the ouster is directed." (See the cases cited in the footnotes of the text.)

In *Humbert v. Trinity Church*, 24 Wend. (N. Y.) 587, cited approvingly in *Colman v. Clements*, 23 Cal. 245, and other succeeding California cases, it is said that the possession of the tenant claiming to hold adversely to his cotenants must be with the intent so to hold, and that it must appear that such intent has been "indicated by acts calculated to exclude the complainants from all participation as tenants in common."

In *Northrop v. Wright*, 24 Wend. (N. Y.) 221, it was held that a possession by a tenant in common for 27 years, during which pe-

riod of time "he had not recognized the right of his cotenant, was not (in or of itself) sufficient to presume an ouster." See Colman v. Clements, *supra*, p. 248.

The following instances of acts constituting an ouster by one cotenant, as against another or others, are found in the books: The exclusion of one tenant, by his cotenant, from the possession of any part of the larger lot, before a survey and location of the common land has been made (*Carpentier v. Webster*, 27 Cal. 524); the refusal of a tenant in possession on a proper demand, to let his cotenant into possession (*Phelan v. Smith*, 100 Cal. 158, 34 P. 667; *Greer v. Tripp*, 56 Cal. 209; *Miller v. Myers*, 46 Cal. 535); "the making and taking and recording of deeds and mortgages by the cotenant affecting the whole of the property and the unquestioned retaining of all the rents and profits" for the statutory period, "and the placing of valuable improvements upon the property, all under a claim of exclusive ownership" (*Smith v. Barrick*, 41 Cal. App. 28, 182 P. 56, 58).

[9-11] Thus we have presented some of the principles of law regarding tenancies in common and the relative rights of the cotenants, for the reason that the defendant Melita Henley, admittedly a cotenant of the common property in controversy, jointly with her husband and codefendant claims in the answer and cross-complaint to have established title to the undivided interest of Frances C. Wood by adverse possession under section 325 of the Code of Civil Procedure, or title by such possession not founded on a written instrument; and also because George J. Henley, from the very fact that he claims title to the undivided interest of Frances C. Wood, necessarily can claim nothing more than being a cotenant in the common property with Melita Henley and Mason Bradfield. Therefore, when tested by the principles above announced, it is perfectly clear that the finding of the court that the defendants acquired no title by adverse possession to the undivided interest of Frances C. Wood is sufficiently supported. In the first place, it is to be noted that the defendants were never at any time in the exclusive possession of the common property or any part thereof. They made no claim at the trial, and make none here, that the defendant Melita Henley and Mason Bradfield, if not in actual occupancy of the common property, were not entitled to the possession or the right to occupy said property as cotenants thereof. There was no particular or specific portion of the lands of which Melita Henley or George J. Henley could claim the right to the possession to the exclusion of Frances C. Wood and Mason Bradfield. The possession of Melita Henley was Bradfield's and Mrs. Wood's possession. Melita Henley could not, without the assent of her cotenants, select and segregate from the common lands a particular or a determinate portion thereof, and claim it as her

interest therein. Nor could George J. Henley do likewise in attempting to establish title by adverse possession to the interest of Mrs. Wood. By this we are not to be understood as saying that a cotenant of a tenancy in common or a stranger to the title may not establish a title by adverse possession to the undivided interest in such tenancy of another cotenant. What we hold is, as above in other language it has been stated, that such cotenant or stranger cannot put his finger on a particular portion of the common property itself, and, by occupying and improving and paying taxes thereon for the statutory period, say and claim that such particular portion is that portion of the common property that the undivided interest to which it is sought to establish title by adverse possession represents. But, apart from all these considerations, the record brings to us no testimony showing that all the essential elements of adverse possession under section 325 exist. From George J. Henley's own testimony, the important and vital portions of which are in substance hereinabove reproduced, it is entirely clear that his possession of the property was not necessarily to be interpreted by Frances C. Wood as hostile to her rights in the common land, or so intended, since she could have assumed, and, indeed, presumed, that whatever acts of dominion he was exercising over the property was for and in behalf and with the consent of his wife, and that the benefits flowing from his activities in that particular would inure to her as well as to Melita Henley and Mason Bradfield, her other cotenants. In other words, in view of the fact that Melita Henley was an owner in cotenancy of an undivided one-fourth interest in the common property, and that George J. Henley owned no interest therein, the other cotenants had the right to assume that any improvements which George J. Henley put upon the common property were intended to be for the benefit of the common property, and, per consequence, for the common benefit of all the cotenants. But, as a matter of fact, in so far as this record discloses, the first acts of George J. Henley which constituted what might be construed into an open declaration by him to claim title to the property adversely to the interests of Frances C. Wood were in his acquisition by quitclaim deed, in July, 1917, of the state's void title to the interest of Mrs. Wood. The filing by the defendants of their answer and cross-complaint in this action, denying (by the first-named pleading) the rights of plaintiff Frances C. Wood, as cotenant and in the last-named pleading seeking to quiet their title to the property as against the said plaintiff, upon the theory that they had acquired title thereto by adverse possession, both under section 323 and section 325 of the Code of Civil Procedure, would perhaps be construed as an act of ouster. Previous to the filing of said pleadings, the defendants did nothing to indi-

cate an intention to hold possession of the property adversely or in hostility to the rights of the plaintiff Frances C. Wood.

[12, 13] There is no testimony that either of the defendants had ever refused to permit said plaintiff to enter upon and into the possession of the common lands. There is no testimony of any declaration by the Henleys (until the time mentioned), which was communicated to said plaintiff, or to her coplaintiff, that they had any intention of claiming the undivided one-half interest of Mrs. Wood adversely to her rights. There was no express repudiation of the rights of plaintiff by the Henleys. There was no testimony that Frances C. Wood or any other person in her behalf ever made a demand, or had occasion to make a demand, upon the Henleys to be permitted to enter into the possession of the premises and participate in the enjoyment of her rights as a cotenant of the common property. There is no testimony definitely showing that, prior to the year 1917, George J. Henley or his codefendant ever paid the taxes assessed upon the property or upon the undivided interest of Frances C. Wood. As to this, George J. Henley testified: "I paid the taxes on the other half interest at Ventura. By that I mean that I paid them at the tax collector's office. I paid the taxes during the years after I bought the place," referring to the purported purchase by him of the undivided one-half interest of Mrs. Wood from the abstract company in July, 1917. If by the statement that he "paid the taxes on this half interest in Ventura to the tax collector," he meant to say that he paid the taxes on said interest prior to the year 1917, when he received the deed from the abstract company, he does not say for what years, or for how many years, or whether for years following each other consecutively, he paid said taxes. He produced no tax receipt showing the payment by him of the taxes prior to 1911 or the years intervening between 1913 and 1917. He knew that the taxes had not been paid in the years 1911, 1912, and 1913, and also that the undivided interest in dispute had been sold to the state for such delinquencies. He did testify, however, although producing no tax receipts to verify his statement, that, after receiving the void deed to the interest in question in July, 1917, he paid the taxes assessed against it for the years 1918, 1919, 1920, and 1921. There is no satisfactory or definite showing with regard to the time during which said Henley held actual possession of the premises. It is very clear, as stated in the early part of this opinion, that his residence upon the property prior to the date on which he received the deed from the Ventura Abstract Company was intermittent—that is to say, that he would go and remain upon the premises during very brief intervals of time. Some years before he erected the stone house, he would go to the land and take out stone from the rock quarries for commercial pur-

poses. Again, during the summer seasons, he would remain on the premises and collect rent for the use of the cabins he erected and maintained on the common property to accommodate various pleasure seekers and other itinerants desiring, for a few days, to "fish" in the stream running through the property. So far as the record shows, all these privileges were exercised by him with the consent, actually given or quiescently, of the cotenants, particularly his wife. In the absence of proof to the contrary, such would be the presumption. At any rate, those acts were not in and of themselves sufficient to warrant the presumption of an ouster, or a holding of possession adversely to the rights of the other cotenants. As to the time during which the defendants claimed to have held sole actual possession of the common property, George J. Henley testified, as above shown, that he "went on the property to live in the year 1916, right after the fire. As I remember it," he continued, "the fire occurred during the month of August." He said, however, that he "had been working on the road previous to that," referring to some year or years previous to 1916, and, continuing, added: "I went actually to work clearing in February, 1916; then I claimed it." His wife testified, as will be noted, that "he (George J. Henley) first commenced staying on the property, sleeping there, in the last of April, 1916. He did not stay there continuously after that," she proceeded to testify. "He was just there once in a while, Saturday nights when campers would be coming in there; he did not sleep there continuously; no, he was working there whenever he had spare time." This testimony itself sufficiently supports the implied finding that George J. Henley did not actually occupy the premises or any part thereof for a period of five years continuously and uninterrupted down to the date of the commencement of this action on May 28, 1921.

[14] As to the act of erecting the stone house and the act of enclosing that structure by a fence, Henley himself supposed, when constructing the house, that he was locating it on a small tract of land of which he was the sole owner, and this fact is strong evidence that he did not intend that the erection of the house and the fence was to constitute an act of hostility to the rights of Frances C. Wood. It may be added, in this connection, that it is not clear, from the testimony, that the house is not in fact on Henley's 40-acre tract. This consideration, it must be understood, goes entirely to the question whether the erection of the house was an act or intended as an act, adverse in a legal sense to the rights of Frances C. Wood, or, in other language, whether, at the time of its erection, it was intended as the assertion by the Henleys of a claim of title to the property adversely to, and in derogation of, the title of Mrs. Wood.

[15] But it is not necessary to proceed fur-

ther in an examination of the testimony to show that the findings of the trial court are amply supported. Indeed, the testimony presented by the defendants in support of their claim of title to the undivided one-half interest of Mrs. Wood is vague, uncertain, and indefinite upon every element of adverse possession prescribed by section 325 of the Code of Civil Procedure which must be shown to divest a person of title to his property and vest it in another under the doctrine of adverse possession. This mode for the transference of property is, obviously, of a very delicate nature, and the Legislature has accordingly exercised meticulous care in providing the means for its accomplishment; and the courts have uniformly held that the provisions of our statutes under which such titles may be established must be strictly followed. As is said in *Pyramid Land, etc., Co. v. Scott*, 51 Cal. App. 634, 646, 197 P. 398, 403:

"It is safe to say that in nearly every case where title to real property is sought to be established by adverse possession or prescription, which is based entirely upon the presumption of a grant of such property to the party so claiming it or to his predecessors in interest, there has in point of fact never been a grant or conveyance to the adverse claimant or his predecessors for a consideration. Hence, no person should be deprived of his property rights upon the plea of adverse possession or prescription unless such plea is sustained by the clearest and most satisfactory proof."

To the same effect are *Clarke v. Clarke*, 133 Cal. 667, 669, 66 P. 10; *Niles v. Los Angeles*, 125 Cal. 576, 58 P. 190, and *Thomas v. England*, 71 Cal. 459, 12 P. 491.

[16-19] The doctrine that the acquisition of title to real property by adverse possession presupposes a grant of such property does not, of course, apply to the statute of limitations; that statute being one of repose, and the effect of its application being to cut off the owner's remedy for the recovery of the property or the possession thereof. But, to start the statute to running against the legal owner of the land, there must be an avowed claim of ownership by the party relying upon the statute and substantially all the elements essential to the establishment of title by adverse possession shown to exist. In the instant case, the claim by defendants of the running of the statute of limitations necessarily falls with the failure of the testimony to support their claim of title by adverse possession. It will not, of course, be denied that a party out of possession of land may maintain an action to quiet his title to such land under section 738 of the Code of Civil Procedure, and that he is not required to proceed in such an action until there has been asserted by another a claim of title thereto hostile to that of the real owner. Code Civ. Proc. § 380; *Richardson v. Williamson*, 24 Cal. 299; *Brusie v. Gates*, 80 Cal. 462, 22 P. 284; *Cobe v. Crane*, 173 Cal. 116, 119, 159 P. 587; *Hyatt v. Colkins*,

174 Cal. 580, 581, 163 P. 1007. See, also, on subject of laches in cases of this character: *Liebrand v. Otto*, 56 Cal. 248; *People's Water Co. v. Boromeo*, 31 Cal. App. 270, 160 P. 574; *People's Water Co. v. Lewis*, 19 Cal. App. 622, 625, 127 P. 506. In the last-named case it is said:

"Plaintiff, having established a legal title to the property, is presumed to have been possessed thereof within the time required by law, and the occupation of the property by defendant to have been under and in subordination to the legal title, and this presumption can only be overcome by sufficient evidence on the part of the appellant that he had held and possessed the property adversely to such legal title for five years before the commencement of the action."

In *Hyde v. Redding*, 74 Cal. 500, 16 P. 380, it is said:

"Where a plaintiff has been in possession of land, he cannot be guilty of laches in the bringing of a suit to remove a cloud at any time before an action has been brought to disturb his possession, or to deprive him of any enjoyment of his right."

Thus far the case has been considered upon the claim by the defendants of title by adverse possession not founded upon a written instrument, and, incidentally, upon the like claim of the bar of the statute of limitations.

[20, 21] Coming now to a consideration of the alleged claim of title by adverse possession founded on the deed received by George J. Henley from the abstract company, a conclusive answer to that claim is in the fact that the plaintiffs brought this action within five years from the date on which said company executed and delivered the quitclaim deed to the interest involved herein to George J. Henley. The deed was dated the 6th day of July, 1917, and, there being no evidence to the contrary, was presumptively delivered to Henley on that date. Civ. Code, § 1055. The plaintiffs brought this action on May 28, 1921. Thus it will be seen that plaintiffs instituted the action within less than four years after the execution and delivery of the deed to George J. Henley. The contention that the defendant George J. Henley, having acquired "color of title" under "a defective written instrument," subsequently to the time of entering into possession and occupation of the property under a claim not founded on a written instrument, "may relate his occupation under the written instrument back to the time of his original entry upon the property," is afforded no support in the record. The cases cited (*Dean v. Goodard*, 55 Minn. 290, 56 N. W. 1060, and *Valentine v. Cooley*, Meigs [Tenn.] 613, 33 Am. Dec. 166), conceding for present purposes only that they hold, as counsel for the defendants contend, are still not applicable to the situation as made here by the evidence, since, as above shown, there is no possession and occupation, in so far as "possession and occupation" constitutes an element

in the establishment of title by adverse possession, for the claim of adverse possession under color of title to "relate back to."

[22, 23] The contention that the court should have allowed the defendants compensation for the improvements they put upon the property is without merit, from a legal standpoint. The first requisite for the granting of such relief is that a demand, properly set out, shall be made for such reimbursement in the pleading of the party asking for such relief. Here no claim for reimbursement for the expenditures required for the making of the asserted improvements was set up in the answer of the defendants to the complaint, or any such issue otherwise submitted or tendered. To justify such an allowance, in a proper case, it must be shown, both by pleading and proof, that the alleged "improvements" were made in good faith, and that they have enhanced the value of the property sought to be recovered. But it is clear that, under the terms of section 741 of the Code of Civil Procedure, such a plea would not be appropriate, and could not be maintained in the present case. The Code section named provides:

"When damages are claimed for withholding the property recovered, upon which permanent improvements have been made by a defendant, or those under whom he claims, holding under color of title adversely to the claim of the plaintiff, in good faith, the value of such improvements must be allowed as a set-off against such damages."

[24] It is plainly manifest that, under the terms of said section, in an action to recover real property, whether the remedy be either legal or equitable, a defendant cannot be allowed reimbursement for improvements made by him upon the property sought to be recovered except by way of a set-off against any damages which may be claimed by the plaintiff for the withholding of the property. See *Ford v. Holton*, 5 Cal. 320, 332; *Huse v. Den*, 85 Cal. 390, 401, 24 P. 790, 20 Am. St. Rep. 232; *Wise v. Burton*, 73 Cal. 174, 14 P. 683; *Kinard v. Kaelin*, 22 Cal. App. 383, 389, 134 P. 370.

In the case last named, the rule is stated, substantially, as it had been stated in previous adjudications of the proposition, as follows:

"It is the rule in actions for the recovery of real property that the value of permanent improvements made by a person holding in good faith and under a color of title adversely to the

plaintiff may be allowed only as a set-off to such damages as may be claimed for the withholding of the property sued for"—citing Code of Civil Procedure, § 741; *Huse v. Den*, 85 Cal. 390, 24 P. 790, 20 Am. St. Rep. 232, 4 Sutherland's Code Pleading, § 6406.

[25, 26] No damages were pleaded or asked for by the plaintiffs for "withholding the property," nor, so far as her own interest was concerned, was there a "withholding of the property" by defendants. It may be added with some propriety that, if, as a legal proposition, it were permissible for defendants to claim reimbursement at the hands of Mrs. Wood for the expense to which they went in erecting the stone house, stable, fence, and road, they would find it difficult, by the evidence in this record, to persuade a court to the conviction that they acted in good faith in claiming title by adverse possession founded upon the quitclaim deed purporting to convey to George J. Henley whatever interest the state or the abstract company had acquired in the property in question, since there were circumstances from which the court could well have found that said Henley well knew, when he took the deed from the abstract company, that, in accepting the conveyance, he would not and did not thereby acquire a valid or any title to the property described in the grant. The deed itself, being a quitclaim, or conveying only such interest in the interest in dispute as the abstract company had acquired from the state, was notice to said Henley that the title thus attempted to be transferred was of dubious or doubtful validity. The letter of Ira B. Wood to the abstract company, in date anterior to the time at which the latter conveyed to George J. Henley, specifically stated that the state's title to the property was absolutely void, and that said company could convey no valid title to the parties (referring to the Henleys) to whom the agent of the company informed said Wood that said company intended to sell and transfer it. These circumstances were sufficient to create more than a mere suspicion of bad faith in George J. Henley's attempt to establish a title to said interest by adverse possession under section 323 of the Code of Civil Procedure. But, however this all may be, we think it is perfectly clear from the record before us that the findings are amply supported, and that the judgment should be affirmed. It is so ordered.

We concur: FINCH, P. J.; PLUMMER, J.

203 Cal. 219

NESBIT v. MacDONALD. (S. F. 12230.)

Supreme Court of California. Jan. 26, 1928.

1. Bills and notes ☞125—Note payable "two years after date" held not demand note bearing interest from date of demand only.

A note, payable "two years after date," held not a demand note, bearing interest from date of demand only.

2. Evidence ☞422—Note, payable "two years after date," cannot be varied by parol evidence that payee never intended to enforce payment at maturity, so as to make it demand note (Code Civ. Proc. § 1856; Civ. Code, § 1625).

Under Code Civ. Proc. § 1856, and Civ. Code, § 1625, terms of note, payable "two years after date," cannot be varied by parol evidence that plaintiff never intended to enforce its payment at maturity, so as to make it a demand note, bearing interest from date of demand only.

3. Bills and notes ☞125—Interest on note, not specifying interest, is allowable from maturity date at legal rate.

No interest being specified in note payable "two years after date," interest is allowable from date of maturity at legal rate.

4. Executors and administrators ☞241, 443 (7)—One suing on decedent's note, after rejection of claim thereon, is not limited to recovery of interest demanded, though presentation and rejection of claim must be pleaded, and claimant can recover only on cause of action stated therein (Code Civ. Proc. § 1500).

While presentation and rejection of claim against decedent's estate must be pleaded under Code Civ. Proc. § 1500, to give court jurisdiction of action thereon, and claimant can recover only on cause of action set forth in claim, action to enforce rejected claim on note is really founded on note, and plaintiff is not limited to recovery of interest demanded, as court may determine true computation and allow correct amount due on note.

5. Executors and administrators ☞241—One suing on note, after executor rejected claim thereon for smaller amount than that due, is not estopped to urge maximum amount due.

Executor, having rejected as a whole a claim on decedent's note for a smaller amount than

that actually due thereon, thus forcing claimant to institute action for recovery, claimant is not estopped to urge maximum amount due by terms of note.

6. Bills and notes ☞125—Interest, recoverable from maturity date of note specifying no interest, is in nature of damages for detention of debt (Civ. Code, §§ 1914, 3302).

Interest, recoverable at legal rate from maturity date of note specifying no interest, is in nature of damages for detention of debt, in view of Civ. Code, §§ 1914, 3302.

7. Bills and notes ☞471—Prayer for interest on note, without specifying rate, is deemed prayer for legal interest.

A prayer for interest on note sued on, without specifying the rate, is deemed a prayer for legal interest.

8. Bills and notes ☞117—Legal interest rate in foreign state, wherein note specifying no interest was executed, does not govern (Civ. Code, §§ 1914, 3302).

Interest from maturity date of note specifying no interest being in nature of damages for detention of debt, in view of Civ. Code, §§ 1914, 3302, legal rate of interest in foreign state, wherein note was executed, does not govern.

9. Evidence ☞80(1)—Court must presume that rate of interest on note in state wherein executed is same as in California, in absence of pleading or proof of former state's law.

In absence of pleading or proof as to what is law of foreign state, in which note specifying no interest was executed, Supreme Court must presume that rate of interest therein is same as in California.

10. Evidence ☞35—Courts do not take judicial notice of foreign laws.

Neither trial court nor Supreme Court takes judicial notice of a foreign law, which must be pleaded and proved like any other fact.

11. Statutes ☞281, 289—First presentation of foreign law on motion to amend findings and in brief is not equivalent of presentation by pleading or evidence.

Presentation of law of foreign state for first time on motion to amend findings and in brief of counsel cannot be considered equivalent of its presentation by pleading or in evidence.

12. Evidence ☞80(1)—California courts presume that laws of other states are same as those of California, in absence of contrary plea or proof.

In absence of plea or proof to the contrary, courts of California presume that laws of other states are the same as those of California.

Department 1.

Appeal from Superior Court, City and County of San Francisco; Thomas F. Graham, Judge.

Action by Mildred Nesbit against Colin MacDonald, as executor of the will of Sara Irene Budd, deceased. Judgment for plaintiff, and defendant appeals. Affirmed.

Albert I. Loeb, of San Francisco, for appellant.

Lionel D. Hargis, of San Francisco, for respondent.

PRESTON, J. This is an action to recover upon the following promissory note:

"\$5,000. Carnegie, Pa. June 1, 1919. Two years after date, I promise to pay to the order of Mildred G. Nesbit—five thousand—00/100 dollars, at Mahoning National Bank, Youngstown, without defalcation, for value received. Due —, Payable at —. Sara Irene Budd."

Judgment was rendered in favor of plaintiff for \$5,000, together with interest from June 1, 1921, at the rate of 7 per cent. per annum. Upon this appeal defendant contends, first, that the court erred in allowing interest prior to November 24, 1924, date of first demand for payment of said note, and, second, that the court erred in allowing any interest at a rate greater than 6 per cent.

It appears that plaintiff loaned the sum evidenced by said note to Sara Irene Budd, deceased, because of their close personal friendship, and, further that she never demanded payment thereof prior to the death of Mrs. Budd, as she believed it would be repaid at such time as Mrs. Budd could do so "without embarrassment." On November 24, 1924, however, following the death of Sara Irene Budd in May of that year, the qualification of defendant as executor of her will in June, and pursuant to notice to creditors, plaintiff presented and filed with said executor claim for \$6,040.54, \$5,000 of which represented the principal sum of the note, and \$1,040.54 interest thereon at 6 per cent. from June 1, 1921, to November 18, 1924. The executor rejected the claim, whereupon plaintiff commenced this action. The note is set forth in full in the complaint, and the claim appears as an exhibit thereto. No rate of interest, however, is specified; the prayer being for the sum of \$5,000, "together with interest thereon from the 1st day of June, 1921." Upon submission of the findings of fact, defendant moved that they be amended so as to allow plaintiff interest only from date of presentation of the claim, November 24, 1924, or, if the court should determine to allow interest from June 1, 1921, that said interest should be charged only at the rate of 6 per cent. per annum, the legal rate appertaining in the state of Pennsylvania, where the note was made. This motion was denied, and judgment went for plaintiff as aforesaid.

[1-3] In support of his first contention appellant urges that the note is in reality a demand note, as plaintiff admittedly never intended to enforce its payment at maturity; therefore it is subject to the well-settled law that demand notes bear interest from date of demand only, in this instance, November 24, 1924. Secondly, appellant contends that, as

the claim filed calls for interest at the rate of 6 per cent., and as the prayer of the complaint is silent on this subject, no higher rate may be allowed, for a judgment may not exceed the amount demanded in the complaint. He further urges that this is true because the 6 per cent. legal rate of interest obtaining in Pennsylvania, where the contract was made, is controlling.

We cannot agree with appellant in either of these contentions. The first falls before the obvious fact that the note is not a demand note, but provides in so many words that it is payable "two years after date." The terms of the writing itself may not be varied by parol evidence. Code Civ. Proc. § 1856; Civ. Code, § 1625. No interest being specified therein, interest is allowable, as provided in the judgment, from the maturity date, June 1, 1921, at the legal rate of 7 per cent. per annum.

[4, 5] The fact that the claim was made an exhibit to the complaint does not affect this conclusion, as said complaint declares upon the note itself. It is true that, in an action upon a rejected claim, under section 1500 of the Code of Civil Procedure, presentation to, and rejection thereof, by the executor must be pleaded to give the trial court jurisdiction (*Reed v. Reed*, 178 Cal. 187, 172 P. 600; *Morrison v. Land*, 169 Cal. 580, 147 P. 259), and claimant can recover only upon the cause of action set forth in the claim (*Lichtenberg v. McGlynn*, 105 Cal. 45, 38 P. 541; *Gallagher v. McGraw*, 132 Cal. 601, 64 P. 1080; *Enscoe v. Fletcher*, 1 Cal. App. 659, 82 P. 1075; *Etchias v. Orena*, 127 Cal. 588, 60 P. 45; *Brooks v. Lawson*, 136 Cal. 10, 68 P. 97; *Barthe v. Rogers*, 127 Cal. 52, 59 P. 310; *In re Dutard*, 147 Cal. 253, 81 P. 519). However, where a claim on a note is rejected, the action is in reality founded upon the note and not upon the claim (*Gallagher v. McGraw*, *supra*), and, where there is a variance between the amount of the interest set forth in the claim and the amount actually due on the note, plaintiff is not limited by her interest demand, for it is properly within the province of the trial court to determine the true computation thereof and, adjusting the error, to make allowance of the correct amount. This holding is implied in the following cases: *Elizade v. Murphy*, 163 Cal. 681, 126 P. 978; *Raggio v. Palmtag*, 155 Cal. 797, 103 P. 312; *Moore v. Russell*, 133 Cal. 297, 65 P. 624, 85 Am. St. Rep. 166; *Merithew v. Orr*, 90 Cal. 363, 27 P. 295. Appellant having rejected the claim as a whole and for the smaller amount, thus forcing the claimant to institute an action for recovery, said claimant is not estopped to urge the maximum amount due on the note as per its terms.

[6, 7] In a case of this character the interest is not recoverable by virtue of any provision of the note or contract, but is in the nature of damages for detention of the debt. Furthermore, a prayer for "interest," without

specifying the rate, is deemed a prayer for legal interest. 14 Cal. Jur. § 15, p. 692; *Latimer v. Ryan*, 20 Cal. 628; *Lamping & Co. v. Hyatt*, 27 Cal. 99.

This very question was before the court in the case of *Puppo v. Larosa*, 194 Cal. 717, 720, 721, 230 P. 439, 440, and it was there said:

"The promissory note by its terms bore no interest. The trial court allowed legal interest thereon from the date of its maturity. * * * If, * * * interest is not expressly reserved, and the paper matures at a time certain, it will draw interest from its maturity by operation of law without prior demand, and at the legal rate. In such case interest is in the nature of damages for the detention of the debt, and is not recoverable by virtue of any provision of the contract. (Civ. Code, § 3302; *Gray v. Bekins*, 186 Cal. 389, 399 [199 P. 767]; 8 Cor. Jur., pp. 1095, 1096, secs. 1425-1427.) * * * The fact that the contract provides for no interest has nothing whatever to do with the damages due after the breach of the condition for payment on the due date of the note. * * * The action of the trial court in allowing legal interest on the amount due was, therefore, correct."

See, also, Civ. Code, § 1914; 14 Cal. Jur. p. 678, § 5, and many cases there cited; *Lockhart v. McDougall Co.*, 190 Cal. 308, 212 P. 1. The principle announced above is similarly stated in 15 R. C. L. § 24, p. 26, citing *Roberts v. Smith*, 64 Tex. 94, 53 Am. Rep. 744, and also in note to 6 Am. Dec. p. 191 (cited in 15 R. C. L. § 20, p. 23).

[8-12] The above holding that interest, after failure to pay, is given, not according to contract, but in the nature of damages, likewise disposes of appellant's contention that the 6 per cent. legal rate of interest alleged to appertain in Pennsylvania should govern. There is, moreover, another answer to this argument, to wit, that, in the absence of pleading or proof as to what the law of the state of Pennsylvania is, we are required to indulge the presumption that the rate of interest there is the same as the rate in this state. Neither the trial court nor this court takes judicial notice of a foreign law and the presentation of it for the first time on motion to amend the findings and in the brief of counsel cannot be considered the equivalent of its presentation by pleading or in evidence. *Ryan v. North Alaska Salmon Co.*, 153 Cal. 438, 440, 95 P. 862. "Where a party seeks to either recover or defend under a foreign law, such law must be pleaded and proved like any other fact." * * * The courts of this state take notice of its own laws, and, as above stated, in the absence of plea or proof to the contrary, presume that the laws of other states are the same." *Peck v. Noee*, 154 Cal. 351, 353, 97 P. 865, 866. See, to the same effect, *Murphy v. Murphy*, 145 Cal. 482, 484, 78 P. 1053, 1054, citing *Wickersham v. Johnston*, 104 Cal. 407, 411, 38 P. 89, 43 Am. St. Rep. 118, where it is said:

"The law of England on the question of interest, as on every other question, will, in the absence of any showing to the contrary, be presumed to be the same as the law of this state."

See, also, *Lefrooth v. Prentice* (Cal. Sup.) 259 P. 947.

Judgment affirmed.

We concur: CURTIS, J.; SEAWELL, J.

203 Cal. 238

MOORE v. SUPERIOR COURT IN AND FOR CITY AND COUNTY OF SAN FRANCISCO et al. (S. F. 12543.)★

Supreme Court of California. Jan. 27, 1928.

Rehearing Denied Feb. 23, 1928.

1. Divorce ⇨303(1), 309—Statute authorizing modifying divorce decree as to children's custody and support is read into decree (Civ. Code, § 138).

Civ. Code, § 138, providing that, in divorce actions, court may make such order for care, custody, and support of minor children as may seem necessary or proper, and may at any time modify or vacate it, must be read into every decree of divorce which purports to deal with care, custody, and support of minor children.

2. Divorce ⇨295—Court has jurisdiction of parties after divorce decree to make orders concerning support and custody of children (Civ. Code, § 138).

Court has same jurisdiction to make orders as to care, custody, and support of minor children of parties to divorce after entry of either interlocutory or final decree of divorce as it had prior thereto as to subject-matter and as to persons, under Civ. Code, § 138.

3. Constitutional law ⇨309(1)—Defendant in divorce action must be given notice before court can require payments for children (Civ. Code, § 138).

Defendant in divorce action must be given such notice as will accord to him due process of law, before court can enter order adjudging amount which he must pay by way of support for minor children, under Civ. Code, § 138.

4. Divorce ⇨303(3), 309—Statute held applicable in determining notice necessary to modify decree as to children's custody and support (Code Civ. Proc. §§ 1003-1007, 1010-1019; Civ. Code, § 138).

Code Civ. Proc. §§ 1003-1007, 1010-1019, relating to giving and service of notice of motions in civil actions, are applicable in determining what notice must be given party to divorce action of motion to modify final divorce decree as to custody, control, and support of minor children under Civ. Code, § 138.

5. Divorce $\Leftrightarrow$ 303(3), 309—Where party is represented by attorney, notice of motion to modify decree as to children's custody and support may be served on him (Civ. Code, § 138; Code Civ. Proc. §§ 1003-1007, 1010-1019).

Where party to divorce action is no longer represented by attorney of record, notice of motion to modify decree of divorce as to care, custody, and support of minor children under Civ. Code, § 138, must be made upon him personally, if he is within jurisdiction in manner provided by Code Civ. Proc. §§ 1003-1007, 1010-1019, but, where he is still represented by his attorney of record, such notice may be served upon such attorney.

6. Evidence $\Leftrightarrow$ 43(1)—It is common knowledge that parties to divorce engage in controversies after decrees mainly through motions by attorneys.

It is common knowledge that parties to divorce actions frequently indulge in even more acrimonious controversies after than before entry of final decree, relating to payment of alimony or care, custody, and support of minor children, and that such controversies are mainly carried on by motions to enforce or modify previous orders and decrees, and that parties are represented by attorneys upon whom papers are served.

7. Divorce $\Leftrightarrow$ 303(3), 309—Whether party to divorce is represented by attorney on whom notice of motion to modify decree as to children's custody and support may be served is question for court (Civ. Code, § 138; Code Civ. Proc. §§ 1003-1007, 1010-1019).

Question whether party to divorce action is still represented by attorney of record, and hence whether notice of motion to modify divorce decree as to custody and support of children under Civ. Code, § 138, may be served on such attorney under Code Civ. Proc. §§ 1003-1007, 1010-1019, is question of fact for court.

8. Divorce $\Leftrightarrow$ 309—Jurisdiction to determine that party to divorce was represented by attorney on whom notice of motion to modify decree as to children's support might be served was not divested by objection (Civ. Code, § 138; Code Civ. Proc. §§ 1003-1007, 1010-1019).

Jurisdiction of court to determine whether party to divorce action was still represented by attorney of record, and hence whether notice of motion to modify divorce decree as to support of minor children under Civ. Code, § 138, might be served on such attorney under Code Civ. Proc. §§ 1003-1007, 1010-1019, was not divested by objection to jurisdiction through other counsel by so-called special appearance.

9. Divorce $\Leftrightarrow$ 312—Determination that notice of motion to modify decree as to children's support might be served on attorney held not reviewable by writ of review (Code Civ. Proc. §§ 1003-1007, 1010-1019, 1068; Civ. Code, § 138).

Error in determining whether party to divorce action was still represented by attorney of record, and hence whether notice of motion to modify divorce decree as to support of minor children, under Civ. Code, § 138, might be served on such attorney under Code Civ. Proc. §§ 1003-

1007, 1010-1019, is not reviewable by writ of review, under section 1068, since appeal lies; error being in exercise of jurisdiction and not in excess of it.

In Bank.

Application by William H. Moore for certiorari to review an order of the Superior Court in and for the City and County of San Francisco, Hon. John J. Van Nostrand, Judge, modifying a final decree of divorce. Order affirmed.

Superseding opinion of Court of Appeal, 255 P. 852.

Stanislaus A. Riley, of San Francisco, for petitioner.

R. F. Mogan, T. W. Hubbard, and Leo A. Murasky, all of San Francisco, for respondents.

RICHARDS, J. The petitioner herein seeks, by a writ of review, to have reviewed a certain proceeding and annulled a certain order of the superior court, in and for the city and county of San Francisco, made and entered in an action for divorce, entitled Alyce Moore, Plaintiff, v. William H. Moore, Defendant. The facts upon which said application is based, and which are practically undisputed, are the following: On the 8th day of April, 1914, the said superior court made and entered its interlocutory decree in said action, wherein and whereby the care, custody, and control of the two minor children of the parties to said action was awarded to the plaintiff, and the defendant was ordered to pay to the plaintiff monthly the sum of \$30 for the support and maintenance of said children, and the further sum of \$12.50 at stated intervals for their necessary clothing. The final decree, which was made and entered on April 12, 1915, embodied the foregoing terms of the interlocutory decree. During the trial of said action, the defendant, who had been personally served and had appeared therein, was represented by one E. G. Ryker, Esq., as his attorney of record in said cause. In the year 1917 the defendant went to reside in Portland, Or., in which state he has since resided. On the 8th day of September, 1926, the plaintiff in said action filed in said court her notice of motion for an order amending the final decree of divorce therein so as to direct the defendant to thereafter pay to said plaintiff the sum of \$60 per month for the support and maintenance of said minor children, and the further sum of \$50 in January and June of each year to assist in purchasing clothing for them. The time fixed in said notice for the hearing of said motion was the 24th day of September, 1926, at the hour of 10 o'clock. Service of said notice of motion was attempted to be made and consisted in the mailing forthwith of a copy thereof to said E. G. Ryker, at the

office address of said Ryker in Oakland, Cal., the said Ryker being, as the affidavit of mailing deposes, the attorney of record for the plaintiff in said action at all the times mentioned therein, and in the further mailing of a copy of said notice to the defendant himself at his Portland place of residence.

On the day fixed in said notice for the hearing upon said motion, the plaintiff appeared in court in support of said motion; the defendant also, represented by other counsel than said Ryker, made a so-called special appearance for the sole alleged purpose of objecting to the jurisdiction of the court to make any order upon said motion and of moving the court to quash the attempted service of notice thereof. In support of said objection and motion, counsel for the defendant presented and filed the affidavit of said E. G. Ryker, who deposed that, while he had at all the times mentioned therein been an attorney and counselor at law, with his offices in the city of Oakland, he had ceased to be the attorney for the defendant at the time of the entry of the final decree therein, and had not since represented him in said action. The plaintiff, in resisting said motion, introduced the affidavit of service of the moving paper therein, wherein it was asserted that said Ryker had at all times been and still was the defendant's attorney of record in said action. The court overruled the defendant's said objection, and denied his said motion, and thereupon proceeded to hear and determine the plaintiff's motion for the amendment of said final decree; and, after taking testimony thereon, in the taking of which the defendant's counsel took no part, made and entered its order amending its final decree in said action so as to provide for the payment to the plaintiff of the sum of \$50 monthly for the support and maintenance of the one of the children of the parties who still remained a minor, said sum being in addition to the sums required for clothing as required by the terms of said decree. In the body of said order, the trial court found and recited that due and legal notice of the hearing of said motion had been duly given to said defendant as required by law. Following the making and entry of said order, the defendant made application for this writ of review, wherein the petitioner averred that the trial court acted beyond and in excess of its jurisdiction in the making and entry of its foregoing orders. In making this insistence, the petitioner herein concedes that during the trial of said action for divorce, and up at least to the time of the entry of the final decree therein, the trial court had acquired full jurisdiction over both the person of said defendant and the subject-matter of said action, including the right in said tribunal to make and enter its orders embraced in both the interlocutory and final judgment therein relating to the custody,

care, support, and maintenance of the minor children of the parties to said action. The petitioner also substantially admits that, in respect to the last-named content of said decrees, the trial court, by virtue of the provisions of section 138 of the Civil Code, retained a continuing jurisdiction over the subject-matter thereof to the extent that it might modify or vacate at any time thereafter during the minority of such children such order or orders as it might have embodied in its said decrees for the custody, care, education, maintenance, and support of such minor children. The petitioner, however, insists that such jurisdiction, while it continues over the subject-matter provided for in said section 138 of the Civil Code, is not retained over the person of the defendant after the date of the making and entry of said final decree.

[1, 2] The language of section 138 of the Civil Code is read into every decree of divorce which purports to deal with the care, custody, and support of the minor children of the parties to the action, and, this being so, whatever orders or decrees the trial court may make or enter in the premises are not in the nature of final judgments which determine the relation of the parties to each other, or to the action or to the subject-matter over which the court has thus retained all of the jurisdiction which it had during every stage of the proceedings and pendency of such action. In the foregoing sense the trial court retained, under said section of the Civil Code, so read into its orders and decrees, the same jurisdiction over the parties and the subject-matter to which said section relates that it had and exercised prior to the making and entry of either its interlocutory or its final decree in said action. The petitioner herein has referred us to no authority which is opposed to this conclusion, and we are satisfied that no such authority exists.

[3, 4] It does not, however, follow that the trial court, which has acquired general jurisdiction over the parties to an action, may arbitrarily or ex parte make and enter either during the progress of the proceedings before it, or after its entry of a so-called final decree therein, orders and decrees adjudging the amount which defendant may be required to pay either in the way of alimony to his wife or in the way of the support of his minor children. Before such orders, which have the effect of money judgments, and which are under the law enforceable by several drastic methods, can be made in an action for divorce or maintenance, some such sufficient notice must be given to the defendant as will amount to what is known as due process of law. This requisite notice must be such as shall find its warrant in the statutory procedure provided for the conduct of civil actions in order to give the court of record in which such actions are pending jurisdic-

tion to make its several orders, judgments, and decrees therein. Prior to the appearance of a defendant in an action, he is required to be served with the process known as a summons, or in some cases as a citation; and, in those actions wherein a judgment in personam is sought, the service of such process must be personal and must provide for such reasonable notice as will enable him to have his day in court. When, however, such defendant has been thus served with process or has appeared in such action, the statute provides other forms of notice in order to give the court jurisdiction to make and enforce its orders pendente lite; as, for example, when a defendant has appeared in an action and has come to be represented by an attorney of record therein, the statute (Code of Civil Procedure, § 1015) provides that the service of all papers, when required, must be upon the attorney instead of the party, with certain specified exceptions, such as service of writs, subpoenas, or other process. In universal practice, the service of notices of motions to be made during the process of an action is made upon the attorney of record in the action under the foregoing express provisions of the statute; and we can perceive no reason why the same provisions of the statute may not have application as well after as before the entry of a decree of divorce, which, in so far as it relates to the custody, care, and maintenance of the minor children of the parties thereto, is not a finality, but over whom, during their said minority, as well as over their parents, the trial court retains a continuing jurisdiction which is as complete as that possessed by it prior to the entry of said final decree. The reason why this should be so is well set forth by the Supreme Court of Washington in the case of *Ruge v. Ruge*, 97 Wash. 51, 55, 165 P. 1063, 1065 (L. R. A. 1917F, 721), wherein it is stated:

"As it seems to us, the true basis upon which the power to modify the decree in these cases rests is that out of the marital relation springs a new relationship, viz. that of parent and child. Palpably neither executive edict, enactment of Legislature, nor decree of court can change the relationship existing between parent and child. The courts may decree that the marital tie shall be absolutely severed and the parties be placed, so far as the law is concerned, in the same situation that they occupied prior to the solemnization of the marriage ceremony; but they cannot alter or modify the fact that a father is the parent of his offspring. This parental relationship, springing as it does from the relationship of marriage, is to this extent incident to the marital status. But the duty of the father, if he has means with which to do so, to support his infant children springs immediately from the parental relationship. As this relationship, incidental as it is to the marriage state, continues to exist after the status out of which it arose has been terminated, either naturally, as by death, or artificially, as by divorce, the duty incident to that continuing relationship still exists.

The right of the wife to alimony arises immediately out of the marriage contract, but the right of the child to support at the hands of its parents springs from the incidental relationship which had its origin in marriage, to wit, that of parent and child. The court therefore, acting upon this relationship as one of the things brought to it by the divorce action, has the power to modify or alter its decree so long as there are minor children under the protection of the court."

We are thus brought to the inquiry as to what notice is by law required to be given to a defendant of an application for an order modifying the provisions of a final decree in a divorce action relating to the custody, control, and support of the minor children of the parties thereto. We are of the opinion that those sections of the Code of Civil Procedure (part 2, tit. 14, chs. 4 and 5) which relate to the giving and service of notice of motions in civil actions would have application to such proceedings in said actions with relation to which the judgments and decrees of the trial court have not become a finality, but over which it retained by law or by the terms of such judgments and decrees a continuing jurisdiction. This would seem to be a rule of reason applicable to both of the parties to the action.

[5] Having thus concluded, the next question which arises is as to the person upon whom the service of such notice might be legally made. It would seem to be clear that if the party to the action, whether plaintiff or defendant, had ceased to be represented in the action by an attorney of record upon the entry of the judgment or final decree, the service of such notice would be required to be made upon the plaintiff or defendant, as the case might be, in person, in the manner and for the time provided in the provisions of the Code of Civil Procedure, to which reference has above been made, provided the party thus to be served was within the territorial jurisdiction of the court; but if, on the other hand, it should be made to appear that the person to be thus served with such notice was still represented in said action by an attorney of record therein, the foregoing sections of said Code would seem to have application to such a situation so as to permit and provide for the service of such notices or other moving papers upon such attorney of record. Illustrations might be multiplied to show the reasonableness of such a rule as applied to such a situation.

[6, 7] It is a matter of common knowledge that the parties to divorce actions frequently indulge in even more acute and acrimonious controversies after than before the entry of final decrees relating to the payment of alimony or to the care, custody and support of minor children, and that such controversies are in the main carried on through the procedure of motions for the enforcement or modification of previous orders and decrees,

and that in such controversies the respective parties are represented by attorneys, upon whom, rather than upon the parties themselves, all such papers as notices of motions, affidavits, and counter affidavits, and other documents having relation to the controversy, are served. It would seem to be almost a rule of necessity that it should be so, since otherwise the very party who had initiated a proceeding for the modification of a divorce decree in respect to the matters over which the court has continuing jurisdiction might betake himself beyond the boundaries of the state of California, and while from this safe position, directing the attack through his attorney, be immune from a counter assault, because, forsooth, the moving papers of his adversary could not be served upon him. This court, in dealing with the aspects of such a precise situation, has recently decided that service upon a defendant's attorney of record in a proceeding pending before it for the enforcement of an order for maintenance would suffice to put him upon such notice of the making of such order as would put him in contempt for its disobedience. *Shibley v. Superior Court* (Cal. Sup.) 262 P. 332. Having thus determined that under such circumstances as those above instanced the service of papers in a pending and undetermined matter before the trial court might be made upon the attorney of record of a party over whom the court had originally acquired full jurisdiction, it would seem to logically follow that the question as to whether such a party was represented in such a proceeding by an attorney of record would be a question of fact to be determined by the trial court upon the hearing of the motion, notice of which was predicated upon such service thereof.

[8, 9] In the instant case, and upon such hearing, the trial court had presented to it conflicting evidence upon the question as to whether E. G. Ryker, the defendant's former attorney of record, still continued to be such up to and including the time of the service of said moving papers upon him. The fact that the defendant presented his objection to the jurisdiction of the court to entertain such motion by other counsel and through a so-called special appearance did not divest the trial court of power to decide the question; and, even if it committed an error therein, it would be an error in the exercise of its jurisdiction and not in excess of it. For such an error the only remedy of the defendant would be by way of an appeal, and, having such a remedy, a writ of review would not lie. Code Civ. Proc. § 1068.

The order is affirmed.

We concur: WASTE, C. J.; SHENK, J.; LANGDON, J.; CURTIS, J.; PRESTON, J.; SEAWELL, J.

McKAY v. LAURISTON et al. (S. F. 12691.)★

Supreme Court of California. Jan. 10, 1928.

Rehearing Granted Feb. 9, 1928.

1. Husband and wife ⇨247—Amendment giving spouses power to make testamentary disposition of half community property held not to enlarge wife's interest in community property previously acquired (Civ. Code § 1401, as amended by St. 1923, p. 29, § 1).

Amendment in 1923 to Civ. Code, § 1401 (St. 1923, p. 29, § 1), providing that upon the death of husband or wife one-half the community property belongs to the surviving spouse and the other half is subject to testamentary disposition, held not to enlarge wife's interest in community property acquired before the amendment became effective.

2. Husband and wife ⇨265—Wife's interest in community property acquired in 1918 held contingent on her survival of husband (Civ. Code, §§ 172a, 1401; St. 1923, p. 29, § 1).

Under Civ. Code, §§ 172a, 1401, wife's interest in community property acquired in 1918 held contingent on her survival of her husband, since the 1923 amendment to section 1401 (St. 1923, p. 29, § 1) did not enlarge wife's interest in community property previously acquired.

3. Husband and wife ⇨273(1)—Wills ⇨6—Wife's attempt to devise community property held ineffectual, since such property on wife's death belonged to husband without administration, notwithstanding statutory amendment (Civ. Code, §§ 172a, 1401; St. 1923, p. 29, § 1).

Wife's attempt to devise community property acquired at a time when her right therein was contingent on surviving her husband held ineffectual, since under Civ. Code, § 172a, and § 1401 (prior to 1923 amendment [St. 1923, p. 29, § 1]), such property on wife's death belonged to husband without administration, and 1923 amendment could not enlarge wife's interest in community property acquired previously.

4. Wills ⇨3—Law at time community property was acquired, and not at wife's death, determines whether wife has devisable interest (Civ. Code, § 1401, as amended by St. 1923, p. 29, § 1).

Law at time community property was acquired, and not at the time of wife's death, determines whether she has a devisable interest, under Civ. Code, § 1401, as amended by St. 1923, p. 29, § 1.

5. Descent and distribution ⇨68—Right to inherit from ancestor is mere expectancy.

The right of an heir to inherit from his ancestor is a mere expectancy, and is not in any sense a vested interest prior to ancestor's death.

6. Constitutional law ⇨94—Statutes governing right of inheritance may be amended without infringing upon any vested right of heir.

Statutes governing rights of heirs to inheritance may be changed in any manner without

infringing upon or violating any vested right of an heir, since the right of an heir to inherit from his ancestor is a mere expectancy.

7. Descent and distribution ⚭6—Statutes in force at time of death control disposition of intestate's property.

Statutes governing the right of inheritance in force at time of intestate's death control the disposition of his estate.

8. Husband and wife ⚭273(1)—Husband held not to take community property, on wife's death, by descent or succession, and hence statutory amendment giving wife power to devise community property was not controlling (Civ. Code, § 1401; St. 1923, p. 29, § 1).

Where community property was acquired prior to 1923 amendment of Civ. Code, § 1401, husband held not to take the community property, on the death of the wife, by descent or succession, and hence 1923 amendment (St. 1923, p. 29, § 1), providing that spouses might devise one-half of the community property, which amendment was in effect at the time of the wife's death, was not controlling.

Preston, J., dissenting.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Claude F. Purkitt, Judge.

Action to quiet title by Patrick J. McKay against Heneretta Lauriston and another, individually and as executrices of the last will and testament of Hattie A. McKay, deceased. Judgment for plaintiff, and defendants appeal. Affirmed.

James J. Harrington, of San Francisco, for appellants.

Richard Fitzpatrick, of San Francisco, for respondent.

CURTIS, J. It appears by written stipulation of the parties hereto, and admissions made by the pleadings herein, that certain real property, described in the complaint and situated in the city and county of San Francisco, was acquired as community property by the plaintiff on the 9th day of November, 1918, at which time plaintiff and Hattie A. McKay were husband and wife. No change in the ownership of said real property was made up to the 16th day of August, 1926, on which date the said Hattie A. McKay died, leaving a last will and testament by the terms of which she sought to devise an interest in said real property to her husband, the plaintiff herein, an undivided one-half, and to the defendants Heneretta Lauriston and Mary Frances De Mello the other undivided one-half thereof. Said defendants were named as executrices of said last will and testament, and in due time and after proceedings duly had in the probate court of the city and county of San Francisco, said will was admitted to probate, and said Heneretta Lauriston

and Mary Frances De Mello were appointed by said court executrices thereof. This action is brought by plaintiff to quiet his title to said real property, he claiming to be the sole owner of the whole thereof. The defendants, individually and as such executrices, assert that they are the owners by virtue of said last will and testament of an undivided one-half of the interest of the said Hattie A. McKay in said real property at the time of her death. The court gave judgment in favor of plaintiff, quieting his title to the whole of said real property against all claims of said defendants. From this judgment the defendants have appealed, and the same is before us upon the judgment roll in which is incorporated said stipulation of the parties above referred to. The only question involved in this proceeding is whether Hattie A. McKay at the time of her death was the owner of any interest in said real property which she could devise by will and testament. It is conceded that if the said Hattie A. McKay had any interest in said real property at the time of her death, which was subject to her testamentary disposition, she acquired said interest and continued to retain the same by virtue of the fact that said real property became upon its purchase in November, 1918, community property and remained such during her lifetime, and that at the date of said purchase and up to the time of her death she was the wife of Patrick J. McKay, the respondent. At the time said real property was acquired by Patrick J. McKay, section 1401 of the Civil Code read as follows:

"Upon the death of the wife the entire community property, without administration, belongs to the surviving husband, except such portion thereof as may have been set apart to her by judicial decree, for her support and maintenance, which portion is subject to her testamentary disposition, and in the absence of such disposition, goes to her descendants, or heirs, exclusive of her husband."

In 1923 said section 1401 was amended, and at the date of the death of said deceased read as follows:

"Upon the death of either husband or wife, one-half of the community property belongs to the surviving spouse; the other half is subject to the testamentary disposition of the decedent, and in the absence thereof goes to the surviving spouse, subject to the provisions of section one thousand four hundred two of this Code."

There is no claim that said real property or any part thereof had ever been set apart to Hattie A. McKay by judicial decree or otherwise, for her maintenance or support, or for any purpose whatsoever. It is also apparent that the provisions of section 1402 of the Civil Code have no direct bearing upon the question of the ownership of Hattie A. McKay of an interest in said real property.

At the time said real property was conveyed to plaintiff, section 172a of the Civil Code read as follows:

"The husband has the management and control of the community real property but the wife must join with him in executing any instrument by which such community real property or any interest therein is leased for a longer period than one year, or is sold, conveyed, or incumbered; provided, however, that the sole lease, contract, mortgage or deed of the husband, holding the record, title to community real property, to a lessee, purchaser or incumbrancer, in good faith without knowledge of the marriage relation shall be presumed to be valid; but no action to avoid such instrument shall be commenced after the expiration of one year from the filing for record of such instrument in the recorder's office in the county in which the land is situate."

In the recent case of *Stewart v. Stewart*, 199 Cal. 318, 249 P. 197, this court after an exhaustive review of the decisions of this court, as well as those from other jurisdictions where the community property law prevails, considered and determined the right of the wife in community property acquired under the laws in force in this state immediately following the adoption of said section 172a and the amendment in the same year of section 172 of the Civil Code, relating, in its amended form, to community personal property. In that case we held that under the laws of this state as in force in the year 1918, relative to the rights of the wife in community property acquired while such laws were in effect, the wife had no present vested interest in the community property during the continuance of the marriage relation, except that she might by resort to appropriate judicial remedies protect and safeguard the community property against the inconsiderate and fraudulent acts of the husband. In the course of the opinion in that case this court gave utterance to the following language:

"It is most earnestly contended by and on behalf of the respondent herein that the changes in the laws relating to community property effectuated by these two latter amendments were such as to create in the wife, if such had not theretofore existed, a vested interest in an undivided one-half of the community property immediately upon the acquisition of such property by the spouses or either of them, and to continue thereafter during the existence of the marriage relation. We are unable for the following reasons to give our approval to that contention. The Legislature in framing these two amendments which, taken together, worked a revision of the former section 172 of the Civil Code did not state therein 'in plain language,' as it was pointed out in the second *Spreckels Case* it might easily have done, 'that the purpose of these amendments was to vest in the wife during the marriage a present interest or estate in the community property.' The Legislature did not even by said amendments to the Civil Code go so far as it had done in its revision of the inheritance tax law, coincidentally

adopted, so as to state that the 'one-half of the community property which goes to the surviving wife on the death of the husband * * * shall not be deemed to pass to her as heir of her husband but shall * * * be deemed to go, pass or be transferred to her for valuable and adequate consideration.' Had the Legislature seen fit to so declare in the language employed by it in the coincident statute, no doubt could have existed as to its intent to work such a radical change in the former and long-established status as to render the interest of the wife in the community property thereafter to be acquired a present vested estate and interest therein from the date of its acquisition. The Legislature did not do this nor anything like it. All that the Legislature by these amendments did do or attempt to do was to cast about the interest of the wife in both the real and personal property of the community during the continued existence of the marriage relation added safeguards and protection against the fraudulent or inconsiderate acts of the husband in the exercise of his control and dominion over these properties of the nature of those already provided for in earlier statutes and especially in and by the 1891 amendment to section 172 of the Civil Code. It follows, to our minds, irresistibly that the same reasoning which was applied to the earlier amendment of section 172 of the Civil Code equally applies to those changes in and revision thereof accomplished by the Legislature in 1917. Additional force is, if needed, given to this conclusion when the particular provisions of section 172a as added to the Code in that year are subjected to careful consideration; for it is made to therein appear that the sole lease, contract, mortgage or deed of the husband holding the record title to community real property to a lessee, purchaser or incumbrancer in good faith, without knowledge of the marriage relation, shall be presumed to be valid and shall be so unless an action to avoid such instrument shall be commenced within one year from the recordation thereof. This provision renders the conveyance of the whole of the community real estate to a purchaser or incumbrancer thereof in good faith voidable but not void; a condition entirely inconsistent with the existence of a present and vested ownership in the wife of an undivided one-half of such property, and also with an intent on the part of the Legislature by said amendments to effectuate such a radical change in a long-established rule of property. We are, therefore, clearly of the opinion that the amendments to the Civil Code, adopted in 1917, did not operate to change such rule to the extent of creating in the wife a present vested interest in the property of the community during the continuance of the marriage relation."

The real property in controversy was acquired by the plaintiff under precisely the same legal conditions as was the real property involved in the case of *Stewart v. Stewart*. Accordingly, Mrs. McKay took no present interest therein which she could dispose of by last will and testament.

[1] It is claimed, however, by appellants that by the subsequent amendment of section 1401 of the Civil Code in 1923, which section was in force as thus amended at the date of

the death of said Hattie A. McKay, she was given power to make testamentary disposition of one-half of the community property. There is no question but that by said section 1401 of the Civil Code, as amended in 1923, the wife at her death has been given the power to dispose by will of whatever interest in community property she may have at the time of her death. We have already seen, however, that at the time said real property was acquired the provisions of the Code then in force gave to the wife no right in the community property which she could dispose of by will. Could a subsequent statute or an amendment to the statute in force at the time the property was acquired invest the wife with a right which she did not possess prior to the enactment of said statute or amendment? This question has frequently been before the courts of this state, and particularly in proceedings where the nature and extent of the interest of the wife in the community property of herself and husband have been the subject of controversy. It has been consistently and repeatedly held by this court, beginning with the case of *Spreckels v. Spreckels*, reported in 116 Cal. 339, 48 P. 228, 36 L. R. A. 497, 58 Am. St. Rep. 170, down to cases of recent determination that amendments whereby it was sought to lessen, enlarge, or change in any manner the rights of the respective spouses in community property will not be given retroactive effect so as to affect the respective rights of the parties in community property acquired prior to the enactment of such amendments. *Spreckels v. Spreckels*, 116 Cal. 339, 48 P. 228, 36 L. R. A. 497, 58 Am. St. Rep. 170; *Estate of Frees*, 187 Cal. 150, 201 P. 112; *Roberts v. Wehmeyer*, 191 Cal. 601, 218 P. 22; *Schubert v. Lowe*, 193 Cal. 291, 223 P. 550; *Estate of Drishaus*, 199 Cal. 369, 249 P. 515; *Stewart v. Stewart*, 199 Cal. 318, 249 P. 197.

The decisions of the District Court of Appeal upon this question have been to the same effect. *Clavo v. Clavo*, 10 Cal. App. 447, 102 P. 556; *Jacobs v. All Persons*, 12 Cal. App. 163, 106 P. 896; *Scott v. Austin*, 57 Cal. App. 553, 207 P. 710; *Scott v. Austin*, 58 Cal. App. 643, 209 P. 251; *Copp v. Rives*, 62 Cal. App. 776, 217 P. 813.

[2-4] At the time of the purchase of said real property the respondent took the absolute title thereto subject to whatever rights his wife had therein by virtue of the fact that the same was the community property of himself and his wife. This right of his wife was the right to receive upon the death of her husband, and subject to his debts, one-half of the community property. In other words, the wife was given a right in the community property contingent upon her surviving her husband, and upon the happening of this contingency such right would have ripened into a vested interest in her in and to

the said community property. Her death, however, prior to that of her husband, made the happening of this contingency impossible and thereupon the entire estate belonged to the husband without administration. Civ. Code, § 1401, prior to its amendment in 1923. These rights of the respective spouses in the community property attached to the property and were acquired by the parties at the time of the conveyance of the property, and, as we have seen, said rights cannot be impaired or destroyed by subsequent legislation. The courts, as above noted, have uniformly held that any legislation affecting the rights of the parties in such cases will not be given a retroactive construction, but that the law in force at the date of the acquisition of the property is determinative of the rights of the parties therein. It is plain, therefore, that the right of Hattie A. McKay in said real property at the time of her death must be determined by the law in force at the time said property was acquired by the respondent and herself, and that as the law then in effect gave her no right to make any testamentary disposition of any of said community property or any part thereof, the provision in her last will and testament by which she sought to devise to appellants an interest in said real property is ineffectual to vest title in appellants to any part or portion of said real property.

[5-7] Appellants further contend that the statute under which the husband succeeds to the community property is a statute of succession and inheritance, and therefore the law in effect at the death of the wife governs the disposition of the property of her estate. There is no question but that the right of an heir to inherit from his ancestor is a mere expectancy and is not deemed in any sense to be a vested interest in any property of his ancestor prior to the death of the latter. Statutes governing this right may be amended in any manner the Legislature may see fit, without infringing upon or violating any vested right of the heir. It is equally well settled that the statutes governing the right of inheritance in force at the time of death control the disposition of property left by an intestate. Did the community property acquired by McKay in 1918, upon the death of Mrs. McKay, become the property of respondent by descent and inheritance, or was he the sole owner thereof at all times since its purchase, subject to a half interest therein in his wife, in case she survived him? If a wife had any interest in said real property which would, upon her death, descend to her husband as her heir, then the husband would take the same by descent and inheritance, and the law in force at the time of her death would govern. The decisions of this court, however, have been to the effect that the husband does not, upon the death of the wife, succeed to the community property by de-

scient or succession. This was definitely decided in the early case of *In re Rowland*, 74 Cal. 523, 16 P. 315, 5 Am. St. Rep. 464, in which case this court employed the following significant language:

"The estate in expectancy of the wife in the community property is dependent upon her survivorship; and in the event of her death before her husband, it is deemed never to have existed. If we are correct in this, the husband does not, upon the death of his wife, as to the community property, take by descent or succession, but holds the community property as though acquired by himself, and as if his deceased wife had never existed."

While *In re Rowland* and many of the later cases enunciating this same doctrine were decided by this court in construing the sections of the Code prior to the amended form in which they were in force in 1918, at the time the McKay property was acquired, yet in more recent decisions, and particularly in *Stewart v. Stewart*, supra, the same doctrine has been adhered to as was enunciated in the earlier cases. We quote again from the *Stewart Case*:

"We are, therefore, clearly of the opinion that the amendments to the Civil Code, adopted in 1917, did not operate to change such rule to the extent of creating in the wife a present vested interest in the property of the community during the continuance of the marriage relation."

[8] Therefore, if, under the law of this state as it stood after the various amendments up to and including those enacted in 1917, the wife had no vested interest in the community property during the continuance of the marriage relation, and upon her death her mere expectancy or inchoate interest therein ceased and terminated, after her death there was no property, nor any interest in any property, to which either the husband or any other person could succeed to by descent or succession or by any other means or method. Accordingly it must be held that the respondent did not, upon the death of his wife, take interest in the community property by descent or succession. On the other hand, it is plain that whatever interest the wife had in said community property ceased and terminated at her death and thereupon the husband was the sole owner of said community property. The contention, therefore, of appellant, that the law in force at the death of Mrs. McKay controls the descent and disposition of said community property, cannot be sustained for the conclusive reason that the husband took no interest in said property by descent or succession. On the other hand, whatever interest the parties had in said property became fixed and determined by the law in force at the time said property was acquired by them; their rights therein thus acquired could not

be diminished, enlarged, or in any way affected by subsequent legislation; and as said property at the time it was acquired by Mr. and Mrs. McKay became their community property, upon the death of Mrs. McKay said property in its entirety belonged to McKay without administration. It follows, therefore, that the plaintiff was, at the commencement of this action, the sole owner of said real property, and that the judgment should be affirmed.

It is so ordered.

We concur: WASTE, C. J.; RICHARDS, J.; SHENK, J.; LANGDON, J.; SEAWELL, J.

I dissent: PRESTON, J.

203 Cal. 100

IN RE PHILLIPS' ESTATE.★

PHILLIPS v. PHILLIPS.

(S. F. 12508.)

Supreme Court of California. Jan. 10, 1928.

Rehearing Denied Feb. 9, 1928.

1. Husband and wife $\S$ 273(1)—Statute providing that on husband's death intestate, widow shall inherit community property is statute of descent and succession or rule of inheritance (Civ. Code, $\S$ 1401, as amended by St. 1923, p. 29).

Civ. Code, $\S$ 1401, as amended by St. 1923, p. 29, providing that upon death of husband or wife half the community property belongs to the survivor and the other half is subject to testamentary disposition of decedent, held a statute of descent and succession or rule of inheritance in so far as it provides that on husband's death intestate, widow shall inherit community property.

2. Descent and distribution $\S$ 6—Inheritance of property is determined by law in force at owner's death.

Inheritance law in force when property was acquired does not determine inheritance, but law in force at time of owner's death determines who shall inherit it.

3. Constitutional law $\S$ 190—Wills $\S$ 3—Portion of statute giving wife right to devise one-half community property held constitutional, though inapplicable to previously acquired community property (Civ. Code, $\S$ 1401, as amended by St. 1923, p. 29).

Portion of Civ. Code, $\S$ 1401, as amended by St. 1923, p. 29, giving wife the right to make testamentary disposition of one-half the community property, held not unconstitutional, although inapplicable to community property acquired before the statutory amendment became effective.

4. Statutes $\S$ 64(2)—Portion of statute concerning descent of husband's one-half of community property held not affected by validity or invalidity of portion giving wife right to devise one-half (Civ. Code, $\S$ 1401, 1402, as amended by St. 1923, p. 29).

Portion of Civ. Code, $\S$ 1401, 1402, as amended by St. 1923, p. 29, so that on husband's death intestate all community property goes to widow, held not affected by the validity or invalidity of portion giving wife right to devise one-half of the community property, since the two portions are entirely distinct and severable.

5. Statutes $\S$ 115(3)—Title of statutory amendment "relating to distribution of community property" held sufficient, although amendment gave wife power to devise one-half community property (St. 1923, p. 29, amending Civ. Code, $\S$ 1401, 1402; Const. art. 4, $\S$ 24).

Title of St. 1923, p. 29, being "An act to amend sections 1401 and 1402 of the Civil Code, relating to the distribution of community property on death of husband or wife," held sufficient, under Const. art. 4, $\S$ 24, providing that every act shall embrace but one subject, which subject shall be expressed in its title, notwithstanding contention that amendment, in giving wife power to devise one-half community property, embraced more than mere distribution of such property.

6. Constitutional law $\S$ 70(3)—Policy or wisdom of legislation is exclusively for Legislature to determine.

The policy or wisdom of legislation is not a matter for judicial determination, but is exclusively a legislative question for the Legislature to determine.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Frank H. Dunne, Judge.

In the matter of the estate of Grattan D. Phillips. Petition by Grattan D. Phillips, Jr., against Margaret A. Phillips, individually and as administratrix of the estate of Grattan D. Phillips. Judgment for contestant, and petitioner appeals. Affirmed.

Harry I. Stafford, of San Francisco (R. P. Henshall, of San Francisco, of counsel), for appellant.

John L. McNab and Byron Coleman, both of San Francisco, for respondent.

Eloise B. Cushing and Thomas A. Keogh, both of San Francisco, amici curiae.

CURTIS, J. This is an appeal from an order denying the petition of Grattan D. Phillips, Jr., for a partial distribution of the estate of Grattan D. Phillips, deceased. Grattan D. Phillips died intestate in the city and county of San Francisco on the 27th day of November, 1925, leaving an estate consisting of real and personal property. He also left as his sole heirs at law Margaret A. Phillips, his surviving wife, and two chil-

dren, Virginia Grattan Phillips and Grattan D. Phillips, Jr., the appellant. The petition of appellant for a partial distribution of said estate, in addition to the foregoing facts, set forth the appointment of the said Margaret A. Phillips as administratrix of the estate of said deceased; that more than four months had elapsed since the issuance of letters of administration to the said administratrix, and that no distribution had been had; that the value of the estate left by said deceased was in excess of \$450,000, and that said estate was but little indebted. Petitioner, the appellant herein, therefore asked for an order of court distributing to him as an heir at law of said deceased the sum of \$50,000 from the property of said estate. Margaret A. Phillips, individually and as administratrix of said estate, filed an answer to said petition, and the matter was heard upon said petition and the said answer thereto. Among other things, the court found:

"Upon stipulation of the parties, said decedent and Margaret A. Phillips were married in the year 1893, and the bulk of the estate of said deceased is community property and was acquired prior to 1923 [and] that said estate left by the deceased consists of real and personal property and is of the approximate total value of \$400,000."

It is further set forth in the findings that:

"It was stipulated by the parties in open court that the sole question to be determined on the hearing of said petition was the right of said Grattan D. Phillips, Jr., as surviving son of said deceased, to have distributed to him any portion of the estate of said deceased consisting of community property left by said deceased."

Upon the findings the court made the following conclusion of law and order:

"That said Grattan D. Phillips, Jr., is not entitled to have distributed to him any portion of the estate of said deceased, and that his petition for partial distribution be and the same is hereby denied."

Prior to the amendments to sections 1401 and 1402 of the Civil Code in 1923, the succession of community property upon the death of the husband was governed by section 1402 of said Code, which read as follows:

"Upon the death of the husband, one-half of the community property goes to the surviving wife, and the other half is subject to the testamentary disposition of the husband, and in the absence of such disposition, goes to his descendants, equally, if such descendants are in the same degree of kindred to the decedent; otherwise, according to the right of representation; and in the absence of both such disposition and such descendants, is subject to distribution in the same manner as the separate property of the husband. In case of the dissolution of the community by the death of the husband,

the entire community property is equally subject to his debts, the family allowance, and the charges and expenses of administration."

In 1923 said sections were amended (St. 1923, p. 29), and as amended section 1401 regulated, or attempted to regulate, the succession to community property upon the death of either the husband or wife. Upon this appeal we are not particularly concerned with section 1402 as amended in 1923. After its amendment in 1923, said section 1401 read as follows:

"Upon the death of either husband or wife, one half of the community property belongs to the surviving spouse; the other half is subject to the testamentary disposition of the decedent, and in the absence thereof goes to the surviving spouse, subject to the provisions of section one thousand four hundred two of this Code."

The trial court was evidently of the opinion that section 1401 of the Civil Code, as amended in 1923, and as in force at the death of said intestate, controlled the disposition and distribution of the community property, and held, according to the terms of said section, that upon the death of said Grattan D. Phillips without leaving any will the whole thereof descended to his surviving wife, the respondent herein—one half thereof by virtue of her interest in the community property and of her survival of her husband, and the remaining half thereof due to the fact that the said deceased made no testamentary disposition of said remaining half.

[1, 2] It is clear that said section 1401, as amended in 1923, in so far as it provides that the wife in case of the death of her husband intestate shall inherit the half of the community property which was subject to his testamentary disposition, is a statute of descent and succession, or a rule of inheritance. It is also equally clear that the law of inheritance in force and effect at the date of the acquisition of property does not determine the right to inherit it upon the death of the owner, but that the law in force at the date of the death of the owner of the property determines who shall inherit it upon his death. *Brenham v. Story*, 39 Cal. 179; *Johnston v. S. F. Savings Union*, 75 Cal. 134, 16 P. 753, 7 Am. St. Rep. 129; *Sharp v. Loupe*, 120 Cal. 89, 52 P. 134, 586; *Estate of Packer*, 125 Cal. 396, 58 P. 59, 73 Am. St. Rep. 58; *Estate of Porter*, 129 Cal. 86, 61 P. 659, 79 Am. St. Rep. 78; *Estate of Benvenuto*, 183 Cal. 382, 191 P. 678.

In view of this well-established rule as applied to said section 1401 of the Civil Code in force and effect at the date of the death of Grattan D. Phillips, deceased, and the facts of this case, there can be no question but that the entire community property upon his death descended to his surviving wife, the respondent herein, to the exclusion of his children or other descendants.

Appellant, however, contends that section

1401, as amended in 1923, and no portion thereof, can be given any retroactive effect which would exclude the children from sharing in community property left by their father to the same extent that they would have shared therein under the law in force prior to the amendment of said section in 1923. Appellant bases this claim upon the assumption that that portion of section 1401, as amended in 1923, which purports to give to the wife the right to make testamentary disposition of one-half of the community property upon her death during the lifetime of her husband, is unconstitutional and void if construed to apply to community property acquired prior to the effective date of the amendment to said section 1401 in 1923, and that this provision of said section is so interwoven with the other parts thereof that the section as a whole is either unconstitutional or cannot be given any retroactive effect so as to affect any property acquired prior to the adoption of said amendment.

[3, 4] We have held in a recent decision (*McKay v. Lauriston* [S. F. 12691] 263 P. 1013, filed January 10, 1928) that the provision in said section 1401, as amended in 1923, giving the wife the right to make testamentary disposition of one-half of the community property upon her death during the lifetime of her husband, has no retroactive effect and has no application to community property acquired prior to the effective date of said amendment. In our opinion, however, this provision of the section is not unconstitutional. But whether unconstitutional or merely inapplicable to prior acquired community property, we are unable to agree with appellant that any defect or imperfection to which it may be subject in any way affects the validity or immediate effectiveness of the other provisions of said section which provide for the descent of the husband's one-half of the community property in the event of his failure to make a testamentary disposition thereof.

Under the law as it stood prior to the amendments of 1923, the community property upon the death of the wife belonged to the husband entirely; upon the death of the husband one half thereof went to the surviving wife, and in the absence of testamentary disposition by the husband the remaining half went to his descendants. As amended in 1923, one-half of the community property upon the death of the wife belongs to the husband and the remaining one-half, in the absence of testamentary disposition by the wife, goes to the husband, also; upon the death of the husband, one-half thereof belongs to the wife, and the remaining one-half, in the absence of testamentary disposition, goes to the wife also. It was evidently the purpose and intent of the amendment of 1923 to extend the interest of the wife in the community property beyond that possessed

by her prior to said amendment. We have seen, however, that that portion of section 1401, as amended in 1923, which purports to give to the wife the right to make testamentary disposition of one-half of the community property during the lifetime of the husband, has no retroactive force or effect and cannot and does not apply to community property acquired by the spouses prior to the enactment of said amendment in 1923. This provision of the section, however, is entirely distinct and severable from that portion of the section which deals with the husband's interest in the community property. The amendment in 1923, in so far as it deals with his interest, simply and solely provides that upon his death the remaining one-half of the community property, after the wife had taken the half thereof to which she was entitled both before and after said amendment, should, in the absence of a will by the husband which he was authorized to make by the law as it stood both before and after said amendment, go to the surviving wife instead of to his descendants as provided by section 1402 prior to its amendment in 1923. Let us assume that the attempt of the Legislature to give to the wife the right to make testamentary disposition of one-half of the community property had failed entirely. Is that any reason to hold or believe that the Legislature, had it known of such invalidity, would not have enacted that provision or the amended section by which the wife would become the owner of the whole of the community property upon the husband dying intestate? Surely not. The fact that the legislative intent in the enactment of each of the two provisions was to enlarge the interest of the wife in the community property is a strong, if not a conclusive, indication that it would have enacted the provision giving to the wife the entire community property upon the husband dying intestate, even had it known that the provision giving to the wife upon her death during the lifetime of her husband the right to make testamentary disposition of one-half of the community property was invalid.

In fact, the invalidity of that portion of this amended section (assuming for the sake of argument that any portion is invalid) which sought to give the wife testamentary disposition over one-half of the community property instead of furnishing a reason why the Legislature would not have enacted the other portion of said section giving to the wife all the community property upon the death of her husband intestate would, in our opinion, have had a favorable rather than an adverse effect upon such contemplated legislation. The intent of the Legislature having been to extend the interest of the wife over the community property by the adoption of an amendment to the existing law whereby two new rights were sought to be conferred

upon her, the invalidity of such enactment providing for one of said rights, if known to the Legislature, would have served as an additional incentive and reason why the other should be enacted into law for the wife's benefit and protection. While it is true that these two enactments are set forth in the same section of the Code and are interwoven with each other in the phraseology thereof, yet the purpose of each is plain and clear, and the one is as distinct and severable from the other as if they had been set forth in two separate sections of the Code. To hold otherwise would be to give effect to form rather than substance, and would be to construe the section according to its letter rather than its just and plain intent and purpose. "A law which is unconstitutional in part only is not to be held wholly void, unless the invalid portion is so important to the general plan and operation of the law in its entirety as to reasonably lead to the conclusion that the law would not have been adopted if the Legislature had perceived the invalidity of the part so held to be unconstitutional. If the law is separable, so that the general object can be attained without aid from the part that is void, the other parts of the law will be upheld. *Ex parte Frazer*, 54 Cal. 94; *People v. Perry*, 79 Cal. 105 [21 P. 423]; *People v. McFadden*, 81 Cal. 496 [22 P. 851, 15 Am. St. Rep. 66]. 'If an independent provision, not in its nature and connections essential to the law, be unconstitutional, it may be treated as a nullity, leaving the rest of the enactment to stand as valid.' *McGowan v. McDonald*, 111 Cal. 65 [43 P. 418, 52 Am. St. Rep. 149]. Such invalid provisions 'will not vitiate the whole act, unless they enter so entirely into the scope and design of the law that it would be impossible to maintain it without such obnoxious provisions.' *People v. Hill*, 7 Cal. 103; *People v. Burbank*, 12 Cal. 393; *Mills v. Sargent*, 36 Cal. 382." *Ex parte Gerino*, 143 Cal. 412, 420, 77 P. 166, 169 (66 L. R. A. 249).

We do not wish to be understood by anything that we have said in this opinion as questioning the constitutionality of that portion of said section 1401, as amended in 1923, which gives to the wife the right to dispose of by will one-half the community property. As already stated, in our opinion, that portion of said section has not, nor was it intended to have, any retroactive force or effect. As applying to community property acquired after the adoption of said amendment it is, in our opinion, a valid and binding legislative enactment. But the mere fact that it does not apply to community property acquired prior to its enactment is no legal or valid ground for holding that the remaining provision of the section dealing with the descent of the husband's half of the community property, is inapplicable to all community property of which a husband may

die seized after the effective date of said amendment, irrespective of whether the property in question was acquired before or after said date.

[5] A further attack upon the constitutionality of said section 1401, as amended in 1923, is made by appellant based upon the claim that the title to the act amending sections 1401 and 1402 of the Civil Code in 1923 is defective and does not meet the requirements of the Constitution providing that "Every act shall embrace but one subject, which subject shall be expressed in its title." Article 4, § 24, of the state Constitution. The title of the act reads as follows:

"An act to amend sections one thousand four hundred one and one thousand four hundred two of the Civil Code, relating to the distribution of community property on death of husband or wife."

Appellant concedes that if the title had read "An act to amend sections one thousand four hundred one and one thousand four hundred two of the Civil Code," it would have been a sufficient compliance with the requirements of the Constitution, but that by the inclusion of the additional words found therein the title was made obnoxious to the mandate of the Constitution. Appellant's particular criticism of the title of the act is directed to the use of the words "relating to the distribution" therein, the claim being made that the subject of the act embraces much more than the mere distribution of community property in that it empowers the wife to dispose by will of her half of the community property and makes a radical change in the succession to community property left by the husband dying intestate. The original sections of the Code which the act sought to amend, among other things, provided for the descent of the community property of the husband upon his death without leaving a will. The title of the act refers to and identifies these two sections of the Code and discloses that the purpose of the act is to amend these sections. This, in itself, would be sufficient to inform any one reading the title that it was proposed in the body of the act to change or amend one or all the provisions of these sections. The fact that the words "relating to the distribution of community property on death of husband or wife" were also contained in the title, and might also be read, would not deceive any one into the belief that it might not be the intent of the amendment to change the order of descent of the community property of a

husband dying intestate. In fact, it appears to us that upon reading said title one of the first things that would suggest itself to the reader would be the possibility that a change in the order of descent of community property of the husband might be contemplated by the passage of the act. The title therefore, in our opinion, was sufficient, as it disclosed the general nature or character of the legislation proposed to be enacted. *Abeel v. Clark*, 84 Cal. 226, 229, 24 P. 383. Speaking of what was necessary to be expressed in the title of an act in order to comply with the constitutional requirements, this court in a recent decision said:

"All that is required to be contained therein in order to meet the constitutional requirements is a reasonably intelligent reference to the subject to which the legislation is to be addressed." *O. T. Johnson Corp. v. City of Los Angeles*, 198 Cal. 308, 323, 245 P. 164, 171.

[6] Appellant's counsel, in his closing brief, refers to the fact that the amendments to sections 1401 and 1402, enacted in 1923, were similar to if not identical with those adopted by the Legislature of 1919 and later defeated by a vote of the people upon a submission to them under the terms of a referendum election. He further characterizes these amendments as "a mess of legislation" designed to deprive children of their just inheritance, "and a scheme of distribution and procedure is provided that we need not further criticize." He closes his appeal to this court expressing confidence and "hope that sections 1401 and 1402 will menace the people of this state no longer." In answer to these aspersions of counsel against the amendments to the community property law enacted in 1923, we have only to call attention to the fact that these sections of the Code have been given approval by the lawmaking power of this state, whose exclusive jurisdiction it is to determine the policy of laws which are to govern the people of the state subject only to those limitations contained in our Constitution. In so far as appellant's rights are involved we are of the opinion that all constitutional requirements have been met in the enactment of these sections of the Civil Code, and that they were not "foisted upon us by an invalid title."

The order appealed from is affirmed.

We concur: WASTE, C. J.; RICHARDS, J.; SHENK, J.; LANGDON, J.; SEAWELL, J.

I concur in the judgment: PRESTON, J.

88 Cal. App. 682

MARPLE et al. v. MANSPEAKER.
(Civ. 4875.)

District Court of Appeal, Second District, Division 2, California. Jan. 27, 1928.

1. Negligence ☞136(22)—Evidence held insufficient for jury as not supporting allegations that patron's injuries were sustained through defect in stairway or defendant's negligence.

In action for injuries by fall down cafeteria stairway, plaintiffs' evidence held insufficient for jury as not supporting allegations of their pleadings that wet materials dropped to steps from balustrade, which defendant's servant was cleaning, or that injuries were sustained through defect in stairway or defendant's negligence.

2. Negligence ☞121(3)—*Res ipsa loquitur* maxim held inapplicable to patron's injuries by falling down stairway.

Maxim *res ipsa loquitur* held inapplicable in action for injuries to cafeteria patron falling down stairway leading to basement.

Appeal from Superior Court, Los Angeles County; John M. York, Judge.

Action by Maud Marple and husband against C. O. Manspeaker. From a judgment of nonsuit, plaintiffs appeal. Affirmed.

Tanner, Odell & Taft, of Los Angeles, for appellants.

Joe Crider, Jr., of Los Angeles, for respondent.

CRAIG, Acting P. J. This is an appeal from a judgment of nonsuit in favor of the defendant upon the ground that the plaintiffs had failed to produce sufficient evidence to sustain the allegations of their complaint.

The plaintiffs alleged, and it is admitted: That the defendant was the owner of and conducted a cafeteria on Third street, in the city of Los Angeles; that inside the restaurant, and to the right of the entrance, a stairway descended a few steps to a landing and turned, and that other steps led to the basement, where defendant maintained a restroom and lavatory; that the steps consisted of marble, and that a brass handrail, attached to the side wall of the stairway, was provided for patrons' guidance in descending and ascending the stairway; that the plaintiff Maud Marple, accompanied by her mother and daughter, entered the defendant's place of business, and was proceeding down said stairway, when she fell near the landing at the turn of the stairs and was injured, whereupon she instituted this action of damages. That the defendant by his servant or employee "was engaged in cleaning the brass balustrades above the west or left side of the second flight of stairs in said stairway and had negligently dropped certain wet cleaning materials used in cleaning the balustrades

upon the said handrail attached * * * and upon the step directly below the same near the foot of said second flight of stairs, thereby causing the said step to become slippery. * * * That when the said plaintiff Maud Marple in so descending the said stairs as aforesaid discovered the said cleaning materials upon the said handrail she was thereby caused to and did let go of said handrail in order to avoid soiling her glove, * * * and stepped upon said slippery step, not knowing of the slippery condition thereof, and by reason thereof and of her having to let go of said handrail (her attention being diverted from the descent of said stairs by reason of the condition of the said handrail as above set forth), all so caused by the negligence and carelessness of the defendant as aforesaid, her foot slipped and she thereby lost her balance and her footing and fell down said stairway and sustained the injuries" described in the amended complaint.

[1] The only evidence adduced by the plaintiffs in their attempt to sustain the allegations of their pleadings indicates that Mrs. Marple had proceeded down certain marble stairs which she had frequently descended for a period of four years or more, until at a point near the second landing, at their turn, when her aunt, who preceded her, called attention to some foreign substance on the handrail by which they both were guiding themselves, whereupon Mrs. Marple relinquished her hold on the rail, looked upward, lost her footing, and fell. We quote the most important portions of the plaintiffs' evidence in this regard:

"We started down the stairway, and we got part of the way down, almost to the second landing, * * * to the platform where we made the turn to go downstairs, * * * I let go of the railing on what my aunt said. * * * I felt just as though I had slipped on a banana peeling, or something, and my feet went from under me; I fell on the landing. * * *

"Q. Did you observe anything on the handrail? A. No, sir; not until my aunt said. * * * I let go of the railing, and as I did so I observed this cleaning material on my gloves; a Jap was cleaning the railing up at the top; * * * did not observe anything on the steps, nor that the stairway was slippery. * * *

"Q. Now, I will ask you, how did you come to notice that the material was on it [the handrail]? A. Because my aunt spoke to me."

During cross-examination, Mrs. Marple further testified:

"Just before this accident happened, I naturally looked to see what was causing the dirt, and saw the Jap; the dirt was more like a paste, kind of gray; I don't know how much there was, my aunt had rubbed her hand over it before I got my hand on it; it had kind of stuck along the railing. * * * Just as quick as I could look at my hand and glance up and take a step, I fell; there was quite a lot of it on the rail. * * * When my aunt told me

it was on the rail, I looked up to see where the dirt was coming from; I did not feel any of it coming down."

Mrs. Dilts, the aunt, in testifying for the plaintiffs, said:

"I turned around to her, and she just slipped and fell and went over on her side with her leg under her. * * *

"Q. You did not examine the floor there after the accident? A. No, sir; I did not.

"Q. And before you went away, there, you didn't examine it at all? A. No, sir; I did not."

[2] We cannot say as a matter of law that the trial court erred in concluding that the plaintiffs had failed to produce evidence to support the material allegations of their pleadings. After an exhaustive search of the entire record we are unable to discover any testimony tending to sustain the averments that wet materials dropped from the balustrade to the steps upon which Mrs. Marple fell, or that she received her injuries through any defect in the stairway, or as a result of carelessness or negligence upon the part of the defendant, his agent or servant. There is no showing that the steps were wet or unsafe in any other respect. The circumstances are not such as to warrant the application of the maxim *res ipsa loquitur*, and without it there is no basis for the belief that any negligence of the defendant contributed to the injury of the plaintiff Maud Marple. In this regard the instant case may be fairly classed with *White v. Spreckels*, 10 Cal. App. 287, 101 P. 920, and *Johnson v. So. Cal. Edison Co.*, 27 Cal. App. 425, 150 P. 656. In the case of *Sharpless v. Pantages*, 178 Cal. 122, 124, 172 P. 384, relied upon by appellants, testimony was introduced which established that the plaintiff slipped because of the looseness of carpets maintained by the defendant, and this was said to be the cause of the plaintiff's fall and injury. In this there was evidence of negligence other than the mere fact of the fall, and hence the case differs from the one at bar.

The judgment is affirmed.

We concur: THOMPSON, J.; VALENTINE, Justice pro tem.

88 Cal. App. 659

WINTERBURN v. SHERRIFF et al.★
(Civ. 4849.)

District Court of Appeal, Second District, Division 2, California. Jan. 26, 1928.

Hearing Denied by Supreme Court March 25, 1928.

1. Evidence ⚡462—Oral evidence held admissible to show stock certificates indorsed in blank were delivered contingently and belonged to plaintiff, indorser.

In an action to recover stock certificates which plaintiff had indorsed in blank and given

to another, since deceased, oral evidence held admissible to show that the certificates were delivered to such person, since deceased, contingently, so that latter might use them in effecting a settlement with his wife, but that such settlement was not effected and such certificate still belonged to the plaintiff, indorser, though shortly before his death the deceased had had the blanks filled in, and had given the certificates to defendant.

2. Corporations ⚡138—In action to secure cancellation of stock certificates and issuance of new certificates plaintiff's failure to plead that prior blank transfer was for particular purpose held not to preclude his introducing oral evidence thereon.

In action to secure cancellation of, and issuance of new certificates for, certain stock certificates indorsed in blank and given to a person, since deceased, allegedly for a particular purpose, and not as an outright transfer of property therein, plaintiff's failure to plead that such assignment was a contingent one, for a particular purpose, and not an outright transfer, held not to preclude his introducing oral evidence thereon, there being no question of fraud involved and plaintiff not seeking to establish a trust.

Appeal from Superior Court, Los Angeles County; J. O. Moncur, Judge.

Action by Elmer E. Winterburn against Carrie V. Sherriff and another. Judgment for plaintiff, and named defendant appeals. Affirmed.

Robert M. Clarke and Henry L. Knoop, both of Los Angeles, for appellant.

Charles F. Blackstock, of Oxnard, for respondent.

THOMPSON, J. This action was brought for the purpose of securing the cancellation of certain certificates of stock evidencing shares of the capital stock of the defendant corporation, Penn Investment Company, and the issuance of a new certificate on the ground that the certificates were wrongfully withheld by the defendant and appellant Carrie V. Sherriff. For a more complete statement of the nature of the action, reference may be had to an opinion on a former appeal in this same cause in 61 Cal. App. 531, 215 P. 406. Subsequent to that decision the case was tried, resulting in a judgment that the 7 certificates of stock, representing 53 shares, and being all of the shares mentioned in the complaint, should be canceled, and directing the defendant corporation upon tender to it of its costs to issue a new certificate for 53 shares. The appeal is from the judgment.

[1] On January 4, 1921, W. J. Sherriff, who was the uncle of plaintiff and the brother-in-law of appellant, transferred to the plaintiff the shares of stock in question, apparently for a valuable consideration. In March of the same year, plaintiff redelivered the certificates, assigned by him in blank, to W. J. Sherriff, by whom they were retained until

two days before his death in July, 1921, when, being advised of the seriousness of his illness, he delivered them to the appellant Carrie V. Sherriff. Before delivery the attending physician, at the direction of Mr. Sherriff, filled in the name of appellant in the blank assignment on all except one certificate for 10 shares, which by apparent oversight was left general. Over the consistent and strenuous objections of appellant's counsel, the plaintiff was permitted to introduce testimony to the effect that the delivery of the certificates to W. J. Sherriff by plaintiff was upon the oral understanding between the plaintiff and his counsel that they were to be used by the latter in effecting a settlement with his wife, and if not used for that purpose were to be returned. It was further testified that the certificates of stock were never used for that purpose. It is the reception of testimony covering the oral agreement under which the stock was delivered to W. J. Sherriff of which appellant complains and which she urges as a ground for a reversal of the judgment, contending in support thereof that appellant's chain of title was complete; that plaintiff could not introduce testimony to vary the terms of the assignments by him and the delivery to W. J. Sherriff, contracts complete in themselves; that the testimony should have been excluded because the plaintiff having failed to plead that he intended the assignments for a limited purpose is precluded from proving such purpose; and lastly, that plaintiff made a gift to W. J. Sherriff which was complete and irrevocable.

It will be observed at the outset of the discussion that appellant was not a purchaser for a valuable consideration, which circumstance, if it were present, might seriously alter the entire situation. Undoubtedly the delivery to appellant of the certificates clothed her with the external indicia of title as counsel asserts, and undoubtedly had she been an innocent third party parting with value she would have been protected under the authority of such cases as *Fowles v. National Bank of California*, 167 Cal. 653, 140 P. 271, but such rule is far different from saying that he who assigns a stock certificate in blank and delivers it to another shall not be permitted to show the real purpose of the delivery. In truth, the authorities relied upon by appellant (*Fowles v. National Bank of California*, supra, and *Bumiller v. Bumiller*, 179 Cal. 119, 175 P. 897) recognize the right of the true owner to establish by competent testimony other than the contents of the assignment and in explanation thereof, the fact of ownership. Even though the insertion of appellant's name in the general and blank assignment might under different circumstances alter the rule, it can make no difference in this action where the foundation of her claim is made to rest upon the title with which W. J. Sherriff was vested by

the assignments in blank. Or, to phrase it in other words, the question here is concluded by the answer to the question, Could the plaintiff have maintained the action and introduced the testimony, so far at least as the first objection is concerned, against W. J. Sherriff? This answer must be in the affirmative. As a further indication of the soundness of this rule, see *Barstow v. Savage M. Co.*, 64 Cal. 388, 1 P. 349, 49 Am. Rep. 705, *Sayward v. Houghton*, 119 Cal. 545, 51 P. 853, and *Popp v. Exchange Bank*, 189 Cal. 296, 208 P. 113.

The answer to this first objection constitutes also the answer to the second; namely, that the plaintiff could not introduce testimony to vary the terms of the general assignments followed by delivery of the certificates to W. J. Sherriff on the ground that such assignments, followed by such delivery, constitute contracts complete in themselves.

[2] We are next confronted by the question of whether the failure of the plaintiff to plead that he intended the assignments for a particular purpose should have precluded him from introducing the testimony. The ultimate fact in issue was the ownership of the certificates of stock and whether they were being wrongfully withheld. There was no question of fraud involved in the case. Neither did plaintiff seek to establish a trust. Ownership of the certificates was to vest in W. J. Sherriff upon the happening of a certain condition, to wit, the consummation of a settlement with his wife, and he was clothed with the external indicia of ownership to assist him in bringing about the condition. We see no real differences in this situation and one where the assignment might have been made for the purpose of giving to another collateral security for a debt. Could it be said in the latter event and after payment of the debt a pleading of the ultimate fact of ownership and wrongful withholding without setting up the fact of the pledge would have precluded the plaintiff from showing the pledge? We think not, for the reason that the complaint is founded upon the theory that title never passed. So here, the complaint is founded upon the theory that title never passed to W. J. Sherriff. To this effect we find the authority of *Jose Realty Co. v. Pavlicevich*, 164 Cal. 613, 130 P. 15, holding, under an allegation of ownership and right of possession to real property, that the plaintiff was entitled to prove, for the purpose of controverting the recitals in a trustee's deed made pursuant to the provisions of a deed to the trustee with a power of sale, that there was in fact no default, and the recitals if permitted to stand uncontroverted would constitute a fraud upon him. That case and the authorities there noted sufficiently dispose of the question.

Appellant's last contention assumes a situation which does not exist. She asserts that

a completed gift is irrevocable, and it must be admitted that her statement of the law is unassailable. However, as we have already observed, there was no completed gift to W. J. Sherriff and was to be none except and upon the sole condition that he effected a settlement with his wife, which condition was never consummated. Hence the argument is unavailing.

Judgment affirmed.

We concur: CRAIG, Acting P. J.; VALENTINE, Justice pro tem.



88 Cal. App. 679

HORN v. YELLOW CAB CO. (Civ. 6014.)

District Court of Appeal, First District, Division 1, California. Jan. 27, 1928.

1. Appeal and error ⇨1004(1)—Only method of determining whether personal injury damages are excessive is by comparing amount awarded with evidence.

There is no absolute rule applicable to all cases of determining whether damages in personal injury case are excessive, but only method of determining question is by comparing the amount of damages awarded with the evidence.

2. Appeal and error ⇨1004(1)—Only where damages are excessive as matter of law, or so grossly disproportionate to injury as to indicate passion, prejudice, or corruption, may reviewing court interfere.

Remedy for safeguarding against danger of excessive verdicts is to great extent committed to trial judge, and it is only in cases where the excess appears as a matter of law, or where recovery is so grossly disproportionate to compensation reasonably warranted by the facts as to shock the sense of justice or at first blush raises presumption that it is the result of passion, prejudice, or corruption, rather than honest and sober judgment, that a reviewing court is justified in interfering.

3. Appeal and error ⇨930(1)—On appeal, evidence on which verdict is based must be accepted as true.

On appeal, evidence on which verdict is based must be accepted as true.

4. Damages ⇨130(3) — \$6,622.35 for slip of sacroiliac joint, requiring three weeks' use of cast and subsequent use of brace with severe pain and nervous shock, from which plaintiff had not recovered, held not excessive.

Award of \$6,622.35 for disability, pain, suffering, and inconvenience resulting from injury to plaintiff's back diagnosed as a slip of the sacroiliac joint, necessitating five weeks' hospital treatment, use of cast for three weeks, strapping of her body with tape for a week thereafter, and use of brace which she was still wearing at time of trial nine months later, accompanied by severe pain and nervous shock from which she would probably not recover for some time after the trial, with a predisposition

to recurrence, in addition to \$887.65 conceded as special damages for doctor's bills, hospitalization, and loss of employment, held not excessive.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by Betty Horn against the Yellow Cab Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Roy A. Bronson and E. D. Bronson, Jr., both of San Francisco, for appellant.

J. Hampton Hoge, of San Francisco, for respondent.

KNIGHT, J. A verdict of \$7,500 damages was awarded respondent on account of personal injuries sustained by her as a result of the alleged negligence of appellant's employee, and from the judgment entered on said verdict this appeal has been taken.

The action was tried with two companion cases, and the appeals were consolidated, but on stipulation the appeals in the other two actions have been dismissed. The sole ground urged for reversal of the judgment in the present case is that the amount of damages awarded is excessive.

The three actions grew out of a collision occurring on the morning of July 5, 1924, at the corner of Post and Laguna streets, San Francisco, between a taxicab operated by the appellant company in which the three plaintiffs were riding as passengers for hire, and an automobile. The taxi was being driven at a speed approximating 30 miles an hour while traversing the intersection of the streets mentioned, and struck the rear end of an automobile running at right angles with the taxi. Following the impact the taxi traveled a distance of 90 feet, ran up on the sidewalk, and crashed into a building on the wrong side of the street, overturning the taxi, injuring the occupants thereof, and damaging the building. At the trial appellant admitted liability for the accident, and the issue before the jury was therefore confined to the question of the extent of the injuries suffered by the occupants of the taxi and the damages proximately resulting therefrom. It is conceded on this appeal that respondent sustained special damages in the sum of \$877.65 on account of doctor's bills, hospitalization, and loss of employment, which leaves an assessment of \$6,622.35 as compensation for the disability and the attendant pain, suffering, and inconvenience.

It appears from the testimony that besides sustaining a severe nervous shock respondent was thrown violently to the floor of the taxi, injuring her back; also, that her head struck against some object driving her teeth through her lip. The injury to her back instantly caused total disability, which was accompanied by intense pain. She was removed

first to the emergency hospital and then to the home of a friend. The physician who was called diagnosed the injury to her back as a slip of the sacroiliac joint, but on account of the agonizing pains accompanying the injury was unable to treat the same fully at the home, and in a couple of days ordered respondent sent to the hospital, where, after placing her under the influence of an anæsthetic, he manipulated the joint into place and put the patient in a plaster cast extending from the hips up to the region of the ribs, which she wore for a period of three weeks; and during that time she was compelled to lie on her back. Following the removal of the cast her body was strapped with adhesive tape for about a week, and thereafter placed in a flexible brace reinforced with steel, which she was still wearing at the time of trial, some nine months after the accident. She remained in the hospital for five weeks, and was wholly unable to perform any kind of work until the following September, when she obtained employment as a stenographer; but on account of exhaustion and constant pain caused by the injury she was unable to work to full capacity, and in January, 1925, was compelled to give up the position.

Instantly upon receiving the injury and for a considerable period of time thereafter she suffered excruciating pain, it being necessary immediately following the accident to muffle her screams by placing a handkerchief in her mouth and a pillow over her head; and she was still suffering from pain at the time of trial, although it was much less severe.

As shown by the medical testimony, the sacroiliac joint is the point of junction of the sacrum, which is a portion of the lower spine, with two of the bones of the pelvis. It is not a movable joint, but consists of flat surfaces held together by ligaments. A slip of the segments of the sacroiliac joint is caused by a wrench or twist severe enough to tear the ligaments, and when this occurs there is necessarily a painful injury to a cluster of nerves centering in the sacral plexus, two of them being the sciatic nerves extending down the back of the thigh and which are eventually distributed in the lower leg and the foot. The immediate effect of such an injury is to prevent the patient from stooping or turning, or from lifting any weight or performing any kind of work calling into play the muscles attending the spine. The evidence shows that in respondent's case the sacroiliac ligaments were stretched and torn to the extent of causing internal hemorrhage.

The evidence further shows that at the time of trial respondent was still under the care of her physician; that she was suffering from nervous shock and from pain which extended from the back down the legs into the feet; that she was not able to sit long in any position nor to walk any considerable distance; and that as a result of the stretch-

ing and tearing of the sacroiliac ligaments there was a predisposition to another slip of the joint which could be caused by a strain. Although there was no direct evidence establishing the period of time respondent would continue to suffer pain and partial disability, it appears from the testimony given by the medical expert produced by appellant that "the so-called sacroiliac slip is one of the most severe conditions in this region that can possibly arise"; and other medical testimony was given to the effect that for some time at least, subsequent to the trial, respondent would be unable to follow her employment as stenographer on account of the pain which would be caused by sitting on the sciatic nerve, by twisting her body, lifting her leg, or arising from a chair.

[1, 2] In support of its contention that the amount of damages awarded is excessive, appellant cites a number of cases from this jurisdiction and others wherein judgments have been reversed on that ground; but, as frequently stated, a classification based upon figures of a particular verdict is of little value because of the innumerable and often indeterminate factors entering in question. 8 Cal. Jur. 839. No two cases exactly alike are to be found, and consequently no absolute rule is applicable to all cases. *Morgan v. Southern Pacific Co.*, 95 Cal. 501, 30 P. 601. Therefore, the only method of determining whether a verdict is excessive is by comparing the amount of damages awarded thereby with the evidence (*Zibbell v. Southern Pacific Co.*, 160 Cal. 237, 116 P. 513); and where the element of past and future pain is involved it is always difficult to fix the amount of damages which should be allowed therefor (*Pedrow v. Federoff*, 77 Cal. App. 164, 247 P. 212). The remedy for safeguarding against the danger of excessive verdicts is necessarily, to a great extent, committed to the judge who presides at the trial, because it is presumed that he will carefully weigh the evidence himself and not allow a verdict to stand if he believes that excessive damages have been awarded by the jury under the influence of passion or prejudice; and it is only in cases where the excess appears as a matter of law, or where the recovery is so grossly disproportionate to any compensation reasonably warranted by the facts as to shock the sense of justice or at first blush raises a presumption that it is the result of passion, prejudice, or corruption, rather than honest and sober judgment, that a reviewing court is justified in interfering. *Bond v. United Railways*, 159 Cal. 270, 113 P. 366, 48 L. R. A. (N. S.) 687, Ann. Cas. 1912C, 50; *Pedrow v. Federoff*, supra; 8 Cal. Jur. 834.

[3, 4] In view of the facts hereinabove narrated, which on appeal must be accepted as true, showing, as they do, that the major injury received by respondent was of a particularly distressing, disabling, and serious character, from which she would probably not fully recover for some time subsequent

to the trial, and that there was a predisposition to recurrence, we think that the case is not one which may be fairly said to fall within the foregoing rule warranting interference on appeal.

The judgment is, therefore, affirmed.

We concur: TYLER, P. J.; CASHIN, J.

88 Cal. App. 671

BROEDLOW v. LE GROS. (Civ. 6029.)

District Court of Appeal, First District, Division 1, California. Jan. 27, 1928.

1. Municipal corporations $\Rightarrow$ 705(2)—Motor vehicle driver must anticipate presence of others having equal rights in street (Vehicle Act § 113).

Aside from mandatory provisions of Vehicle Act, § 113 (St. 1923, p. 553), as to driving at reasonable speed with due regard to traffic, surface, and width of highway, driver of motor vehicle is bound to anticipate presence on street of other persons having equal rights there.

2. Municipal corporations $\Rightarrow$ 706(6)—Negligence in operating automobile striking pedestrian crossing street between intersections held question of fact.

Whether driver was operating automobile in negligent manner at time of striking pedestrian crossing street between intersections, *held* fact question for trial court, in view of misty evening, slippery pavement, place of accident, street, approach of interurban train about to stop at station within block, driver's wavering course, and his failure to observe pedestrian until within 6 feet of her, give warning of sudden change of course, and have automobile under such control as to allow him to stop within range of his vision.

3. Municipal corporations $\Rightarrow$ 706(5)—Evidence held to support finding of negligent operation of automobile striking pedestrian crossing street between intersections.

Evidence, in action for death of pedestrian struck by automobile while attempting to cross street between intersections, *held* sufficient to support trial court's finding of negligent operation of automobile by defendant.

4. Municipal corporations $\Rightarrow$ 705(10)—In absence of regulation, pedestrian may cross street anywhere within block.

In absence of prohibitory state or municipal law, pedestrian has right to cross street at any point within block.

5. Municipal corporations $\Rightarrow$ 706(3)—Pedestrian struck by automobile is presumed to have exercised requisite care.

Presumption is that pedestrian, struck by automobile while crossing street between intersections, was at all times exercising requisite degree and amount of care for her own safety.

6. Municipal corporations $\Rightarrow$ 706(7)—Negligence of pedestrian, struck by automobile while crossing street between intersections, held question of fact.

Whether pedestrian, struck by automobile, was negligent in attempting to cross street between intersections on misty evening while pavement was wet, *held* question of fact for trial court.

7. Municipal corporations $\Rightarrow$ 706(3)—Burden of showing pedestrian, killed by automobile, was negligent, was on defendant.

In action for death of pedestrian, struck by automobile, while crossing street between intersections, burden of showing that decedent was negligent was on defendant.

8. Municipal corporations $\Rightarrow$ 706(5)—Testimony that pedestrian, struck by automobile, was looking toward interurban train, held not to establish negligence.

In action for death of pedestrian struck by automobile, defendant driver's and one of his passenger's, testimony that decedent was looking toward approaching interurban train, *held* not to show that she was negligent, in absence of evidence that she did not exercise requisite care to look in both directions for approaching vehicles immediately before impact; presumption being that she did.

9. Municipal corporations $\Rightarrow$ 706(5)—Testimony that pedestrian stepped back into path of automobile held not to establish contributory negligence.

In action for death of pedestrian struck by automobile, testimony of defendant driver and one of his passengers that decedent stepped backward into path of car *held* not to establish contributory negligence, in view of evidence that she saw approaching automobile, and, believing it would continue on straight course in front of her, stepped back to get out of way, and that defendant without warning suddenly swerved and collided with her.

Appeal from Superior Court, Alameda County; T. W. Harris, Judge.

Action by Mary Mesmer Broedlow against Ernest Le Gros. Judgment for plaintiff, and defendant appeals. Affirmed.

J. Hampton Hoge, of San Francisco, for appellant.

Clark, Nichols & Eltse, of Berkeley, and Reece Clark, of Calistoga, for respondent.

KNIGHT, J. While operating an automobile in the "jitney" service along Seventh street in Oakland, appellant collided with a pedestrian named Lydia Mesmer, inflicting upon her injuries from which she soon afterwards died. As a result of the accident, the decedent's mother, being dependent upon her daughter's support, commenced this action for damages, alleging that her daughter's death was proximately caused by the negligent operation of appellant's automobile, and upon trial before the court sitting without a jury was given judgment for the sum of \$2,500,

from which judgment this appeal has been taken. The points urged for reversal are that the court erred in not granting a nonsuit, and that the findings upon the contested issues of appellant's negligence and the decedent's contributory negligence are not supported by the evidence.

The accident happened on December 4, 1924, about the hour of 7:20 p. m., on Seventh street, between Myrtle and Market streets, at a point about 60 feet east of the intersection of Seventh with Myrtle, while the decedent was attempting to cross Seventh street. The latter street runs east and west, is about 74 feet in width, and crosses Myrtle street at right angles. Along the center thereof are laid the double tracks of the Southern Pacific Company's interurban railroad; there being a space of about 10 feet between the two sets of tracks, and the rails of each set being approximately $4\frac{1}{2}$ feet apart. The west-bound electric trains are operated over the northerly tracks, and the east-bound trains over the southerly tracks.

At the time of the accident, the weather was misty, and the street was wet and slippery; it having rained earlier in the evening. Appellant was driving a seven-passenger automobile east along the south side of Seventh street, carrying four passengers; the gross weight of the machine with the passengers being approximately three tons. Shortly prior to the accident the decedent left her apartment, located on the north side of Seventh street within the block mentioned, where she lived with her mother, to go across the street to purchase some foodstuffs at a bakery, after which she started to recross the street, but, upon observing a west-bound train approaching from her right, stopped just before attempting to cross the southerly or east-bound tracks, and it was at or near this point where she was struck by appellant's automobile, which came upon her from the left side. She was picked up about 2 or 3 feet south of the most southerly rail and about 60 feet east of said intersection.

The evidence as to the exact movements of appellant's automobile immediately preceding the accident are somewhat conflicting, but the essential facts adduced at the trial supporting the contested findings are substantially as follows: As appellant entered the intersection of Seventh and Myrtle streets, he observed two pedestrians crossing Seventh street in a southerly direction, and, instead of passing in front of them by keeping well to the right and traveling along the south curb of Seventh street as he could have done, he turned to the left and passed behind them, which caused him to drive his automobile over onto and along the southerly or east-bound railroad track. While following this course, the west-bound train, with its headlight burning, approached from the opposite direction on the northerly tracks, and was about to stop at the Market street station, which was lo-

cated on the north side of Seventh street in the middle of the block between Myrtle and Market streets. When the train drew closer to him, appellant, without giving any warning of his intention so to do, suddenly swerved to the right from the southerly tracks upon which he had been traveling, and, not observing decedent until his machine was within 6 feet of her, nor having his machine under sufficient control to stop within that distance, struck the decedent, knocking her down, and fracturing her skull.

Appellant testified at the trial to the effect that, after passing the two pedestrians above mentioned and before leaving the intersection, he gradually diverted his course to the right from the railroad track and regained the traveled portion of the south side of Seventh street, and that he had proceeded straight ahead for a short distance when suddenly the decedent appeared within the glare of his headlights, not 6 feet away; that she was then looking in the direction of, and backing away from, the approaching electric train, and in doing so stepped backward into the pathway of his machine; that at no time was he traveling more than 15 miles an hour; and that he brought his automobile to a stop within 4 or 5 feet from the point of the impact. Appellant had given his version of the accident under oath on two previous occasions, however, first, before the coroner's jury, and later in the form of a deposition, and the record shows that some of the statements there made varied with those made at the trial. But, aside from the question of the conflicting statements, appellant admitted in his previous testimony that, as he approached the point of the accident, the headlight from the electric train more or less affected his vision, but that nevertheless he was able to see ahead for a distance of about 40 feet; also that, after decedent came within his view, and in an effort to avoid striking her, he turned quickly to the south toward the gutter, but a Ford truck was standing alongside the gutter, and he was unable to divert his course farther to the south, and that the application of his brakes caused his machine to skid, the front wheels turning toward the north and the rear wheels toward the curb.

[1] Section 113 of the state Vehicle Act (St. 1923, p. 553) requires that any person driving a vehicle on the public highways of this state shall drive the same at a careful and prudent speed not greater than is reasonable and proper and having due regard to the traffic, surface, and width of the highway, and no person shall drive any vehicle upon a public highway at such a speed as to endanger life, limb, or property of any person; and, aside from these mandatory provisions of the statute, the driver of a motor vehicle is bound to anticipate the presence on the street of other persons having equal rights there with himself. *Zarzana v. Neve Drug Co.*, 180 Cal. 32, 179 P. 203, 15 A. L. R. 401. In this connection, the

case of *Rush v. Lagomarsino*, 196 Cal. 308, 237 P. 1066, declares:

"The right of drivers of automobiles to use public highways is not superior to that of the humblest pedestrian and in the exercise of a common right to the use of the public highways all persons using the same must exert constant care and caution for the conservation of their correlative rights commensurate with the special hazard which is peculiar to and nowadays ever present in the use of public highways. Accordingly the driver of an automobile 'has no right to assume that the road is clear, but under all circumstances and at all times he must be vigilant and must anticipate the presence of others. * * * The fact that he did not know that any one was on the highway is no excuse for conduct which would have amounted to recklessness if he had known that another vehicle or person was on the highway.' *Meyers v. Bradford*, 54 Cal. App. 157, 159 [201 P. 471]. Even though the operator of an automobile may be rigidly within the law, 'he still remains bound to anticipate that he may meet persons at any point of the street and he must, in order to avoid the charge of negligence, keep a proper lookout for them and keep his machine under such control as will enable him to avoid a collision with another person using proper care and caution and if the situation requires, he must slow up and stop.' *Reaugh v. Cudahy Packing Co.*, 189 Cal. 335, 340, 208 P. 125, 127."

[2, 3] In view of the numerous and peculiar circumstances attending the accident here involved, including the condition of the weather and the pavement, the location of the accident, and the fact of the approaching train which was about to stop at a station within the block, the wavering course appellant was following, his failure to observe the decedent until he was within 6 feet of her, also his omission to give any warning of his sudden change of course just before striking the decedent, and the fact that he did not have his automobile under such control as to allow him to stop within the range of his vision, we are of the opinion that the question of whether appellant was operating his automobile in a negligent manner was one of pure fact for the trial court to determine, and, it having found in the affirmative upon that issue, that the evidence hereinabove set forth is sufficient to support its finding. *Zarzana v. Neve Drug Co.*, supra; *Gross v. Burnside*, 186 Cal. 467, 199 P. 780; *Burgesser v. Bullock's*, 190 Cal. 673, 214 P. 649; *Ham v. County of Los Angeles*, 46 Cal. App. 148, 189 P. 462; *Park v. Orbison*, 43 Cal. App. 74, 184 P. 428; *Courviosier v. Burger*, 61 Cal. App. 470, 215 P. 93; *Simmons v. Stephens*, 48 Cal. App. 351, 191 P. 978.

[4-9] Nor do we find sufficient legal grounds to justify an interference with the trial

court's negative finding upon the question of contributory negligence. In the absence of a prohibitory state or municipal law, the decedent had the right to cross Seventh street at any point within the block (*Hatzakorjian v. Rucker-Fuller Desk Co.*, 197 Cal. 82, 239 P. 709, 41 A. L. R. 1027; *Gett v. Pacific Gas & Electric Co.*, 192 Cal. 621, 221 P. 376), and the presumption is that while doing so she was at all times exercising the requisite degree and amount of care for her own safety (*Hatzakorjian v. Rucker-Fuller Desk Co.*, supra; *Hollowell v. Cameron*, 186 Cal. 530, 199 P. 803). The question, therefore, of whether or not she was negligent in attempting to cross the street at the particular place and under the circumstances above related was also one of fact to be determined by the trial court, and the burden of showing that the decedent was negligent rested on appellant. As proof of such asserted negligence, appellant relies mainly upon the testimony given by himself and one of his passengers, to the effect that the decedent was looking in the direction of the approaching train and stepped backward into the pathway of the automobile. It is evident from this testimony, however, that the conduct of the decedent was under their observation for only a fraction of a second before the impact, and in the absence of any evidence showing that immediately prior thereto she did not exercise the requisite amount of care to look in both directions for approaching vehicles, the presumption of law is that she did (*Hollowell v. Cameron*, supra; *Hatzakorjian v. Rucker-Fuller Desk Co.*, supra); and, with reference to the claim that the decedent stepped backward, it may be reasonably inferred from all of the circumstances attending the accident that the decedent saw the approach of appellant's automobile as it was headed down the east-bound tracks, and, believing that it would continue on a straight course and pass in front of her, she receded so as to get out of the line of its travel, and that just as she was in the act of doing so appellant, without giving any warning indicating he was about to change his course, suddenly swerved to the south and collided with her, in which case she would not be guilty of contributory negligence. In this respect the case is essentially the same in principle as *Potter v. Back Country Transp. Co.*, 33 Cal. App. 24, 164 P. 342, *Park v. Orbison*, supra, and *Haines v. Fewkes*, 190 Cal. 477, 213 P. 490, and in our opinion must be governed by the law declared therein.

The judgment is affirmed.

We concur: TYLER, P. J.; CASHIN, J.

88 Cal. App. 657

HUNTOON v. POWELL. (Civ. 5078.)

District Court of Appeal, Second District, Division 1. California. Jan. 26, 1928.

1. **Frauds, statute of** §129(1)—**Son's oral promise to pay mother's doctor bill, previously incurred, held within statute, notwithstanding part payment by son** (Civ. Code, §§ 206, 1624, subd. 2).

In action by a physician to recover from a son of his former patient for services rendered defendant's mother at her request, *held* that the son's oral promise, made after services had been rendered, to pay the bill, was not enforceable even though he had paid a portion of it, since, in absence of a showing that, under Civ. Code, § 206, relative to children's responsibility for poor parents, such debt was the son's debt, the promise was within the statute of frauds, section 1624, subd. 2.

2. **Paupers** §37(1)—**Son held not liable for mother's doctor bill, in absence of evidence showing mother was poor person unable to maintain herself by work** (Civ. Code, § 206).

In action by a physician against a son of a former patient to recover payment for medical services rendered such parent at her request, *held* that son was not liable for payment thereof, under Civ. Code, § 206, imposing certain liabilities upon the children of poor persons, even though he had orally promised, after such services had been rendered, to pay, in the absence of evidence showing that the mother was a poor person unable to maintain herself by work.

Appeal from Superior Court, Los Angeles County; Harry A. Hollzer, Judge.

Action by Harry A. Huntoon against E. A. Powell. Judgment for plaintiff, and defendant appeals. Reversed.

Joe Crail, Harold C. Morton, and Claude A. Shutt, all of Los Angeles, for appellant.

Bradner W. Lee, Bradner W. Lee, Jr., and Kenyon F. Lee, all of Los Angeles, for respondent.

WOOD, Justice pro tem. Plaintiff, a physician, commenced the action against E. A. Powell and Mrs. M. E. Powell to recover the sum of \$342.50, alleged to be due for services rendered to Mrs. M. E. Powell between July 13, 1921, and March 16, 1923. The defendant Mrs. M. E. Powell died before the trial and the action was dismissed as to her. The trial court found that the services were rendered at the special instance and request of Mrs. Powell, who was the mother of defendant E. A. Powell; that the entire bill amounted to \$442.50; and that E. A. Powell paid \$100 on account on September 15, 1921. E. A. Powell by oral promise agreed on September 1, 1921, to pay plaintiff for said services, most of which had been rendered before that date. After the trial plaintiff was permitted to file an amendment to the complaint in which it

is alleged "that the defendant Mrs. M. E. Powell was at all the times herein mentioned a poor person, and unable to maintain herself by work." The court found this allegation, which was denied by E. A. Powell, to be true.

[1] It is the contention of plaintiff that section 206 of the Civil Code justifies the court in rendering judgment upon the oral promise of defendant, since that section provides that the "promise of an adult child * * * is binding." Defendant contends that the proper interpretation to be given to section 206 is that it supplies the element of consideration where such a promise is otherwise valid by being in writing, citing subdivision 2 of section 1624, wherein it is provided that "a special promise to answer for the debt, default, or miscarriage of another" must be in writing. This question has already been passed upon by our Supreme Court in *Flournoy v. Van Campen*, 71 Cal. 14, 12 P. 257, a case in which the facts were almost exactly the same as in the case before us, the only difference being that defendant Powell paid the sum of \$100 after making the oral promise. In that case the court said:

"His recovery in the court below against the defendant included compensation for services rendered by him as well before as after the contract with defendant, and is not susceptible, as the record is presented, of severance. Certainly the services rendered prior to the contract with defendant were rendered at the instance of defendant's mother, and for them she was bound to pay. That debt was her debt, and for it defendant could under the statute only bind himself in writing."

Section 206 was enacted in 1872 and has not been amended. The case of *Flournoy v. Van Campen* was decided 14 years later. In accordance with that decision, the judgment in the instant case must be reversed.

[2] Defendant maintains that, regardless of his contention that the promise must be in writing, plaintiff has not proved sufficient facts to enable him to rely upon section 206. That section is as follows:

"It is the duty of the father, the mother, and the children of any poor person who is unable to maintain himself by work, to maintain such person to the extent of their ability. The promise of an adult child to pay for necessities previously furnished to such parent is binding."

There is no evidence in the record to sustain the finding that the mother of defendant was a poor person who was unable to maintain herself by work. Plaintiff contends that:

"The nonpayment of the bill for medical services by Mrs. Powell and the payment on account thereof by, and the promises of appellant to pay the bill, affords an inference that Mrs. Powell was unable to pay it, and being unable to pay it, the inference follows that she was without the means to do so."

By drawing the most liberal inference from these facts it cannot be said that plaintiff has established that Mrs. Powell was a poor person unable to maintain herself by work.

The judgment is reversed.

We concur: HOUSER, Acting P. J.; YORK, J.

88 Cal. App. 601

MILLER v. MURPHY. (Civ. 5860.)

District Court of Appeal, First District, Division 2, California, Jan. 25, 1928.

1. Appeal and error ⇐207, 719(1)—Error cannot be predicated on prejudicial misconduct of opposing counsel not brought to attention of trial court, nor assigned as error.

Reversible error could not be predicated on alleged misconduct of opposing counsel in his opening statement to the jury, where the court's attention was not called to the statement, it was not assigned as error, nor was any request made to instruct the jury to disregard it, even though the statement was prejudicial.

2. Trial ⇐133(6)—Opposing counsel's improper statement held not ground for reversal, where court's language, though not direct, effectively instructed jury to disregard it.

Where the argument of opposing counsel was improper, and was objected to, the court's instruction to the jury which, in effect, told the jury to disregard such argument, *held* to preclude reversal for argument, even though court's instruction to disregard was in indirect language.

3. Trial ⇐260(9)—Refusing requested instructions in contract action held not error, where instructions given conveyed same meaning.

Where, in an action on a contract, certain instructions requested were refused, refusal thereof *held* not error, where instructions given had the same meaning, though couched in different language.

4. Appeal and error ⇐1002—Jury's finding of fact on conflicting evidence will not be disturbed on appeal.

The jury's finding of facts on conflicting evidence will not be disturbed on appeal.

5. Interest ⇐66—\$600 verdict in suit for \$500 held excessive by \$100, where \$100 had been allowed for interest, which was neither pleaded nor proved.

In action on contract to pay \$500, wherein the jury returned a verdict in sum of \$600, and plaintiff claimed that the additional \$100 was a proper part of the verdict as being allowed for interest, *held* that verdict was excessive by such \$100 allowed for interest, since there was neither pleading nor proof relative thereto.

Appeal from Superior Court, City and County of San Francisco; Louis H. Ward, Judge.

Action by Joseph Miller against John Murphy and others. From a judgment for plain-

tiff against him only, the defendant named appeals. Modified, and, as modified, affirmed.

Cyril Appel and Ivores R. Dains, both of San Francisco, for appellant.

Vincent W. Hallinan, of San Francisco, for respondent.

BURROUGHS, Presiding Justice pro tem. This is an appeal by the defendant, John Murphy, from a judgment in favor of the plaintiff in the sum of \$600. The complaint sets out two causes of action; the first count alleges an express contract to pay the sum of \$500, the second alleges the reasonable value of services rendered in the same amount. The cause was tried by a jury. Upon the conclusion of the testimony for plaintiff the court granted a nonsuit as to the defendant Nora Murphy upon both counts of the complaint, and also granted a nonsuit as to the defendant, John Murphy, upon the second count. The trial thereupon proceeded against the last-named defendant upon the first cause of action, and judgment thereon was rendered as above stated.

Appellant's first claim of prejudicial error is based upon alleged misconduct on the part of counsel for plaintiff. In his opening statement to the jury counsel used the following language:

" * * * And Mr. Murphy still withheld paying Mr. Miller, and we filed suit for it, and Mr. Murphy, through his attorney, demanded a jury trial, which we waived, and that is why we are here to-day."

[1] The attention of the trial court was not called to this statement, nor was it assigned as error, nor any request made to instruct the jury to disregard it. Therefore, even though prejudicial, reversible error cannot be predicated thereon. *People v. Babcock*, 160 Cal. 537, 117 P. 549.

During his argument to the jury, counsel for respondent stated:

"You know, one thing that strikes me all through this case is all the pitiable bluster about a little \$500 case anyway. They filed suit, and came in here and demanded jury trial, took up all the time of twelve people here—Mr. Appel: Just one second. I take exception to that remark and assign the making of it as misconduct, and ask the court to instruct the jury to disregard it. Mr. Hallinan: I think—The Court: That is a constitutional right, that any litigant may have a jury in a case of this character, and I don't believe you can criticize it without criticizing the Constitution. Therefore the court will have to prohibit you from taking up that proposition."

[2] Again, conceding this statement constituted error, while the court did not in express language instruct the jury to disregard it, the jury could not have otherwise understood the language of the court. *Matts et ux. v. Borba*, 4 Cal. Unrep. 691, 37 P. 159.

At another point in his argument the following colloquy took place:

"Mr. Hallinan: There isn't any question at all Mr. Murphy got a building through Mr. Miller's estimate, that he paid \$18,000 for, and sold for approximately \$27,000? Mr. Appel: I make an assignment of misconduct in reference to that matter, and ask the court to instruct the jury to disregard it. The Court: No evidence as to the amount. Mr. Hallinan: Let me say this: We asked Mr. Murphy if he got \$27,500 for his building, and he said 'No,'—refused to answer what he did get. Mr. Appel: One second, if the court please— The Court: Just a minute. Under the circumstances, I will have to follow the suggestion of counsel. Ladies and gentlemen, you are instructed to disregard the last statement of counsel in determining any issue in this case. Go ahead."

Under the above direction of the court the jury were instructed to disregard the remark, and therefore whatever prejudice may have resulted was removed. *Lanigan v. Neely*, 4 Cal. App. 760, 89 P. 441; *People v. Ho Kim You*, 24 Cal. App. 454, 141 P. 950; *Tingley v. Times-Mirror*, 151 Cal. 1, 89 P. 1097.

In its charge to the jury the court instructed them to carefully distinguish between the facts testified to by the witnesses and the statements made by the attorneys in their arguments as to what facts had been proved, and, if there was a variance, to consider only those facts testified to by the witnesses, and to remember that statements of counsel in their arguments were not evidence. The court further instructed the jury that in arriving at a verdict they must not permit themselves to be influenced in the slightest degree by sympathy, prejudice, or any emotion in favor of or against either party, but they must proceed solely upon the evidence introduced and the instructions of the court. We are therefore of the opinion that whatever error was committed was cured by the instructions of the court. *Tingley v. Times-Mirror*, supra.

It is further contended that the trial court erred in refusing to give three instructions offered by the defendant. The first instruction was to the effect that, if the defendant agreed to pay plaintiff the sum of \$60 per week for his services, and the plaintiff received said sum, and the jury found there was no other or further contract between the parties respecting compensation, under such circumstances the defendant was entitled to a verdict. The second instruction was to the effect that, if they found that plaintiff was an employee of defendant, and if from all the evidence in the case they found that plaintiff had been compensated and paid all sums to which he (the plaintiff) was entitled for his services, the defendant was entitled to a verdict. The third and last instruction is that, if plaintiff was compensated by the receipt of his weekly salary for whatever services he performed or rendered for the defendant in

erecting the building, then and in that event the defendant was entitled to a verdict. These instructions are the same in substance, and either one or all three might have been given by the trial court, as they contained a correct statement of the law, but the court did instruct the jury that:

"If you find from the evidence that the plaintiff claims to be entitled to a bonus for any services which he performed for Murphy, then I instruct he cannot recover, because the only claim is for services performed."

"If you find that said services were performed by said plaintiff at the special instance and request of said defendant, and that defendant promised and agreed to pay therefor the sum of \$500, then your verdict should be for the plaintiff."

[3] While couched in different language from the foregoing offered instructions, the jury could not have understood these instructions to mean other than their plain import indicated; namely, that plaintiff could not recover judgment except upon proof of the express contract alleged in his complaint. In the case of *Cowan v. Abbott*, 92 Cal. 100, 28 P. 213, cited by appellant, the refusal of the court to give an instruction similar to the ones here offered and refused was held reversible error. It was there held the refused instruction was necessary to enable the jury to pass upon the affirmative defense alleged in the answer. In the instant case, the instructions given by the court cover the issues, and were sufficient to advise the jury that plaintiff could only recover upon proof of the express contract alleged in his complaint.

[4] It is next assigned as error that the evidence fails to establish an express contract to pay \$500. The evidence upon this question is conflicting. The plaintiff and his witness testified directly that said defendant agreed to pay plaintiff the sum of \$500 for superintending and managing the erection of the building, and the testimony shows that such services were in fact performed by plaintiff, in addition to his work as a foreman carpenter, and for which he was paid \$60 per week. This contract is denied by the defendant Murphy. It also appears in the evidence that the plaintiff used the terms "commission" and "bonus" as interchangeable, but it is plain from the evidence that the jury concluded the agreed sum of \$500 was a commission and not a bonus. It was within the province of the jury to determine this conflict in the evidence, and, having resolved it in plaintiff's favor, it will not be disturbed on appeal.

Appellant's motion to strike out all plaintiff's evidence was properly denied; it being relevant to the allegations of the express contract alleged in the first count of the complaint.

[5] Plaintiff alleged a contract to pay the sum of \$500. The jury returned a verdict in the sum of \$600. In justification of the ver-

dict, counsel for the respondent states that he called to the attention of the jury that, in addition to the sum of \$500 principal, he was entitled to interest thereon, and that the additional \$100 was awarded by the jury as interest on the principal sum. He cites in support of this theory *Cassacia v. Phoenix Insurance Co.*, 28 Cal. 628. In the last-cited case the action was upon an insurance policy for the value of goods destroyed by fire. The contract of insurance contained a clause that the loss was to be paid 60 days after due notice and proof of the same was made by the assured. The fire was alleged to have occurred, the proofs made, and notice given, more than 60 days prior to the commencement of the suit. These allegations were sustained by the evidence. The Supreme Court held that under such circumstances the trial court was authorized to allow interest on the amount found due. In the case at bar there is neither pleading nor proof to sustain the claim of interest, and the verdict of the jury is therefore excessive in the sum of \$100.

The judgment is therefore modified by striking therefrom the sum of \$600, and the trial court is directed to enter judgment in favor of the plaintiff and against the defendant, John Murphy, in the sum of \$500; as thus modified the judgment will stand affirmed. Appellant to recover his costs on appeal.

We concur: STURTEVANT, J.;
NOURSE, J.

88 Cal. App. 515

BORTON et al. v. JOSLIN et al. (Civ. 5960.)

District Court of Appeal, First District, Division 2, California. Jan. 23, 1928.

1. Appeal and error ⇨842(8)—Rule that construction of contracts is question of law reviewable on appeal held not applicable, where conclusion of law depended upon finding of facts.

Rule that construction of contracts is question of law reviewable on appeal held not applicable, where conclusion of law depended upon finding of facts, which in turn were based upon extrinsic and conflicting evidence.

2. Mortgages ⇨36—Presumption is that instrument is what it purports to be.

Where question was whether an instrument was a mortgage or an absolute conveyance, held that the presumption is that instrument is what it purports to be.

3. Mortgages ⇨36, 38(2)—Burden was upon persons claiming that instrument, purporting to be absolute conveyance, was mortgage to show it by clear, unequivocal, and convincing evidence.

Where plaintiffs sued to have certain deed absolute in form declared to be mortgage, held that the burden was upon them to show by clear,

unequivocal, and convincing evidence that the instrument purporting to be an absolute conveyance was not such.

4. Appeal and error ⇨1010(1)—Finding on question whether evidence is sufficient to overcome presumption that deed, which is absolute conveyance in form, is not such, is conclusive on appeal if supported by any evidence.

Where parties to conveyance which, on its face, is deed absolute in form seek to have such deed declared mortgage, finding of trial court as to whether evidence is sufficient to overcome presumption that instrument is what it purports to be is binding on reviewing court, unless there is no evidence in record to support finding.

5. Mortgages ⇨36—In suit to have conveyance absolute on face declared mortgage, evidence held insufficient to overcome presumption from face of deed.

In a suit to have deed which, on its face, was absolute in form, declared to be mortgage, evidence held not sufficient to overcome presumption which arose from face of note.

6. Mortgages ⇨38(1)—Full release of indebtedness on delivery of deed held persuasive evidence that transaction was to be transfer and not mortgage.

In suit to have deed, absolute in form, declared to be mortgage, fact that for seven years parties had apparently treated delivery of instrument as full release of indebtedness held persuasive evidence that transaction was intended to be transfer by deed and not mortgage.

7. Trusts ⇨1—"Voluntary trust" is obligation arising out of confidential relation and voluntarily accepted (Civ. Code, § 2216).

A "voluntary trust" is, under Civ. Code, § 2216, an obligation arising out of a confidential relation and voluntarily accepted.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Voluntary Trust.]

8. Trusts ⇨91—"Constructive trust" arises, regardless of intention, whenever by fraud or breach of fiduciary duty one accepts property of another to make purchase in own name.

"Constructive trust arises, regardless of intention, whenever by fraud or breach of fiduciary duty one accepts property of another to make purchase in his own name.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Constructive Trust.]

9. Trusts ⇨110—Evidence held to show no act by which persons to whom property had been conveyed by deed absolute in form became involuntary trustees (Civ. Code, § 2224).

In a suit to have grantees declared trustees of the property for the grantor, where conveyance was absolute in form, evidence held not to show fraud, accident, mistake, undue influence, or any other wrongful act on the part of the transferees by which any of them had become involuntary trustee under Civ. Code, § 2224, for the benefit of the plaintiffs.

10. Trusts ~~§~~44(2)—Evidence held not to show grantees to whom property had been conveyed by deed absolute in form held it in voluntary trust (Civ. Code, § 2216).

In suit to have transferees of real property declared trustees thereof, evidence *held* not to show that the property had been transferred to them to be held in voluntary trust under Civ. Code, § 2216.

11. Trusts ~~§~~17, 18(3)—Trusts in real property can be created only by written instrument or operation of law.

Trusts in real property can be created only by written instrument or by operation of law.

Appeal from Superior Court, Los Angeles County; Frank C. Collier, Judge.

Suit by C. F. Borton and another against Garnett A. Joslin, administrator, substituted for C. E. Joslin, and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

Newby & Palmer and Nathan Newby, all of Los Angeles (Dee Holder, of Los Angeles, of counsel), for appellants.

C. E. Joslin, Rufus L. Horton, and Waldo M. York, all of Los Angeles, for respondent Joslin.

Rufus L. Horton, of Los Angeles, for respondent Hammond Lumber Co.

L. E. Tripp, R. H. Spotts, H. C. Allen, Jr., and L. L. Otis, all of Los Angeles (C. F. Adams, of Los Angeles, of counsel), for respondent Title Ins. & Trust Co.

NOURSE, J. Plaintiffs sued to have certain deeds, absolute in form, declared to be mortgages, for an accounting by defendants, for a conveyance of certain real property to plaintiffs and the quieting of their title thereto. The cause was tried before the court and resulted in a judgment for the defendants, from which the plaintiffs have appealed upon a bill of exceptions.

For some time prior to May 3, 1926, the plaintiffs were the owners of the property described in the complaint subject to an indebtedness of \$22,000, secured by a trust deed. This property was the community property of the plaintiffs, although the deed thereto was made in the name of Laura E. Borton as sole grantee. Her husband, C. F. Borton, acting as her attorney in fact, represented to the defendants that it was her separate estate, and upon these representations he induced the Hammond Lumber Company on May 3, 1916, to accept a deed executed in her name alone conveying the property to the company as security for an indebtedness which was then due the company from the plaintiffs. Prior to April 10, 1917, the plaintiffs became indebted to certain claimants in the sum of \$9,302.39 for work, labor, and materials in the construction of the Borton Apartments upon other property, the title to which also stood in the name of Laura E.

Borton. These creditors were all represented by defendant C. E. Joslin, an attorney at law, and were at the time threatening to file liens upon the property upon which the Borton Apartments were being constructed. For the purpose of satisfying these creditors and saving the Borton Apartments from the cloud of liens which were about to be filed, the plaintiffs and defendant C. E. Joslin agreed that the plaintiffs should convey the property described in the complaint to the Title Insurance & Trust Company, subject to the incumbrances, in full satisfaction of the indebtedness owing the lien claimants, and that the latter, in consideration thereof, would release their claims on the building.

In accordance with this agreement deeds were executed by Laura E. Borton and the Hammond Lumber Company to the Title Insurance & Trust Company, absolute in form, and purporting to convey to the grantee clear title to said property. At the same time plaintiff C. F. Borton, again acting as attorney in fact for his wife and representing her to be the sole owner of the property, gave directions in writing to the trust company by which it was authorized to sell the property for not less than \$35,000 and from the proceeds of the sale to pay all fees, charges, expenses, and incumbrances against the property, and the surplus, if any, to C. E. Joslin, who was designated as sole beneficiary. At the time of the execution of these documents an option was given to Laura E. Borton running to September 30, 1917, to purchase the property subject to all incumbrances of record for the sum of \$10,200, which sum was estimated to be the total amount of the demands of the lien claimants, plus attorney's fees to C. F. Joslin and interest accruing during the period of the option. As a part of this transaction the lien claimants waived in writing all claims of lien upon the Borton Apartments, accepting the equity in the property described in the complaint in full payment of their claims, and a receipt in full payment and discharge of all claims was given to the plaintiffs by C. E. Joslin, who acted throughout the transaction as attorney for the lien claimants only. Up to the time of the expiration of the option plaintiffs endeavored to find a purchaser for the property, but were unsuccessful in this and on October 5, 1917, the trust company notified them in writing that their option had expired and that all their rights thereunder had ceased. Beyond their efforts to secure a purchaser during this period the plaintiffs have made no claim to any right or interest in the property conveyed; made no effort to pay any taxes, street assessments or other charges against the property; made no demand for an accounting of the rents and profits thereof until about the time this action was commenced on April 3, 1924.

During this period of seven years the defendants treated the transaction as an absolute conveyance of the premises. The lien claimants accepted it as a complete satisfaction of their claims. The plaintiffs treated it as a full settlement and as an accord and satisfaction of all these claims, and the defendant C. E. Joslin, as sole beneficiary, entered into possession of the premises at the time of the settlement and held possession under the conveyance, paying all taxes and street assessments levied thereon and exercising sole and exclusive ownership for himself and said creditors excepting as to a portion of the premises thereafter conveyed by the trust company at his direction, and received the monthly rentals coming from the premises and paid all costs of repairs and upkeep. Inasmuch as these rentals were not sufficient to pay these charges the expenses for the maintenance and upkeep of the property were apportioned among the various creditors according to their respective claims, but these became dissatisfied with the arrangement and sold their interests to the defendant C. E. Joslin from time to time until January, 1923, when he became the sole owner of all the interest of these claimants. The trial court found that the value of the property at the time of the conveyance in April, 1917, was \$44,000, but that it could not have been sold at that time for more than \$35,000. Upon this issue witnesses testified that its value at that time was from \$30,000 to \$35,000, but that it could not be sold for the latter amount. Upon the facts herein stated the trial court found that the transaction was intended to be an absolute conveyance of the property in full satisfaction of the claims due to the creditors and that it was accepted by all parties as such. It also found upon the special issues that the plaintiffs were estopped by their actions from maintaining this suit; that they were barred by the statute of limitations and by their laches, and that they had not for more than five years before the commencement of the action been the owners of the property or of any interest therein.

[1-5] On this appeal the appellants argue that the transaction was a contract between the parties which the trial court should have construed as one for the securing of the indebtedness only. In support of the argument cases are cited to the point that the construction of contracts is a question of law reviewable on appeal. The cases support the point to which they are cited, but are not applicable here because this is a case where the conclusion of law depends upon the finding of facts, which, in turn, is based upon extrinsic and conflicting evidence. The transaction upon its face purports to provide an absolute conveyance, and, of course, the presumption is that the instrument is what it purports to be. To overcome this presumption the burden was upon the appellants to show that something different was accomplished by the parties,

and this, of course, could be shown only by extrinsic evidence which in cases of this kind "must be clear, unequivocal and convincing." *Ahern v. McCarthy*, 107 Cal. 382, 383, 40 P. 482; *Sheehan v. Sullivan*, 126 Cal. 189, 193, 58 P. 543; 17 Cal. Jur. 756, § 58. When, therefore, the parties rely upon evidence to overcome this presumption and such evidence is presented to the trial court, the finding of the trial court is, of course, conclusive on appeal unless there is no evidence in the record to support it. *Lockhart v. McDougall Co.*, 190 Cal. 308, 310, 212 P. 1. Appellants do not seriously contend that there is no evidence in the record to support the finding of the trial court that the deed in controversy "was intended by the plaintiffs to be a conveyance in full payment and satisfaction of the claims of said creditors and that the said deed was accepted by said creditors as and for a full and complete payment and satisfaction of all their said claims"; or that "said deed was not taken as security for the payment of said claims or any of them, or that the title to said property should be taken * * * in trust for plaintiffs or either of them, or by way of mortgage in any way or manner whatsoever." Sufficient evidence is referred to in our statement of facts to sustain this finding upon the essential issue of the intention of the parties, and this forces the conclusion of law that the appellants have failed to overcome by clear and satisfactory evidence the presumption which arises from the face of the deed. This being so, it becomes unnecessary to analyze or further consider the cases cited by either party which on the one hand hold that under a particular state of facts the paper should have been construed to be a mortgage and on the other hand hold that under a different state of facts the paper there in consideration should have been construed to be an absolute conveyance. A review of the evidence in the record clearly discloses that all the parties to the transaction contemplated and intended that the deed should be an absolute conveyance of appellants' entire equity in the premises subject to an option to repurchase within a stated time; that this course was pursued because the property was overburdened with incumbrances at a time when the value had greatly depreciated because of the World War, and that because of these conditions none of the creditors and none of the respondents would have consented to any further mortgage upon the property or to any other disposition than an outright conveyance.

[6] But the outstanding fact is that the creditors treated the transaction as a full and complete payment and satisfaction of all their claims and that the appellants, for a period of seven years at least, treated it in the same way and made no attempt to pay these claims in any other manner or to assert any claim of ownership to the property. Mr. Pomeroy has said that in cases of this character: "The

sure test and the essential requisite are the continued existence of a debt." Pomeroy's Eq. Jur. (2d Ed.) § 1196. The purpose of a mortgage being to secure payment of a debt, the full release of the indebtedness upon the delivery of the deed is persuasive evidence that the transaction was intended to be a transfer and not a mortgage. See *Ahern v. McCarthy*, 107 Cal. 383, 386, 40 P. 482. We find ample evidence to support the trial court's finding of facts, and upon these facts the only proper conclusion of law to have been drawn was that the deed was an absolute transfer of title and not a mortgage.

[7-9] The trial court found that appellants' cause of action was barred by the statute of limitations, and to avoid this obstacle the appellants now argue that the transaction resulted in the creation of a voluntary constructive trust whereby the trustee became obligated to sell the property, pay off all the existing incumbrances against it as well as the claims of the lien claimants, and to pay the proceeds, if any, to the appellants. This position is, of course, wholly inconsistent with the theory that the deed, absolute in form, was intended to be a mortgage. There is an equal inconsistency in appellants' argument on this branch of the case. A voluntary trust is an obligation arising out of a confidential relation and voluntarily accepted (section 2216, Civ. Code), while a constructive trust arises, regardless of intention, "when-ever by fraud or in breach of a fiduciary duty one uses the property of another to make a purchase in his own name." *Lezinsky v. Mason Malt W. D. Co.*, 185 Cal. 240, 252, 196 P. 884, 890. But there is no evidence of any confidential relation between the parties—the appellants were dealing with the attorney for adverse claimants who was pressing these claims for collection; there is no proof of fraud, accident, mistake, undue influence, or of any other wrongful act on the part of respondents by which any of them became an involuntary trustee for the benefit of appellants under section 2224, Civil Code; there was no evidence of any facts which would justify a conclusion that a trust of any character to which the appellants were beneficiaries was created by either written instrument or operation of law—the two ways by which alone a trust in real property can be created. *Sheehan v. Sullivan*, 126 Cal. 189, 192, 58 P. 543.

[10, 11] In support of the judgment respondents point out that the trial court found that appellants' cause of action was barred by the statute of limitations and by their laches—that, if the transaction should be treated as a mortgage, the statute of limitations would apply, and, if it should be treated as a trust in favor of appellants, they are barred by their laches. Our attention is also directed to the finding that appellants are estopped by their conduct from asserting that the prop-

erty was community. Appellants attack all of these findings, but it is not necessary to consider the rules of law involved because, upon the merits, respondents were entitled to the judgment.

Criticism is made of a number of rulings adverse to appellants on the admission of evidence. Many of the assignments of error are not accompanied by argument or citation of authority and none of the 38 assignments is claimed to have been prejudicial to appellants. We have examined the record with care and find that in each instance where the correctness of the ruling of the trial court is at all doubtful the evidence received or rejected was merely cumulative and the rulings criticized were harmless.

Judgment affirmed.

We concur: KOFORD, P. J.; STURTEVANT, J.

88 Cal. App. 713

PEOPLE v. LIVINGSTON. (Cr. 1579.)

District Court of Appeal, Second District, Division 1, California. Jan. 30, 1928.

1. Witnesses $\hookrightarrow$ 63—Judgment setting aside defendant's marriage to prosecutrix not being final, prosecutrix could not testify against defendant in rape prosecution (Pen. Code, § 1322).

Where judgment setting aside defendant's marriage to prosecutrix was not final, it should not have been admitted in evidence in rape prosecution, and hence prosecutrix should not have been allowed to testify against defendant without his consent, under Pen. Code, § 1322.

2. Criminal law $\hookrightarrow$ 406(1)—Extrajudicial statements and admissions were admissible to connect defendant with commission of crime of rape.

Extrajudicial statements and admissions were properly admissible for purpose of connecting defendant with commission of crime of rape.

3. Rape $\hookrightarrow$ 51(1)—Evidence held to support conviction of rape.

Evidence properly admitted, without testimony of prosecutrix, improperly admitted, held sufficient to support conviction for rape.

4. Criminal law $\hookrightarrow$ 1186(4)—Permitting prosecutrix, whom defendant married, to testify against defendant in rape prosecution, where judgment setting aside marriage was not final, held not reversible error (Pen. Code, § 1322; Const. art. 6, § 4½).

Where defendant, charged with rape, married prosecutrix, and judgment setting aside marriage was not final, permitting prosecutrix to testify against defendant without his consent, in violation of Pen. Code, § 1322, held not reversible error, under Const. art. 6, § 4½, where evidence properly admitted established defendant's guilt.

Appeal from Superior Court, Kern County; William D. Dehy, Judge.

William Livingston was convicted of rape, and he appeals. Affirmed.

T. F. Allen, of Bakersfield, for appellant.

U. S. Webb, Atty. Gen., John L. Flynn, Dep. Atty. Gen., and John D. Richer, of Los Angeles, for the People.

WOOD, Justice pro tem. Appellant was accused by an indictment filed by the grand jury of the crime of rape committed upon Jessie Peters, a girl of the age of 12 years. The trial jury returned a verdict of guilty with the recommendation that the accused be punished by imprisonment in the state prison. Appellant made a motion for a new trial, which was denied. The date of the offense as charged in the indictment was on or about August 27, 1926. The indictment was returned on October 13, 1927, and the trial conducted on October 31, 1927. Appellant and Jessie Peters were married at Goldfield, Nev., on February 27, 1927, her father and mother being witnesses to the ceremony and her father giving his consent to the marriage. The district attorney offered in evidence a judgment of the superior court of Kern county in an action entitled "Elva Peters v. William Livingston and Jessie Livingston, formerly Jessie Peters," dated October 3, 1927, and entered October 5, 1927, in which it was adjudged that the said marriage "be set aside and annulled." To the offer of this evidence defendant objected on the ground that the judgment was void because Jessie Peters, a necessary party and a minor, was not served with process or represented by counsel or a guardian therein and because the judgment was not final, the time for appeal not having elapsed. The objection was overruled and the judgment admitted in evidence. Thereupon Jessie Peters was permitted, over objection, to testify concerning her relations with appellant.

[1] Appellant now seeks a reversal of the judgment on the ground that Jessie Peters was his wife and therefore could not testify against him without his consent, citing section 1322 of the Penal Code, and *People v. Curiale*, 137 Cal. 534, 70 P. 468, 59 L. R. A. 588. The Attorney General does not answer this contention of appellant or seek in any way to justify the ruling of the court in permitting Jessie Peters to testify. The judgment setting aside the marriage not being final, it should not have been admitted in evidence. *Harris v. Barnhart*, 97 Cal. 546, 32 P. 589; *Di Nola v. Allison*, 143 Cal. 106, 76 P. 976, 65 L. R. A. 419, 101 Am. St. Rep. 84; *Cook v. Ceas*, 143 Cal. 221, 77 P. 65. It follows that Jessie Peters should not have been allowed to testify.

The Attorney General maintains that, even should it be conceded that the testimony of Jessie Peters was erroneously admitted, the other evidence was such that a reversal would not be justified in view of section 4½

of article 6 of the Constitution. This contention must be upheld. The age of the girl was shown by her parents to be 12 years at the time of the offense. Dr. H. R. McCallister testified that about March, 1927, he examined Jessie and found her hymen broken and that she was then pregnant. He stated that the approximate time of her conception was about September 1, 1926. The witness Emery O. Peters, father of the complaining witness, testified that after appellant had been arrested on a charge of having raped his daughter, and while released on bail, he came to the Peters' home for the purpose of trying to make an "outside settlement." The witness stated that he told appellant that he had no outside settlement to make, that he did not care to talk the proposition over with him at all, and that he intended to let the thing stand as it was. Several weeks later appellant proposed marriage in order that the girl might have his name. On the following day Jessie Peters, accompanied by her mother and father, went with appellant to Las Vegas, Nev., and there attempted to procure a marriage license, but were unable to do so because of the girl's age. Thereupon they went to Goldfield and secured a marriage license. The said license was secured upon the misrepresentation of appellant that Jessie Peters was then 17 years old. They then went to a church and Jessie Peters and appellant were duly married. The witness further testified that it was distinctly understood between himself and appellant that appellant should not live with his daughter at all. Appellant told Mr. Peters that he would foot all the expenses of the trip to Nevada. The mother of Jessie Peters, Mrs. Elva Peters, testified that the family had been on intimate relations with appellant for years; that he had boarded with them and had had free access to the home; that on August 27, 1926, she was in the city of Turlock; that in the latter part of September, 1926, her daughter became ill, and when she told appellant of her daughter's illness he offered to bring her to a doctor in Bakersfield and have her examined; and that about January 15, 1927, Jessie was examined by Dr. McCallister. Mrs. Peters also testified that she had a conversation with appellant shortly before they left for Nevada in which she asked him how he could do such a thing and why he did it, and that he replied he did not know—that he could not tell her. The witness further stated that appellant came to their home after he had been released on bail and asked to be forgiven for what he had done. The witness further testified that on June 6, 1927, her daughter gave birth to a child. During the course of the examination of the witness Jessie Peters the following took place:

"Q. Now, was there any other occasion either before or after that in which this defendant had sexual intercourse with you? A. Yes, sir.

"Q. When?"

"Mr. Livingston: I will take all blame; I don't want her humiliated any more—"

"The Court: Mr. Livingston, you've got to keep quiet in court. Mr. Livingston: I am going to plead guilty, sir."

[2-4] No evidence was offered by appellant other than the showing of the Nevada marriage. The testimony above set forth stands uncontradicted. The corpus delicti was established by the testimony of Dr. McCallister and that of the parents of the child. The guilt of the defendant was shown by his statements made to Mr. and Mrs. Peters. It is well settled that extrajudicial statements and admissions are properly admissible for the purpose of connecting the defendant with the commission of the crime. *People v. Selby*, 198 Cal. 426, 245 P. 426; *People v. Stone*, 199 Cal. 621, 250 P. 659. The evidence properly admitted overwhelmingly establishes the guilt of the accused. The statements made by the defendant in open court are in themselves sufficient to convince that no injustice has been done in these proceedings. We are satisfied that the error complained of has not resulted in any miscarriage of justice.

The judgment and order are affirmed.

We concur: HOUSER, J., Acting P. J.; YORK, J.

88 Cal. App. 607

WILLIAMS v. WREN et al. (Civ. 6136.)

District Court of Appeal, First District, Division 2, California. Jan. 25, 1928.

1. Trial $\S$ 395(2)—Finding that "material" allegations of complaint are true and that defendants' answers are insufficient held insufficient (Code Civ. Proc. $\S\S$ 632, 633).

In proceeding to compel officers of corporation to permit inspection of corporate books, finding that all material allegations of complaint are true and that answers of defendants do not state facts sufficient to constitute defense thereto was not compliance with Code Civ. Proc. $\S\S$ 632, 633; insertion of word "material" making finding uncertain and insufficient to sustain judgment.

2. Trial $\S$ 395(2)—Definite and certain findings of fact must be made for appellate courts where required and involved (Code Civ. Proc. $\S\S$ 632, 633).

Where findings are required and involved, appellate courts are entitled to definite and certain findings of facts of case, under Code Civ. Proc. $\S\S$ 632, 633.

3. Trial $\S$ 388(1)—Findings, unless waived, are mandatory on trial of questions of fact (Code Civ. Proc. $\S$ 632).

In trial involving questions of fact, findings, unless waived, are mandatory on trial of questions, under Code Civ. Proc. $\S$ 632.

Appeal from Superior Court, Los Angeles County; W. A. Anderson, Judge.

Action by E. L. Williams against Charles F. Wren, President, and another. From an order granting writ of mandate to permit inspection of certain books and the making of copies and memoranda therefrom, defendants appeal. Reversed and remanded.

Warren E. Libby, of Los Angeles, for appellants.

Culbert L. Olson, of Los Angeles, for respondent.

WELCH, Justice pro tem. This proceeding was commenced by way of a petition to compel the defendant officers of the Pickwick Corporation to permit the respondent to inspect the stock ledgers and stock certificate books of the corporation and to take copies and memoranda thereof. Issue was joined by answer of the appellants denying specifically the allegations of the petition and setting forth separate and further defenses to the petition for the writ of mandate. This appeal is from the order granting the writ and is upon the judgment roll and the reporter's transcript of the testimony.

A decision in the usual form was not made or filed in the proceeding by the court, but the court, in its order herein appealed from, found:

"That all of the material allegations of the complaint are true and that the answers of the defendants do not state facts sufficient to constitute a defense thereto."

[1-3] Appellants make the point here that this finding is not a compliance with sections 632 and 633 of the Code of Civil Procedure. This contention must be sustained. Appellate courts are entitled to definite and certain findings of the facts of the case where findings are required and involved. Indeed, findings, unless waived, are mandatory upon the trial of questions of fact. Section 632, Code Civ. Proc. A trial of questions of fact was had in this proceeding requiring findings to be made and filed. *Black v. Board of Police Commissioners*, 17 Cal. App. 313, 119 P. 674. "The system of express findings (sections 632 and 633, Code Civ. Proc.) which prevails in this state, requires a finding when there is a material issue." *Taylor v. Taylor*, 192 Cal. 71, 218 P. 760 (51 A. L. R. 1074).

It has been held by both the Supreme Court and the District Courts of Appeal that the insertion of the word "material" in a general finding, such as is here under consideration, makes the finding uncertain, and insufficient to sustain the judgment. *Turner v. Turner*, 187 Cal. 632, 203 P. 109; *McKannay v. McKannay*, 68 Cal. App. 709, 230 P. 218. "The general omnibus finding 'that * * * all the material averments of the amended complaint [herein] are true' is insufficient for any

purpose." *Holt Mfg. Co. v. Collins*, 154 Cal. 276, 97 P. 520.

The order appealed from is reversed, and the case is remanded for further proceedings.

We concur: KOFORD, P. J.; STURTEVANT, J.

88 Cal. App. 648

RICHARDSON v. SOUTHERN PAC. CO. et al.
(Civ. 6038.)

District Court of Appeal, First District, Division 1, California. Jan. 26, 1928.

1. Negligence $\Leftrightarrow$ 122(1)—Presumption that injured person exercised ordinary care, arising where there is no evidence, may be destroyed by plaintiff's or defendant's testimony.

Where there is no evidence adduced concerning conduct of person under given conditions, presumption that he exercised ordinary care will arise, presumption being disputable, and where plaintiff presents case overwhelmingly destroying presumption, effect thereof is same as though presumption had been destroyed by testimony of defendant.

2. Street railroads $\Leftrightarrow$ 98(6)—Nonsuit held justified where pedestrian deliberately continued in path of train after warning by motorman making every effort to avoid accident.

In action to recover damages for death of pedestrian struck by defendant's interurban train, evidence showing that train was proceeding along right of way unobstructed to vision of decedent at the lawful and ordinary rate of speed, giving warning of its approach, that there was nothing in conduct of decedent to denote that he was in danger or not in full possession of his faculties, and that motorman used all diligence to avoid accident as soon as there arose slightest doubt as to decedent's intentions or possibility of accident, and that decedent without exercising care or caution deliberately continued in path of train, justified judgment of nonsuit.

3. Trial $\Leftrightarrow$ 139(1)—Negative testimony of witness as to hearing no warnings, without showing witness' opportunity to hear, held insufficient to make question for jury.

In action to recover damages for death of pedestrian struck by interurban train, negative testimony of witness that he heard no unusual sounds or warning held mere conclusion with reference to what was usual and what unusual, and did not contradict evidence of motorman that he sounded bell, and was insufficient to make case for jury where there was nothing to show witness' opportunity to have heard warning if given.

4. Street railroads $\Leftrightarrow$ 103(2)—Doctrine of last clear chance held inapplicable where pedestrian was not in danger and motorman used every opportunity to stop.

In action to recover damages for death of pedestrian struck by defendant's interurban train, evidence showing that decedent was never in any place of danger until he stepped on

track and that as soon as decedent's situation was known and observed, or could be observed, motorman employed every means possible to stop train and avoid accident, held not to warrant application of doctrine of last clear chance.

5. Street railroads $\Leftrightarrow$ 93(4)—Motorman need not stop when seeing pedestrian leave sidewalk and approach tracks.

In action to recover damages for death of pedestrian struck by interurban train, motorman held not required to stop each time he observed pedestrian leave sidewalk and approach track.

6. Negligence $\Leftrightarrow$ 67—Persons must exercise some care for own protection.

Law requires each person to exercise some degree of care for his own protection.

Appeal from Superior Court, Alameda County; J. J. Trabucco, Judge.

Action by Jennie A. Richardson against the Southern Pacific Company and others. From a judgment of nonsuit, plaintiff appeals. Affirmed.

Philip M. Carey and Frank O. Nebeker, both of Oakland, and F. G. Ostrander, of Merced, for appellant.

Ford, Johnson & Bourquin, of San Francisco, for respondents.

PARKER, Justice pro tem. This is an action brought to recover damages on account of the death of plaintiff's husband alleged to have resulted from injuries sustained through the negligence of defendant, Southern Pacific Company. The complaint included as parties defendant others than said corporation, but the said remaining defendants were not served with summons, and the cause was tried as against defendant, Southern Pacific Company, alone.

At the close of plaintiff's case the trial court, on motion of defendant, ordered a nonsuit, and from the judgment entered pursuant to said order the plaintiff prosecutes this appeal.

The record discloses the grounds of nonsuit to be that the evidence introduced by plaintiff affirmatively shows as a matter of law that deceased was guilty of negligence proximately contributing to the injuries complained of. No question is presented other than the one of contributory negligence. There is sufficient evidence of plaintiff's right to maintain the action as surviving spouse, and as to her right to recover damages should the facts warrant.

The decedent, James Richardson, was a carpenter by trade, and for about two or three months prior to the date of the accident had been working at a place to reach which from his home it was necessary to cross Bond street, in East Oakland, upon which the tracks of the railway service operated by defendant were laid. It was his custom to

walk to work each morning. On the morning of August 6, 1923, Richardson, as usual, departed for his work, and before reaching his destination was struck by a street car and sustained injuries from which he died within a few hours. The only eyewitness to the accident whose testimony was produced was one J. W. August, motorman on the train involved, and the facts as further narrated here are necessarily taken from the testimony of this witness.

The Southern Pacific Company's trains run along Bond street from Fiftieth avenue to Seminary avenue, a distance of about two miles. The line runs along and upon Seventh street before it turns into Bond street. From Seventh to Bond street it turns northeasterly for about three-quarters of a mile and runs across some private rights of way. It runs through the city of Oakland and through a thickly built-up section. The rails at Bond street are flush with the surface. The nature of the car or cars in question may be classed as a street railway, with the qualification, however, that the cars do not stop at street intersections or on signal, but as per schedule receive and discharge passengers at fixed stations en route. The train involved herein consisted of five passenger cars equipped with air brakes. On the morning of August 26, 1923, the train was running on usual schedule and would have made the next stop at a point called Seminary station. The rate of speed at which the train was traveling was about 20 miles per hour. The train was proceeding easterly on Bond street. Owing to certain construction work in progress at another portion of the route, the train was traveling eastward on the north track instead of being on the south track as is the general custom. The day in question was bright and clear, and with reference particularly to the operator of the train and the decedent there was nothing in the locality that could obstruct the sight or vision of either. The train was running along in its accustomed right of way, and the decedent, Richardson, was proceeding to his work, and everything was apparently normal to this point. The testimony of the motorman in his own language now follows:

"I first saw Mr. Richardson as he was leaving the curb on the north side of Bond street. When I first saw him I was 150 feet west of him and I was traveling about 20 miles per hour. I doubt if he was walking over 2 miles per hour. He had a grip in his hand and was looking down towards the ground. He was walking as a man ordinarily walks and carries his head as he is walking. I could not see anything unusual in the droop of his head. I saw him all of the time from the time he left the curb until the train struck him. When he left the curb at Bond street he started in a diagonal southeasterly direction as though he intended going toward the station, which was a short distance southerly and easterly. At that time I gave a whistle to call his attention to the train's approach. I whistled immediately on seeing

him. He did not heed the whistle, but continued along. When he was still 8 or 9 feet from the northerly track I applied the emergency brake and attempted to stop the train. I continued to blow the whistle and had my foot on the bell from the time I applied the emergency brakes until the time he was struck. The track at the point where the accident occurred is straight for a distance of approximately 1,000 feet, and from that distance up to the point of the accident the train would be in full view of any person standing on the curb as Mr. Richardson was. The stop that I made was the quickest that could be made with that train and with that equipment, and at the time the brakes were applied the man was fully 8 or 10 feet away from the tracks. I knew there were no signs there to warn the public that the train was being operated on the north track instead of the usual routing on the south track, and I knew also that there was no flagman or watchman there."

There were two other witnesses called by the plaintiff. One witness, a passenger on the train, testified that there was nothing unusual about the speed of the train; that the day was bright, clear and sunshiny; that he did not notice any sudden application of the brakes; and that there was no gong or whistle that he noticed and no violent stopping of the train. However, this witness testifies that he did note "the whistling which they always do when near to a station," and also that on this occasion the train stopped before it got to the station and west of the point where it usually stops. From the testimony of this witness it is obvious that whatever whistling he heard could not have been for the station stop inasmuch as the train did not reach the station. But, irrespective of the reason for the whistling, the fact is that the whistle was sounded before the accident, thus to some extent corroborating the testimony of the motorman. The remaining witness, who conducted a tailoring establishment on Bond street almost directly opposite the place of the accident, testified that his attention was drawn to the accident by hearing some women scream. He was then in the rear part of his shop. His testimony was that he heard no unusual whistling at the time of the accident or before. The testimony of this witness is negative in character. The testimony of the conductor to the effect that he did sound the whistle and bell is not contradicted by this witness inasmuch as he mentions nothing concerning the sounding of the bell, and his testimony is likewise consistent with the testimony of the passenger, who did hear whistling but thought it the usual signal for the station stop. It was on this state of the record that the nonsuit was ordered.

It is the contention of the appellant that the trial court was in error in granting the nonsuit, and the argument advanced is threefold.

Appellant urges that the evidence discloses

negligence on the part of defendant, and that there is no sufficient showing of contributory negligence on the part of decedent to bar the action. Lastly, appellant urges that if it is determined that decedent was clearly guilty of contributory negligence, nevertheless, under the facts as shown, it is a case for the application of the doctrine of "last clear chance," and that upon the application of that rule the right of recovery is apparent. The argument of appellant goes only to the extent required on this appeal; that is to say, his argument is that if the evidence, viewed in its most favorable light, leaves the slightest uncertainty, then the question should have been submitted to the jury. Conceding this for the present, we do not go to the extent of holding that a reviewing court must go the length of distorting testimony from its natural meaning, or snatching at chance phrases appearing at intervals in the testimony. It is not the function of this court to make uncertainty from a record in itself clear and intelligible. Nor do we intend so to do.

[1] Appellant contends that the law of "stop, look, and listen" does not apply in this case for the reason that the "train in question here does not come within the class to which such law applies. However, it is conceded by appellant that decedent was still held to the exercise of ordinary care. Then, going further, he contends that the presumption of law to the effect that a person takes ordinary care of his own concerns in and of itself is sufficient in the case to present such a conflict of fact as to demand the submission of the case to a jury. In support of this claim the following cases are cited: *Fleenor v. Oregon S. L. R. R.*, 16 Idaho, 781, 102 P. 897; *Crabbe v. Mammoth Channel Gold Mining Co.*, 168 Cal. 500, 143 P. 714; *Drouillard v. Southern Pac. Co.*, 36 Cal. App. 447, 172 P. 405; *Ross v. S. F. O. T. Railways*, 47 Cal. App. 753, 191 P. 703; *Walker v. Southern Pacific*, 38 Cal. App. 379, 176 P. 175. A careful reading of these cases will disclose that this theory of appellant finds little support therein. True, detached portions of the opinions would seem to uphold in part the contention made, but in each case the language of the court seems to guard expressly against such an unqualified rule as is here contended for. The full effect of the rule announced in the cases cited is no more than to establish the doctrine that where there is no evidence adduced concerning the conduct of a person under given conditions the presumption that he exercised ordinary care will arise. At best the presumption is a disputable one; and where the plaintiff, as here, presents a case overwhelmingly destroying the presumption, the effect thereof is as controlling as it would be in a case where the presumption had been destroyed by testimony offered by the defendant. To adopt as a rule of practice that the presumption that the exercise of ordinary care always stands with

the strength of independent evidence as against the proven facts, and thus produce in all cases a substantial conflict demanding the verdict of a jury would mean that in no case would the trial court be permitted to entertain a motion for a nonsuit. We are not prepared to announce such a rule.

[2, 3] From the facts of the case there can be but one conclusion. The train in question was proceeding in plain sight along a right of way unobstructed to the vision of decedent. It was proceeding at a lawful and ordinary rate of speed and giving warning of its approach. There was nothing in the position of decedent nor in his action to denote that he was in danger or that he was not in full possession of all of the ordinary faculties of sight and hearing. As soon as there arose the slightest doubt as to the intentions of the pedestrian or concerning the possibility of an accident the motorman used all diligence and care possible to avoid the same. Notwithstanding this the decedent, without the exercise of any care or caution, deliberately continued in his perilous course with the regrettable result noted. The testimony of the witness to the effect that he heard no unusual sounds of warning means nothing. While it is true that negative testimony of this character oftentimes is regarded as sufficiently positive to create a question for the jury, the rule requires that it go further than is presented here. There is not one word concerning the opportunity of this witness to have heard a warning, if given; nothing to show the state of his attention or the work, if any, in which he was engaged. It could hardly be argued that the declaration of a witness ten miles off to the effect that he heard no bell would be considered any evidence at all on the subject, though it would meet the demands of appellant here as to being sufficiently negative. Further, the testimony of the witness here that he heard no *unusual* whistling is inherently weak in two particulars. First, standing alone, it is a mere conclusion with reference to what was usual and what unusual; and, secondly, it does not in any sense contradict the evidence of the motorman as to the sounding of the bell or gong.

[4] There is nothing in the facts of the case to warrant any application of the last clear chance rule. The decedent was never in any place of danger until he stepped upon the track. Conceding, however, that he was approaching such a place and was unaware thereof, yet the facts show beyond controversy that as soon as such situation was known and as soon as such a situation was observed or could be observed, the motorman employed every means possible to stop the train and avoid the accident (*Palmer v. Tschudy*, 191 Cal. 696, 218 P. 36).

[5, 6] We have gone carefully over the entire record presented, and if the contention of appellant could be sustained it would result in but one thing, namely, a return to the

horse-drawn street car. If it were incumbent upon the motorman of an interurban train to stop each time he saw a pedestrian leave the sidewalk and approach the tracks, then necessarily such trains as we are dealing with here would have to be abandoned. The courts have never been backward in holding railroads, street railways, or even automobile drivers, to a rigid rule of care. Always have the courts manifested a solicitude for the general safety and protection of the foot-passenger and others enjoying the right of travel along roads or highways used by trains and street railways. But the law likewise requires on the part of each person the exercise of some degree of care for his own protection.

In *Klusman v. Pacific Electric Railway Co.*, 190 Cal. 441, 213 P. 38, it is said:

"If the plaintiff knew that cars were operated on the middle track in both directions, she was bound in the exercise of ordinary care to look in both directions before stepping upon the track. If she did not know that cars were operated in both directions upon the middle track, she was negligent in assuming that cars were only operated in one direction, without taking the precaution to look in the other direction as well. From either point of view the conclusion of the trial court that she was guilty of negligence as a matter of law was correct."

In *Schooley v. Fresno Traction Co.*, 56 Cal. App. 705, 206 P. 481, the court says:

"Surely, under the language of the cases * * * cited and under any rational system of law, defendant could not be charged with a duty to anticipate that anyone would suddenly step from a place of safety onto the car tracks in the middle of a block, directly in front of an approaching street car. We think such gross negligence on the part of a pedestrian will bar all right of recovery for any injuries which he may sustain."

In the case cited the court quotes from *Driscoll v. Market St. Cable Ry. Co.*, 97 Cal. 553, 32 P. 591, 33 Am. St. Rep. 203, as follows:

"While, therefore, the owners of these railroads are to be held to due care in the management of their lines, they, when exercising such care, are not responsible in damages to a person who, in a careless or reckless, or absent-minded way, walks suddenly in front of a moving car, and is injured before there is time to stop it. The person in charge of a car, with a clear track before him has a right to assume that people will not suddenly undertake to cross in front of it; otherwise he could not make any headway, and no street-car line could be successfully operated, either for the profit of the owner or the convenience of the public. And the general rule is, that where the negligence of the injured party is a contributing proximate cause of the accident, he cannot recover damages."

It is said in *Ruling Case Law*, vol. 25, p. 1285:

"However, where a foot passenger walks or steps directly in front of an approaching car

and is struck the instant he sets his foot between the rails there is but one inference that can reasonably be drawn from that fact, that is the inference of negligence."

In *Green v. Los Angeles Ry. Co.*, 143 Cal. 31, 76 P. 719, 101 Am. St. Rep. 68, we find this language:

"We are unable to find in the record any excuse for the intestate's disregard of his obvious duty to himself, to use his eye-sight at the time when he could easily have discovered the danger of collision, which was up to the very moment he stepped upon the main track. Until then he had full control of his movements. He could by the slightest movement of his head towards the east have discovered his hazard, and by the slightest check of his movements have avoided the same."

See, also, *Green v. Southern Cal. Ry.*, 138 Cal. 1, 70 P. 926; *Bailey v. Market St. Ry.*, 110 Cal. 320, 42 P. 914; *Jones v. Southern Pacific Ry. Co.*, 34 Cal. App. 629, 168 P. 586.

Giving to appellant every favorable inference that might be drawn from the record, and construing every ambiguous piece of testimony in his behalf, we still can find nothing sufficient to overthrow the court's order of nonsuit.

The judgment is affirmed.

We concur: KNIGHT, Acting P. J.; CASHIN, J.



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